

**An Examination of the Recent Developments and Gaps in the
Rights to Maintenance for Partners within Unmarried Intimate
Relationships in South Africa**



RESEARCH DISSERTATION

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DECLARATION

I declare that ‘An Examination of the Recent Developments and Gaps in the Rights to Maintenance for Partners within Unmarried Intimate Relationships in South Africa’ is my work and has not been submitted for any degree or examination in any other university or academic institution. All sources and materials used are duly acknowledged and are properly referenced.

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ABSTRACT

This dissertation examines the evolving legal treatment of maintenance rights for partners in unmarried intimate relationships in South Africa. While the South African legal system has made notable strides in recognising diverse family structures, significant gaps remain in affording adequate protection to life partners who do not formalise their relationships through marriage. The analysis reveals that maintenance obligations for such partners are inconsistently recognised, often relying on contractual agreements or piecemeal extensions, and fail to provide *ex lege* protections comparable to those enjoyed by spouses in legally recognised marriages.

Drawing on recent case law, statutory provisions, and the work of the South African Law Reform Commission (SALRC), this study interrogates the existing legal framework, highlighting inconsistencies and socio-economic injustices that arise from the absence of comprehensive legislation. The discussion includes an in-depth analysis of key decisions such as *Volks v Robinson*, *Gory v Kolver*, *Paixão v Road Accident Fund*, and *Bwanya v Master of the High Court*.

Further, the dissertation explores proposed reforms, including the 2008 Draft Domestic Partnerships Bill and the 2021 SALRC Discussion Paper on the Single Marriage Statute, evaluating their potential to address these gaps. A comparative analysis with foreign jurisdictions and international legal instruments is also undertaken to situate South Africa's approach within a broader context and identify models of best practice.

The dissertation places emphasis on ensuring that the law protects economically vulnerable partners, particularly women, and aligns with constitutional values of equality, dignity, and access to justice.

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All glory to God – without Your grace, strength, and presence, none of this would have been possible.

LIST OF ACRONYMS

SALC South African Law Commission (*now the South African Law Reform Commission*)

SALRC South African Law Reform Commission

MSSA The Maintenance of Surviving Spouses Act 27 of 1990

ISA Intestate Succession Act 81 of 1987

UN United Nations

CEDAW Convention on the Elimination of All Forms of Discrimination Against Women

UDHR Universal Declaration of Human Rights

ICCPR International Covenant on Civil and Political Rights

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CHAPTER I: INTRODUCTION

1.1. Background of the research problem: life partnerships in South Africa

The legal landscape governing marital affairs in South Africa has experienced a notable transformation. Milestone statutes such as the Recognition of Customary Marriages Act 120 of 1998 and the Civil Union Act 17 of 2006 signify crucial advancements in extending protections to historically marginalised groups. Aligned with the constitutional mandate, a commitment to justice, equality, and non-discrimination resonates within both the judiciary and legislative branches since the adoption of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution). Despite these commendable strides as well as the common usage of terms like "common-law marriage," those in permanent life partnerships or intimate unmarried relationships continue to grapple with a lack of sufficient legal protection. While society acknowledges these partnerships, a gap exists in the legal framework concerning maintenance rights upon the dissolution of such unions.

The recent evolution in the legal landscape surrounding intimate life partnerships reflects historical challenges. Previously, there was no established legal right to claim maintenance from a life partner, creating significant challenges for indigent and/or surviving life partners, particularly women. Legal recourse was limited, relying on claims of unjust enrichment, especially when economic disparities existed within the life partnership arrangement.

The duty of support is a fundamental aspect of maintenance rights. The failure to recognise maintenance rights for life partners, as well as the duty of support predominant between those in intimate life partnerships raises questions about the treatment of these individuals under the law.

By addressing the evolving dynamics and disparities within maintenance laws for unmarried intimate relationships, this study aims to foster a more equitable and inclusive legal environment for all individuals in South Africa.

1.2. Definition of life partnerships

Life partnership or 'living together' has no legal definition in South Africa. The concept of life partnership is often misunderstood by both the general public and partners themselves, leading to confusion regarding their respective rights and obligations.

Various terms have been employed to describe life partnerships. According to the South African Law Reform Commission, such expressions include 'shacking-up, living together, *concubinage*, *association libre*, *verhaltnis*, common-law marriage, *de facto* marriage, *quasi-*

marriage, and putative marriage.... registered partnership, universal partnership and private marriage'¹

Many also erroneously equate them with and define life partnership as "common-law marriage," assuming that it automatically confers the same legal protections and responsibilities as marriage. However, this notion is unfounded, as the South African legal system does not recognise the existence of a "common-law marriage."²

For the purposes of this research, the term "life partnership" refers to an established intimate relationship that is of a permanent nature between two heterosexual people or two homosexual people who live together without concluding a marriage ceremony.³ Moreover, these relationships will be considered to have a level of permanence and stability; they are not casual or intermittent in nature.⁴

1.3. Reasons individuals opt for intimate life partnerships

For centuries, couples have cohabited without formalising their relationship through marriage - a trend that continues in South Africa today, where millions of people opt for this lifestyle.⁵ Cohabitation has notably increased in recent decades. According to a study, although the majority of South Africans, comprising 74%, choose traditional marital unions; approximately 19% of South Africans choose to live together in intimate life partnerships.⁶

People enter into intimate life partnerships for a variety of reasons - the court in *Volks* acknowledged the various circumstances that lead individuals to choose such arrangements.⁷ In South Africa, the decision not to marry is influenced by several unique factors, given the country's historical and socio-economic context. While it might be a matter of choice for middle class persons, many poor women in South Africa find themselves in such situations due to circumstances beyond their control.⁸

The following factors contribute to the existence of life partnerships:

¹South African Law Commission Discussion Paper 104 (Project 118) *Domestic Partnerships* (2003) at 8.

² Ibid at 10.

³Belinda van Heerden, *et al. Family Law in South Africa* 2 ed (2021) 248.

⁴ South African Law Reform Commission op cit note 1 at 8

⁵ Jacqueline Heaton & Hanneretha Kruger *South African Family Law* 4 ed (2015) 255.

⁶ Abdul Maluleke & Peter Mphahlele 'The Relationship between Marital Status and Socio-Economic Status: A Population Study of South Africa' (2023) 12 *African Journal of Gender, Society and Development* 191 at 196.

⁷ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) para 120: 'Some may be living together with no intention of permanence at all, others may be living together because there is a legal or religious bar to their marriage, others may be living together on the firm and joint understanding that they do not wish their relationship to attract legal consequences, and still others may be living together with the firm and shared intention of being permanent life partners.'

⁸ South African Law Reform Commission op cit note 1 at 19 – 20.

1.3.1. Labour migration and apartheid

In South Africa, the legacy of apartheid has had a profound impact on family structures and relationships. Various apartheid laws and policies, such as influx control, group areas, and forced removals, have contributed to overcrowding, rapid urbanisation, inadequate housing as well as low marriage rates and higher age at first marriage amongst South Africans. Sach J in his dissenting judgement in *Volks* 'stated that the migrant labour system involved the 'deliberate and targeted destruction of settled and sustainable African family life in rural areas so as to provide a flow of cheap labour to the mines and the towns'.⁹ These factors have disrupted intimate relationships, particularly among black people, often leading to cohabitation for socio-political and economic reasons.¹⁰

Migrant labour and apartheid policies have further eroded traditional family arrangements. As a result, many couples cohabit in urban areas without marrying, while the man may have a wife in a rural area. Unmarried women in such situations often have little legal protection for their property interests within the family. Many life partnerships have emerged as a coping mechanism for isolated migrant men and women, providing a more affordable living arrangement and safeguarding against destitution during challenging times.¹¹

Interestingly, the temporary nature of migrant workers' urban lives influences their relationships. Urban women partners must accept that their relationships may be temporary, as the primary obligation of their male partners is often to support their families in rural villages or towns. Bonthuys holds that as a consequence, African couples in long-term relationships may not always reside together permanently or even for extended periods, despite sharing emotional, sexual, and economic bonds.¹²

1.3.2. Poverty, unemployment, and economic conditions

The prevailing socio-economic conditions significantly contribute to the existence of life partnerships. Women often rely on men for financial support and accommodation due to limited access to jobs and income. This dependency drives them to accept unfavourable situations, including their partners' refusals to marry and economic and physical abuse. As a result, women remain in insecure relationships to meet their basic needs and those of their children. Life partnerships tend to be more common in informal housing areas, suggesting a correlation with poverty.¹³

⁹ *Volks* supra note 7 para 165.

¹⁰ South African Law Reform Commission op cit note 1 at 20.

¹¹ Ibid

¹² Elsje Bonthuys 'A Duty of Support for All South African Unmarried Intimate Partners Part I: The Limits of the Cohabitation and Marriage Based Models' (2018) 21 *PER/PELJ* at 6.

¹³ South African Law Reform Commission op cit note 1 at 20-21.

In some cases, women enter such arrangements to secure financial support for themselves and their children, fearing that marriage may limit their access to employment and promotional opportunities.¹⁴

Many young, tertiary-educated, unmarried couples tend to perceive life partnerships as free from the legal, social, and financial constraints associated with traditional marriage. In addition to seeking companionship and intimacy, individuals in life partnerships desire a shared domestic life without the commitment of marriage. This arrangement often benefits men, as they can enter and exit relationships with ease, avoiding legal obligations such as spousal support or property division. Furthermore, terminating a life relationship is generally simpler than ending a marriage, as domestic partnerships typically involve fewer legal complications and "exit costs."

Furthermore, individuals may choose life partnerships over marriage to retain financial benefits, such as maintenance, pensions, or annuities, which could be lost upon remarriage.¹⁵ The economic advantages of life partnerships make them an appealing alternative to civil marriages.¹⁶

1.3.3. Lobola

Financial constraints associated with ilobolo can pose significant challenges for men, potentially delaying the formalisation of intimate relationships, particularly within the context of South African customary law.¹⁷ As ilobolo is a requisite for obtaining a bride's family's approval, the prevalent issues of unemployment, low-paying jobs and elevated financial expectations worsen the difficulty for many African men attempting to fulfil this cultural obligation.¹⁸ In such circumstances, a life partnership relationship may serve as a viable alternative for couples seeking commitment without the financial burden imposed by ilobolo.

1.3.4. Ignorance

Ignorance of the law and inadequate access to legal services worsen the vulnerability of individuals in life partnerships. As aforementioned, a substantial number of women incorrectly assume that their relationships are legally recognised and protected, assuming the existence of

¹⁴ South African Law Reform Commission op cit note 1 at 21.

¹⁵ Divorce Act 70 of 1979 s 7(2); *Georghiades v Janse van Rensburg* 2007 (3) SA 18.

¹⁶ South African Law Reform Commission op cit note 1 at 21.

¹⁷ Refiloe Makama *Constructions, Negotiations and Performances of Gender and Power in Lobolo: An African-Centred Feminist Perspective* (unpublished PhD thesis, University of South Africa, 2020) 29.

¹⁸ Ibid

a “common-law marriage” which leads them to a false sense of security. Such women fail to fulfil specific formalities, as they mistakenly believe their marriage is already official.¹⁹

The consequences of this misinformation can be dire, with many women discovering their true legal standing only when it is too late, such as during a separation or the death of a partner.²⁰

1.3.5. Lack of negotiating power

Women who desire marriage frequently rely on their male partners to initiate the marriage proposal, considering it inappropriate to bring up the topic themselves. Generally, women seek the security and status associated with marriage, while men tend to prefer the freedom and flexibility offered by life partnerships. This discrepancy can lead to situations where women, desiring the stability and commitment of marriage, remain in cohabiting relationships on the basis of promises of marriage in the future.²¹

1.3.6. Prohibition by the law

Individuals related within a prohibited degree of blood relationship or affinity are not permitted to marry, which includes relationships like a woman and her former son-in-law or father-in-law, or a man and his stepchild. Consanguinity is legally regarded as incest and can lead to criminal prosecution in cases where sexual relationships occur.²² Similarly, an adoptive parent is prohibited from marrying his or her adopted child.²³

Civil marriages are monogamous in nature. Individuals who have already concluded a civil marriage may not enter into another marriage without obtaining a divorce.²⁴ Prior to the Divorce Act of 1979, obtaining a divorce was challenging if one spouse refused to cooperate. Presently, a spouse can initiate the divorce process without the other's consent. However, factors like the distribution of matrimonial property can discourage individuals from pursuing a divorce.²⁵

¹⁹ Bonita Meyersfield ‘If You can See, Look: Domestic Partnerships and the Law’ (2010) 3 *CCR* 271 at 275.

²⁰ Ibid.

²¹ South African Law Reform Commission op cit note 1 at 22-23.

²² Van Heerden et al op cit note 3 at 61.

²³ The Children’s Act 38 of 2005 s 242 (2) – (3).

²⁴ Heaton & Kruger op cit note 5 at 25.

²⁵ South African Law Reform Commission op cit note 1 at 23 – 24.

The ‘choice argument’ which was raised in *Volks*, suggesting that individuals would opt for marriage if they so desired,²⁶ oversimplifies the complex motivations behind forming life partnerships. Various socio-economic, cultural, and legal factors contribute to the decision-making process, necessitating a comprehensive approach to understanding these arrangements. In light of this complexity, it is essential to recognise the vulnerability of partners in life partnerships and implement appropriate measures to safeguard their maintenance rights upon separation or divorce.

1.4. What does the duty of support entail?

Central to maintenance rights is the role of duty of support. By common law, interestingly, the provision of support entails providing financial support (money) to purchase the items and services needed by a claimant or providing support by the performance of certain kinds of services (such as looking after children or performing household chores).²⁷ According to Joubert and for the sake of this research, duty of support includes obligations to provide accommodation, food, clothing, medical and dental care, and other essentials aligned with the parties' social status, lifestyle, and financial means.²⁸ An *ex lege* duty of support, that is; duty of support by operation of law, is based on the nature of the relationship; a demonstrated need to be supported and; the sufficient financial capacity of the provider. Generally, an *ex lege* duty of support can arise through blood relationships, adoptions and marriages.²⁹ It is seen that life partners, on the other hand, must either implicitly or tacitly (by performance of familial and spouse-like duties) or explicitly (by contract) establish a reciprocal duty of support to be granted limited legal recognition.³⁰

1.5. Research questions

This study aims to address the development of maintenance laws pertaining to the termination of unmarried life partnerships, the extent to which the rights to maintenance have been extended in such cases, the basis for the extension of these rights, and the legislative provisions that have been enacted in this regard. Additionally, the study will analyse disparities in the regulations of maintenance in regard to dissolved life partnerships and identify key considerations for the legislature to address when developing domestic partnership laws. This

²⁶ *Volks* supra note 7 para 54 – 60; the majority raised the “choice argument” revolves around the idea that individuals have the freedom to decide whether or not to marry, and that this decision impacts their legal rights and obligations. They held that because there was no legal barrier to marriage between the parties, their decision not to marry was a conscious choice that should be respected.

²⁷ Amanda Barratt et al *Law of Persons and the Family* 2 ed (2017) 265.

²⁸ Brigitte Clark ‘Duty of Support And Maintenance’ in WA Joubert (founding ed) *The Law of South Africa* vol 28 (2020) para 194.

²⁹ *Ibid* para 195.

³⁰ *Volks* supra note 7 para 3.

is done with the aim providing a comprehensive understanding of the current legal landscape, identify critical gaps and inconsistencies, and suggest future legal frameworks to ensure equitable maintenance rights for partners in unmarried intimate relationships. As such, the following questions have been posed:

- How has the law of maintenance pertaining to termination of unmarried life partnerships developed in recent years?
 - What are the different cases in which maintenance has been extended to those in life partnerships?
 - Which aspects of the duty to maintain have the respective judgements addressed and extended to unmarried life partners?
 - What is the basis for the extension of the rights to maintenance in such cases?
 - Which legislative provisions have been made or extended for the rights to maintenance in relation to terminated life partnerships?
- What are some of the gaps or inconsistencies in maintenance laws of various family law relationships which have been dissolved?
 - How do the rights stemming from the duty of support and maintenance vary among different types of unions, such as civil marriages, religious marriages, and customary marriages, considering the differing legal frameworks and regulations governing each?
 - Do the same laws apply where civil marriages are dissolved by death or by the parties themselves?
 - Do the same laws apply to unmarried same-sex life partners in comparison to heterosexual life partners?
 - If there are different rules and laws, are there any constitutionally valid justifications for these different rules and laws?
- How should the law be developed to deal with disparities in the regulations of maintenance in regard to dissolved life partnerships?
 - What are the key considerations to be made by the legislature when developing domestic partnership laws?
 - How does foreign and international law address the matter of dissolved life partnerships?

1.6. Scope of the dissertation

The scope of this research aims to provide a comprehensive analysis of the current state of the rights to maintenance for partners within unmarried intimate relationships in South Africa. The study will delve into the legal, socio-economic, and constitutional implications of the non-recognition of maintenance rights and duties for intimate life partners.

In the Chapter 2, a historical review of life partnerships follows, providing context on how the legal system has approached these relationships over time. This chapter reflects on how, despite some advancements in recent years, the law still falls short in protecting life partners, especially in matters of financial support. Relevant cases and legislative efforts are analysed to highlight both progress and ongoing gaps in recognising these partnerships.

Additionally, chapter 2 of this dissertation includes a comparative study of how the duty of support applies across different types of relationships, including marriages, customary unions, and religious unions. By examining how maintenance obligations vary across these contexts, the study reveals the significant inequalities faced by life partners compared to those in legally recognised unions.

Chapter 3 of this dissertation incorporates a comparative foreign and international law analysis. This section examines how other jurisdictions, such as Australia, the United States, and England and Wales, have established comprehensive frameworks that extend maintenance protections to cohabitants. By contrasting these models with South Africa's current policies, the study reveals significant shortcomings in local legislation and draws on international best practices to propose potential reform avenues. Additionally, the dissertation references international human rights instruments, such as the African Charter and the Women's Protocol, assessing South Africa's obligations to align domestic laws with global standards that protect all family structures, regardless of marital status.

A critical aspect of the dissertation involves a constitutional analysis, examining how South African right to equality intersects with maintenance rights in life partnerships. Through this lens, Chapter 4 of this dissertation assesses whether the exclusion of life partners from maintenance protections aligns with South Africa's constitutional promises. This analysis draws on landmark cases that have shaped our understanding of these rights, advocating for interpretations that extend these protections to life partners, especially those economically dependent on the relationship.

In the recommendations section – Chapter 6, the dissertation critically assesses the socio-economic consequences of South Africa's current legal stance, focusing on how the lack of maintenance rights for life partners disproportionately affects economically vulnerable individuals, especially women. It examines proposed legislation, such as the Domestic Partnership Bill and the proposed Single Marriage Statute, weighing their potential to fill existing gaps and protect those most at risk under the current system.

Through this focused approach, the dissertation aims to provide an in-depth examination of the current state of maintenance rights for partners in unmarried intimate relationships in South Africa, identifying existing gaps and suggesting potential pathways for legal and social reform.

1.7. Research methodology

This research will employ a desktop research approach to investigate the recent developments and gaps in maintenance laws within unmarried intimate relationships in South Africa. This approach is appropriate for this research as it allows for an in-depth exploration of the legal landscape in South Africa, including the examination of recent court judgments and proposed legislation.

Data collection will involve a review of relevant literature, including academic articles, books, legal documents, and case law, to provide a comprehensive understanding of the legal framework governing maintenance laws in South Africa. The literature review will include both black letter research, which focuses on the interpretation and application of legal rules, and critical legal research, which examines the social and economic contexts in which legal rules are created and enforced.

The doctrinal research will involve an analysis of the relevant statutes, regulations, and case law related to maintenance laws in South Africa. This analysis will focus on identifying the legal principles and rules that govern maintenance laws, including the rights and obligations of parties in unmarried intimate relationships.

The critical legal research will involve an analysis of the social and economic contexts in which maintenance laws are created and enforced in South Africa.

CHAPTER II: THE LEGAL RECOGNITION OF LIFE PARTNERSHIPS AND DUTY OF SUPPORT

Historically, intimate life partnerships, whether between heterosexual or same-sex partners, were not acknowledged by the legal system, leaving many partners without protection or support. This chapter explores the historical backdrop of life partnerships and the evolving legal recognition of their status, with a particular focus on the reciprocal duty of support. Initially, we look at the lack of recognition for life partnerships and the difficulties partners faced in securing maintenance rights. As societal views shifted, legal perspectives followed, leading to gradual changes in legislation and court decisions that began to acknowledge life partnerships. We then discuss the current legal framework, highlighting how life partnerships are recognised today. This includes an examination of specific legislative changes and the ordinary legal remedies available to partners. The chapter also covers the duty of support in various types of relationships, comparing the responsibilities in traditional marriages with those in life partnerships. Addressing the reciprocal duty of support between married spouses, considering both post-dissolution by death and separation will highlight and clarify the role of duty of support in permanent long-lasting relationships. This comparison extends to intimate customary marriages, religious marriages, and same-sex marriages, emphasising the unique legal challenges in each case. Finally, the chapter considers judicial restraint in extending these rights and the ongoing legislative reform efforts, particularly those led by the South African Law Reform Commission. By combining the historical evolution of life partnerships with modern constitutional considerations, this chapter aims to provide a thorough understanding of the legal recognition and duty of support in these relationships.

2.1. History of non-recognition of heterosexual and same-sex life-partnerships and the right to maintenance in judicial precedent

The absence of legal and formal protection for heterosexual domestic partners in South Africa is often linked to the decision not to marry.³¹ This "choice argument," developed through legal cases, has led to a growing trend where the courts tend to reject cases concerning the safeguarding of rights for life partners.³²

In the *National Coalition v Home Affairs* case of 2000,³³ the Court acknowledged that while marriage represents one form of life partnership, there are other forms, including same-sex conjugal relationships, that were not recognised by law. The court held that the word "spouse" could not be read to include a same-sex partner and effectively excluded same-sex

³¹ *Volks* supra note 7 para 154.

³² *Ibid* para 54 – 60.

³³ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC).

life-partnerships from the rights and protections afforded to traditional marriage.³⁴ The contrary was held in the 2001 case of *Satchwell*³⁵. This matter involved Judge Satchwell's legal challenge against the exclusion of benefits for same-sex partners under the Judges Remuneration and Conditions of Employment Act 88 of 1989. The court deliberated on whether such exclusion constituted unfair discrimination based on sexual orientation, applying the principles of equality and non-discrimination as enshrined in the Constitution. The court found that denying benefits to same-sex partners while granting them to married judges amounted to discriminatory treatment on the basis of sexual orientation. Emphasising the importance of recognising various types of life partnerships, including same-sex relationships that carry comparable responsibilities and societal value as traditional marriages, the court concluded that the exclusion of benefits for same-sex partners under the Act was unjust discrimination.³⁶ In this matter, differentiating between same-sex and heterosexual partners was crucial. Madala J held that while heterosexual couples could have chosen not to marry for various reasons, they were legally free to marry. In contrast, same-sex couples were legally prohibited from entering into a valid marriage, which precluded them from the rights and protections associated with marriage. The court held that this difference in status rendered it inappropriate to treat same-sex and heterosexual couples as analogous. Thus, it was considered essential to focus solely on the unique legal challenges faced by same-sex partners.³⁷

In the 2005 case of *Volks*³⁸, the court argued that there was no unjust differentiation between married couples and long-term heterosexual life partners, as marriage entailed specific rights and responsibilities that did not exist in long-term partnerships.³⁹ In this case, Mrs. Robinson and Mr. Shandling had been in a long-term life partnership, sharing a flat for about twelve years. Mr. Shandling provided financial support to Mrs. Robinson, who was accepted as a dependent on his medical aid scheme and cared for him during periods of illness.⁴⁰ In his will, Mr. Shandling had left assets to Mrs. Robinson and the residue of his estate to his children from a prior marriage.⁴¹ Mrs Robinson intended to claim maintenance from the residue of Mr. Shandling's estate and thus the legal issue revolved around the Maintenance of Surviving Spouses Act 27 of 1990 (*hereinafter* the MSSA) which was challenged in the High Court for its failure to extend spousal benefits to opposite-sex life partners. The central question before the court was whether denying benefits to surviving partners of life partnerships amounted to unfair discrimination under the Constitution.⁴² The majority of judges in the Constitutional Court maintained that the law could legitimately differentiate between spouses and heterosexual life partners. Although acknowledging arguments for mutual obligation between partners; such as financial and social disadvantages faced by South African women,⁴³ the majority did not find enough evidence to conclude unfair discrimination on the grounds of

³⁴ Ibid para 36.

³⁵ *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284 (T).

³⁶ Ibid para 15.

³⁷ Ibid para 16.

³⁸ *Volks* supra note 7 para 36

³⁹ Ibid para 56-60.

⁴⁰ Ibid para 3, 5 and 6.

⁴¹ Ibid para 7 and 15.

⁴² Ibid para 26.

⁴³ Ibid para 63 - 68.

marital status.⁴⁴ The majority raised the “choice argument” which revolves around the idea that individuals have the freedom to decide whether or not to marry, and that this decision impacts their legal rights and obligations. They held that because there was no legal barrier to marriage between the parties, their decision not to marry was a conscious one that should be respected.⁴⁵ Skweyiya J argued that it was inappropriate to impose a duty of support on a life partner's estate after their death if there was no legal obligation to support the heterosexual life partner while they were alive.⁴⁶ Skweyiya J recognised the social and economic vulnerability of women in cohabitation but believed this broader societal issue should be addressed through legislative empowerment and social policies.⁴⁷ Ultimately, the court upheld the exclusion of opposite-sex life partners from spousal benefits (specifically surviving spouse maintenance), finding it not to infringe upon the right to dignity, but rather reflecting a fundamental difference in the legal obligations between marriage and cohabitation.

In 2006, a different judgement in *Gory*⁴⁸ held that same-sex partners in long-term relationships could inherit from each other but did not address the situation for heterosexual partners. The facts of the matter are as follows: Mr Gory and Mr Brooks had been involved in a permanent same-sex life partnership and had undertaken reciprocal duties of support. Following Mr Brooks' intestate death, Mr Gory was denied succession rights under the Intestate Succession Act 81 of 1987⁴⁹ (*hereinafter* the ISA) due to their same-sex relationship.⁵⁰ The central issue revolved around whether the exclusion of same-sex life partners from intestate succession rights violated constitutional principles of equality and dignity.⁵¹ The court highlighted the significant pre-existing disadvantage and vulnerability of same-sex life partners that resulted from ‘the long history in our country and abroad of marginalisation and persecution of gays and lesbians’⁵² and determined that the ISA exhibited unfair discrimination against same-sex couples based on their sexual orientation, as it provided the right to intestate succession only to married (heterosexual) spouses.⁵³ Consequently, it found Section 1 of the Act⁵⁴ to be invalid for violating Section 9 of the Constitution⁵⁵, which guarantees equality and dignity for all. To remedy this invalidity, the court included terms like “permanent same-sex partners” within the section.⁵⁶ As a result, this meant that the protection afforded by section 1 of the ISA extended to same-sex partners, but it excluded heterosexual life partners from its coverage.⁵⁷ Interestingly, when the Civil Union Act 17 of 2006⁵⁸ was enacted, granting both

⁴⁴ *Volks* supra note 7 para 79; The High Court in a prior hearing stated that disregarding such unions undermines the dignity and equality of the couples and in applying the test from *Harksen* found unfair discrimination presumed to exist due to marital status being a listed ground in the Constitution.

⁴⁵ *Volks* supra note 7 para 54 – 60.

⁴⁶ *Ibid* para 62.

⁴⁷ *Ibid* para 59.

⁴⁸ *Gory v Kolver* 2006 ZACC 20.

⁴⁹ Intestate Succession Act 81 of 1987.

⁵⁰ *Gory* supra note 48 para 2-3.

⁵¹ *Ibid* para 4.

⁵² *National Coalition* supra note 33 para 42-54.

⁵³ *Gory* supra note 48 para 40.

⁵⁴ Intestate Succession Act s 1.

⁵⁵ The Constitution of the Republic of South Africa, 1996 s 9.

⁵⁶ *Gory* supra note 48 para 19.

⁵⁷ *Ibid* para 25.

⁵⁸ Civil Union Act 17 of 2006.

same-sex and heterosexual couples the right to form a union, the ISA remained unaltered and did not recognise intestate succession rights for heterosexual life partners.⁵⁹ This disparity prompted the concern that since all couples now have the legal option to marry (as per the Civil Union Act), continuing to treat unmarried same-sex partners more favourably than unmarried heterosexual partners by granting the former intestate succession rights creates a form of inequality and unfair discrimination – a view expressed by Froneman J in the majority judgement of *Laubscher v Duplan*.⁶⁰

The court in *Butters v Mncora*⁶¹ later outlined the criteria (for both heterosexual and same-sex couples) for proving an intention to share assets through an implicit universal partnership, although it did not cover matters such as inheritance or maintenance.⁶²

Finally, one of the most recent developments in the law of maintenance for those in life partnerships is contained in the decision of the Constitutional Court in the case of *Bwanya v Master of the High Court*⁶³ which introduced new reasoning based on principles of equality by challenging the constitutionality of the MSSA and the ISA insofar as they excluded heterosexual life partners from inheriting or receiving maintenance from their deceased partner's estate.⁶⁴

The matter was first heard in the High Court. The couple had planned to marry, but two months before their scheduled trip to Zimbabwe to negotiate lobolo with the future wife's family, the deceased passed away. His will had named his mother as the sole heir to his estate (although it was outdated because his mother had passed away in 2013). The couple involved had been in a permanent heterosexual life partnership in which they had both undertaken reciprocal duties of support.⁶⁵ The deceased had provided financial and emotional support to the applicant, introducing her to friends as his wife. They had mutually committed to supporting each other and were planning to start a family together. The issue was whether the exclusion of permanent opposite-sex life partners from the benefits conferred by the ISA and MSSA was inconsistent with the Constitution and violated the right to equality and dignity. A further issue

⁵⁹ *Bwanya v Master of the High Court*, Cape Town 2020 ZAWCH 111 para 153; Van Heerden et al op cit note 3 at 254 notes that although same-sex couples are now legally permitted to marry, it could be argued that the legal foundation restricting same-sex unions in earlier decisions - those handed down before the enactment of the Civil Union Act - should no longer apply. Nonetheless, the Constitutional Court in *Gory* has made it clear that the legal developments established before the legalisation of same-sex marriage will remain valid unless and until they are explicitly repealed or revised by the legislature. As a result, same-sex life partners currently enjoy a more favourable legal position than their opposite-sex counterparts.

⁶⁰ *Laubscher v Duplan* 2017 (2) SA 264 (CC) para 66; *Bwanya* supra note 59.

⁶¹ *Butters v Mncora* 2011 ZASCA 29.

⁶² *Ibid* para 34-36.

⁶³ *Bwanya v The Master of the High Court* [2021] 2021 (1) SA 138 (WCC); ZACC 51; 2022 (4) BCLR 410 (CC).

⁶⁴ After *Gory*, the protection afforded by section 1 of the ISA was extended to same-sex partners, but it excluded heterosexual life partners from its coverage.

⁶⁵ *Bwanya* supra note 63 para 3-8.

was whether the definition of "survivor" in section 1 of the MSSA⁶⁶ was unconstitutional and invalid.⁶⁷

The High Court held that a party in an opposite-sex partnership may inherit from the estate of their deceased partner, but they cannot claim maintenance under the MSSA. This is because the High Court was bound to the Constitutional Court judgement made in *Volks*.⁶⁸

On appeal to the Constitutional Court, the applicant raised the argument that section 1(1) of the ISA amounted to unfair discrimination against her and others in similar situations, particularly women, based on factors such as gender, sexual orientation, and marital status. She contended that this discrimination violated her right to dignity and equality.⁶⁹ Concerning section 1 of the MSSA, the applicant argued that the Constitution necessitates the expansion of maintenance provisions within this Act to include survivors in various types of relationships, such as permanent heterosexual life partnerships, where partners have mutually committed to providing support to each other. The applicant argued that the exclusion of such partnerships which deprived her and individuals in similar circumstances of their right to equal protection under the law, constituted unfair discrimination based on the grounds mentioned earlier in relation to succession claims, and infringed upon their right to dignity.⁷⁰

The court overturned the precedent set in *Volks* and held that the issue of choice was an empirical matter of fact rather than a matter of law, expressing doubts about the existence of a real choice to marry for those who lack bargaining power and economic dependence.⁷¹ Concerning section 1 of the MSSA, Madlanga J, emphasised that permanent life partnerships constitute a valid family structure that is deserving of respect and legal protection, particularly considering recent developments in common law.⁷² The majority judgment declared that the definition of "survivor" in section 1 of the MSSA was unconstitutional and thus ordered the incorporation of "permanent life partnerships" into the definition of the MSSA and further stipulated that the terms "spouse" and "marriage" be interpreted to encompass a person involved in a permanent life partnership.⁷³

2.2. The current legal status of life partnerships

Despite the evolution of society and the law, there is still little to no legal recognition of life partnerships – that is; the law does not currently place life partners on the same legal

⁶⁶ Maintenance of Surviving Spouses Act 27 of 1990 (*hereinafter* the MSSA) 1: this section did not include the phrase 'and includes the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate' in the definition of survivor.

⁶⁷ *Bwanya* supra note 63 para 2.

⁶⁸ *Bwanya* supra note 63 para 43-4; the judgement in *Volks* held that the benefits of surviving spouses by the MSSA were unavailable to those heterosexual life partners regardless of the lengthiness of their cohabitation.

⁶⁹ *Ibid* para 88.

⁷⁰ *Ibid* para 49 – 55.

⁷¹ *Ibid* para 62.

⁷² *Ibid* para 137 – 138.

⁷³ *Ibid*.

standing as married persons and there is no law governing life partnerships that is entirely equivalent to a law of marriage.⁷⁴

The lack of legal recognition for life partnerships can be attributed to the prevailing societal perspective that regards marriage as a fundamental pillar of the legal and social landscape. Schafer suggests that this viewpoint implies that marriage offers an optimal environment for child-rearing and holds a unique status within the societal structure, while life partnerships are often perceived as posing a potential challenge to the institution of marriage.⁷⁵ It is also difficult for the law to impose legal obligations upon life partners who have consciously chosen not to formalise their union through marriage, as the option of marriage remains accessible to them.⁷⁶ Moreover, evidencing the existence of such relationships can be challenging - especially one that gives rise to maintenance obligations.

This was evident in the *EW v VH* case⁷⁷, which was initiated by Miss W against her partner, Mr. H, with whom she had been in a relationship for nine years. They initially entered the relationship while still involved with previous partners but later moved in together and lived as a couple until April 2022. During their relationship, they had three children together. Miss W brought the case before the court to request an order compelling Mr. H to provide financial support, cover her medical aid and vehicle expenses, and contribute to her legal fees. The majority judgment held that a "lasting romantic relationship" did not necessarily equate to a life partnership and does not mean that the partners had assumed reciprocal duties of support in a familial relationship that is eligible for maintenance.⁷⁸ Additionally, the judges pointed out that Miss W would not be in a financially precarious situation if she didn't receive maintenance. This was because she had already obtained a court order covering the financial needs of her children, including educational and medical expenses, as well as rental and utility costs.⁷⁹ Crucially, the court held that she could not make a claim for interim maintenance, as would generally happen in divorce proceedings because the legislation surround life partnerships was simply not finalized, thus prejudicing the applicant.⁸⁰ This outcome highlights the evidentiary burden placed on life partners and the unpredictability of legal recognition, even in cases where a relationship is identical to a marriage. It further illustrates the precarious position of unmarried partners when it comes to the right to maintenance upon separation, as there is no clear or automatic legal entitlement.

The Constitutional Court has, however, recognised that the historically narrow focus on heterosexual marriages has excluded other forms of relationships, including life partnerships.

⁷⁴ Ibid 248 – 249.

⁷⁵ Lawrence Schafer 'Marriage and marriage like relationships: Constructing a new hierarchy of life partnerships' (2006) 123 *SALJ* 630 at 626-647.

⁷⁶ *Volks* supra note 7 para 95.

⁷⁷ *EW v VH (Women's Legal Centre Trust as Amicus Curiae)* [2023] JOL 58224 (WCC).

⁷⁸ Ibid para 51.

⁷⁹ Ibid para 46.

⁸⁰ Ibid para 72 – 75.

These forms of relationships, in the eyes of the court, generate comparable obligations and embody social values akin to marriage.⁸¹

Since the promulgation of the Constitution in 1996, judicial authorities have noted the inherent economic dependency that may result from partnership arrangements and have concurred that these economically vulnerable partners warrant enhanced legal safeguarding.⁸² Courts have taken incremental steps to extend certain legal consequences associated with marriage to life partnerships that meet specific legal criteria. Piecemeal extensions of rights and responsibilities through certain statutes⁸³ provide equal protection to life partners treating them as though they were spouses. One such example is seen in the Pension Funds Act 24 of 1956 which includes permanent life partners in the definition of "spouse". There are also several common law remedies that are available to protect those in life partnerships. According to Heaton and Kruger, these remedies include contracts, the doctrine of estoppel, wills, and the remedy of unjustified enrichment.⁸⁴

Heaton noted, however, that developments in the recognition of life partnerships have predominantly favoured same-sex domestic partnerships, thereby leaving heterosexual domestic partners feeling further aggrieved by the absence of legal acknowledgment.⁸⁵

Despite efforts to draft a Domestic Partnerships Bill⁸⁶ aimed at redressing the existing void in legal protection, legislative progress has stalled, giving rise to perceptions of discrimination as well as a rise to an advocacy for equality within intimate unmarried relationships, particularly among women in South Africa.

2.3. The extent to which life partnerships have been recognised by legislation.

2.3.1. Piecemeal extensions of life partnerships in legislation

Aside from the aforementioned MSSA and the ISA, other statutes have partially recognised duty of support (the obligations to provide accommodation, food, clothing, medical and dental care, and other essentials aligned with the parties' social status, lifestyle, and financial means to a life partner). The following are examples of piecemeal extensions whereby life partnerships have been recognised:

⁸¹ *Satchwell* supra note 35 para 22.

⁸² *Bwanya* supra note 63; *Volks* op cit note 7.

⁸³ Domestic Violence Act 116 of 1998; Maintenance Act 99 of 1998; Medical Schemes Act 131 of 1998; Income Tax Act 58 of 1962; Estate Duty Act 45 of 1955; Compensation for Occupational Injuries and Diseases Act 130 of 1993; Insolvency Act 24 of 1936.

⁸⁴ Heaton & Kruger op cit note 5 at 256-260.

⁸⁵ Jacqueline Heaton *South African Family Law* 3 ed (2010) 243.

⁸⁶ Domestic Partnerships Bill (Draft) GG 30663 of 14 January 2008.

a) Compensation for Occupational Injuries and Diseases Act 130 of 1993

Sections 1 and 22 of the Compensation for Occupational Injuries and Diseases Act⁸⁷ allow a life partner who is dependent on an injured employee to claim compensation if the employee is injured, contracts a disease or is killed during employment.⁸⁸

b) Estate Duty Act 45 of 1955

The definition of "spouse" in the Estate Duty Act now includes a partner in a life partnership intended to be permanent.⁸⁹ This amendment allows any benefits accruing to such a partner to be deductible under Section 4(q) of the Estate Duty Act, similar to spouses.⁹⁰

c) Maintenance Act 99 of 1998

While the Maintenance Act does not create a duty of support or expressly extend maintenance rights to life partners, it provides that its provisions apply to any legally recognised duty of support, regardless of the nature of the relationship between the persons involved.⁹¹ This means that life partners may rely on the Act as a mechanism to enforce a duty of support, but only if they can first establish that such a duty exists in law or contract and that both partners consented to this duty.⁹²

d) Medical Schemes Act 131 of 1998

Section 1 of the Medical Schemes Act includes a life partner as a dependent, protecting them and their immediate family under the Act.⁹³ Section 24(1)(e) ensures that schemes do not unfairly discriminate on grounds such as gender, marital status, and social origin.⁹⁴

e) Pension Funds Act 24 of 1956

⁸⁷ Compensation for Occupational Injuries and Diseases Act s 1 & s 22.

⁸⁸ Van Heerden et al op cit note 3 at 253.

⁸⁹ *EW* supra note 77 para 51: a 'permanent romantic relationship' is not synonymous with a permanent life partnership wherein the parties undertook reciprocal duties of support to one another within the context of a familial setting. Our understanding of the case law referred to herein is that a permanent romantic relationship does not per se equate to proof of the assumption of a reciprocal duty of support in a familial setting'

⁹⁰ Estate Duty Act s 4(q) allows any amount of the surviving spouse, whether it is in the form of a donation, life insurance payment or inheritance to be deductible in order to arrive at a net value of the estate.

⁹¹ Maintenance Act s 2(1).

⁹² *Paixão v Road Accident* 2012 (6) SA 377 (SCA) para 26; *McDonald v Young* 2012 (3) SA 1 SCA para 25. *Satchwell* supra note 35 para 25.

⁹³ Medical Schemes Act s 1.

⁹⁴ *Ibid* s 24(1)(e).

Section 1 of the Pension Funds Act includes domestic partners in the definition of “spouse”.⁹⁵ Section 37(c)(1) allows a pension fund to award a death benefit to a dependent of a life partner within twelve months of the deceased's death, provided the benefit was not part of the deceased's estate or regulated by the Intestate Succession Act.⁹⁶

f) Road Accident Fund Act 56 of 1996

A life partner can claim maintenance or loss of support under Section 17(1) of the Road Accident Fund Act if their partner dies or is seriously injured in a motor vehicle accident caused by the wrongful or negligent driving of an insured driver.⁹⁷ The surviving partner must prove that the deceased supported them and that the fund should honour this support agreement.

2.3.2. Common law remedies

i. Universal Partnership

South African courts have sometimes aided life partners by recognising the existence of an express or tacit universal partnership. This type of partnership forms when partners conduct themselves as if they had a partnership agreement, even if no formal agreement was made. If the relationship comes to an end, the court can distribute the assets acquired during the relationship between the partners.⁹⁸ To establish a universal partnership, the court needs evidence that both parties contributed skills, labour, money, or other resources, aimed to make a profit, and that both benefitted from the partnership.⁹⁹ Additionally, the agreement must be legitimate and not violate public policy or law.

The principles of partnership law applied to life partners are based on Pothier's requirements, which do not necessarily require a profit motive; simply intending to save money by running a joint household is enough. The parties must clearly express or imply their intention to enter into a universal partnership through their actions. This partnership can be inferred from circumstances such as long-term cohabitation as husband and wife. If the parties' conduct is ambiguous, the court must determine whether it is more likely than not that a universal partnership existed. Like any contract, the parties must agree to form the partnership. In a universal partnership, both partners own the partnership property in undivided shares, and the partnership agreement may specify each partner's share. If not, the share is determined by each partner's contribution upon the partnership's termination.¹⁰⁰

⁹⁵ Pension Funds Act 24 of 1956 s 1.

⁹⁶ Ibid s 37(c)(1).

⁹⁷ Road Accident Fund Act 56 of 1996 s 17(1).

⁹⁸ Van Heerden et al op cit note 3 at 255.

⁹⁹ *Butters* supra note 61 para 11.

¹⁰⁰ Barratt et al op cit note 27 at 434 – 435.

A *societas universorum quae ex quaestu veniunt* is a type of universal partnership where the partners agree that any assets acquired during the partnership, from all commercial endeavours, will be shared. Conversely, a *societas universorum bonorum* involves the partners agreeing to pool all their current and future property, including all movable and immovable assets, inheritances, gifts, and donations. This type of partnership is not restricted to commercial activities, meaning one partner's contributions can be entirely domestic, such as managing the household and caring for children.¹⁰¹

ii. Life Partnership Contract

Life partners can regulate their rights and duties through a contract.¹⁰² This agreement can address specific aspects, like support obligations or post-separation maintenance, or cover a broader range of issues, becoming a life partnership contract.¹⁰³ Similar to universal partnership agreements, these contracts can be explicit or tacit and inferred from the parties' behaviour; however, there are currently no reported cases based on tacit life partnership contracts in South African law. Life partnership contracts can include any legal provisions, provided they are not illegal, immoral, or against public policy. Life partners contracts can for instance, include household expenses, common residence after termination, ownership of joint and separate property acquired before and during the life partnership, and dispute resolution through mediation or arbitration. Life partners may also use the contract to establish maintenance obligations, stipulating financial support during the partnership and potentially after its termination.¹⁰⁴ The partners cannot, however, contract to give their relationship all the legal effects of marriage or require dissolution through the Divorce Act 70 of 1979. Typically, the contract binds only the parties involved. However, if one partner agrees to support the other, this agreement is safeguarded by a common-law action for damages if a third party causes the supporting partner's death. This protection extends to both same-sex and heterosexual life partners.¹⁰⁵

iii. Agency

A life partner can appoint the other as an agent, granting them the authority to purchase household necessities or acquire assets in both partners' names.¹⁰⁶

iv. Doctrine of estoppel

¹⁰¹ Heaton & Kruger op cit note 5 at 257.

¹⁰² Ibid.

¹⁰³ Van Heerden et al op cit note 3 at 257-258.

¹⁰⁴ Heaton & Kruger op cit note 5 at 260.

¹⁰⁵ *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) para 42; *Paixão* supra note 92 para 30.

¹⁰⁶ Heaton & Kruger op cit note 5 at 260.

If life partners present themselves as married to third parties, estoppel may prevent one partner from denying liability for debts incurred by the other for household necessities purchased on credit.¹⁰⁷

v. Wills

Life partners can designate each other as heirs or beneficiaries in their wills, either individually or through a joint will.¹⁰⁸

vi. Unjustified Enrichment

If one partner benefits at the expense of the other, the impoverished partner can, in certain cases, file an enrichment claim.¹⁰⁹ However, enrichment liability is generally limited in its applicability to life partners.¹¹⁰

2.3.3. The limits of common law development in terms of life partnerships

While courts have recognised certain common law remedies in the context of life partnerships, they have also shown caution in extending common law duties such as maintenance to such relationships without clear legislative direction. This section explores the judiciary's restrained approach and its implications for future reform

In the 2023 case of *EW v VH*,¹¹¹ the applicant, EW, sought maintenance from the respondent, VH, following the termination of their life partnership through separation. The core issue was whether the common law should be extended to impose maintenance obligations on life partners, akin to those in marriages.¹¹² The court raised significant questions about the development of common law and the role of the judiciary versus the legislature in law reform.

In its considerations, the court raised the Domestic Partnerships Bill as a legislative proposal aimed at providing legal recognition and protection to life partnerships. The court noted that despite the claims of legislative inaction since the 2008 draft of the Domestic Partnerships Bill,

¹⁰⁷ Van Heerden et al op cit note 3 at 257.

¹⁰⁸ Van Heerden et al op cit note 3 at 258

¹⁰⁹ South African Law Reform Commission op cit note 1 at 122.

¹¹⁰ South African Law Reform Commission op cit note 1 at 123; Van Heerden et al op cit note 3 at 258 holds that given the recent courts' willingness to recognise enrichment claims beyond traditional boundaries, it remains speculative whether this remedy would effectively resolve disputes between life partners. While there is potential for enrichment claims to offer life partners an avenue for resolution, the lack of established precedent in this area could hinder their ability to seek appropriate redress.

¹¹¹ *EW* supra note 77.

¹¹² *Ibid* para 20 – 42.

the SALC has been actively working on this issue,¹¹³ as evidenced by the 2021 Single Marriage Statute Discussion Paper¹¹⁴.

The 2021 Discussion Paper by the SALC is a comprehensive document proposing reforms to regulate life partnerships. It reflects ongoing efforts to adapt the legal framework to contemporary social realities and to provide adequate protection for individuals in life partnerships. The paper included draft legislation with two proposed options: the Protected Relationships Bill and the Recognition and Registration of Marriages and Life Partnerships Bill. These bills aimed to rationalise marriage laws pertaining to all types of relationships, provide for the registration of protected relationships or marriages and life partnerships, and facilitate the enforcement of rights in such relationships. The court further noted key proposals in the paper, which include the formal recognition and registration of life partnerships, ensuring that partners have legal rights and obligations similar to those in marriages.¹¹⁵ Furthermore, the SALC is currently conducting research under Project 100 to explore matters concerning spousal support and maintenance. It is important to highlight that the SALC suggests defining life-partnerships as relationships where individuals live together and have committed to providing ongoing support to one another. The SALC also advocates for the establishment of a system for officially registering life partnerships.¹¹⁶

In *EW*, the court carefully considered its role in developing common law. The South African judiciary has a constitutional mandate to develop common law in line with the Bill of Rights,¹¹⁷ particularly when existing laws are inadequate to protect individuals' rights.¹¹⁸ However, the court must also respect the separation of powers and the legislature's primary role in law reform. The court referenced key cases such as *Carmichele v Minister of Safety and Security*¹¹⁹. In *Carmichele*, the principle was established that courts have a duty to develop common law to align with constitutional values, ensuring that common law evolves to protect fundamental rights adequately.¹²⁰

The court in *EW* declined to develop the common law further, reasoning that the Constitutional Court in *Bwanya* had already addressed the legal position of life partners.¹²¹ However, this reliance is misplaced, as *Bwanya* was confined to claims arising from the death of a partner, not the termination of a life partnership by separation. As a result, the question of

¹¹³ Ibid para 26.

¹¹⁴ South African Law Commission Discussion Paper 152 (Project 144) *Single Marriage Statute* (2021).

¹¹⁵ *EW* supra note 77 para 28.

¹¹⁶ Ibid para 29.

¹¹⁷ the Constitution s 39(2) of requires courts to promote the spirit, purport and objects of the Bill of Rights when developing the common law.

¹¹⁸ *EW* supra note 77 para 23.

¹¹⁹ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC).

¹²⁰ Ibid para 39; 'Before a court proceeds to develop the common law it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law'.

¹²¹ Ibid para 36.

post-separation maintenance for life partners remains legally unresolved and continues to expose vulnerable individuals to potential injustice.

The court acknowledged the importance of the ongoing work by the SALC and the need for comprehensive legislative reform based on extensive research and public consultation. The court emphasised the importance of having comprehensive evidence before making decisions on common law development. In this case, the court felt it did not have sufficient evidence, particularly from the SALC, to determine the broader consequences of the proposed changes.¹²²

While the court recognised the evolving legal recognition of life partnerships and the need to protect vulnerable life partners, it deferred extensive changes to the common law pending further legislative action and more comprehensive evidence. The case underscores the judiciary's cautious approach to developing common law, especially in areas requiring significant legal reform. It illustrates the complex interplay between judicial intervention and legislative reform in the evolution of family law, highlighting the ongoing efforts to balance the rights and obligations of partners in life partnerships similarly to those in marriages. The court's reference to the SALC's proposals, including the Domestic Partnership Bill, underscores the evolving legal landscape surrounding life partnerships and the potential impact of legislative reforms on the rights and obligations of individuals in such relationships.

2.4. Duty of support in various relationship forms

2.4.1. Reciprocal duty of support between married spouses

Upon entering into marriage, an inevitable outcome and inherent feature is the establishment of a reciprocal duty of support between the spouses, irrespective of their chosen matrimonial property system. Heaton suggests that this legal obligation of reciprocal support automatically arises (*ex lege*) and thus there is no need for spouses to prove the existence of this duty.¹²³ This mutual obligation takes precedence over the duties of support that exist between family members, such as parents and adult children. The entitlement to maintenance hinges on the demonstrated need for support by one spouse and the other spouse's capacity to meet this need. The scope of the duty of support is thus decided *inter alia* by the social status of the parties, the cost of living and the means and income of the parties. The duty of support encompasses various necessities such as accommodation, clothing, food, medical and dental services, expenses related to matrimonial litigation, and other essential requirements. The extent of the maintenance duty is determined by factors such as the social status of the spouses, their financial resources, income, lifestyle, and cost of living.¹²⁴

¹²² *EW* supra note 77 para 35.

¹²³ Heaton op cit note 85 at 46.

¹²⁴ Van Heerden et al op cit note 3 at 82-83.

Interestingly, Van Heerden argues that the duty to support does not depend on the existence of a shared household. In cases of separation where spouses cease to cohabit, the duty of support continues for as long as the marriage endures, unless modified by court orders.¹²⁵

Should one spouse neglect to provide adequate spousal support, the aggrieved party has several avenues for recourse, including approaching the High Court for a maintenance order or the more expedient and less costly procedure offered by the Maintenance Act 99 of 1998, which empowers maintenance courts to issue maintenance orders¹²⁶ and impose civil and criminal sanctions for non-compliance. In general, spouses cannot retroactively claim "arrear maintenance" for periods during which support was absent, unless the claimant was obliged to incur debts for their maintenance.¹²⁷ Moreover, maintenance orders and related arrears can be claimed by spouses.¹²⁸

Because the reciprocal duty of support between spouses is a direct result of their marital union, this obligation is normally terminated when the marriage is brought to an end, either through the dissolution of the marriage via divorce or the death of one of the spouses.¹²⁹

a) The duty to maintain after the dissolution of the relationship by death.

The patrimonial effects of the dissolution of a marriage through the death of a spouses is reliant on the matrimonial system of the couple. Had the spouses been married in community of property, the net joint estate is split in half; one half goes to the surviving spouse and the other half goes to the heirs of the deceased spouse. Had the spouses been married out of community of property without accrual, the outstanding provisions stipulated in the antenuptial contract must be executed and then the executor is to distribute the deceased's estate to the heirs – the estate of the surviving spouse is not affected. Had the spouses been married out of community of property with accrual, the surviving spouses is entitled to the share of the accrual in terms of the Matrimonial Property Act 88 of 1984, and after the accrual has been paid, the executor of the estate of the deceased may distribute the remainder of the estate to the heirs of the deceased.¹³⁰

A surviving spouse may be left indigent and in need of maintenance after the death of the deceased spouse – such as when the parties were married out of community of property without accrual and the deceased bequeathed in a will all his assets to a third part to the exclusion of the surviving spouse.¹³¹ The surviving spouse may then claim reasonable maintenance and duty to support in terms of the MSSA until their death or remarriage if they are not able to provide

¹²⁵ Ibid.

¹²⁶ Maintenance Act s 3.

¹²⁷ *Woodhead v Woodhead* 1955 (4) SA 138 (SR) at 141.

¹²⁸ Barratt et al op cit note 27 at 266 – 267.

¹²⁹ Ibid.

¹³⁰ Ibid at 91-93.

¹³¹ Ibid at 147-148.

for their maintenance needs from their own means and earnings.¹³² When deciding the reasonable maintenance of the surviving spouse, the courts will consider factors such as the amount in the estate that is available for the distributions amongst the heirs and the legatees; the existing and expected means, the age of the surviving spouse at the time of the death of the deceased spouse, earning capacity, financial needs and obligations of the surviving spouse; the standard of living of the surviving spouse during the course of the marriage and at the deceased spouse's death.¹³³

b) The duty to maintain after separation/divorce.

The duty of support, stemming from marital relationships, typically ceases upon the dissolution of marriage through divorce. The patrimonial effects of such a dissolution of a marriage through the divorce of the spouses is reliant on the matrimonial system of the couple, similarly to those of a dissolution of marriage through the death of a spouse.¹³⁴ Heaton and Kruger suggest, however, there are two possible options that allow the parties to mutually prolong the maintenance obligation post-divorce and allow them a duty of support.¹³⁵

First, the spouses may agree for one party to provide maintenance to the other, creating a contractual support obligation. Section 7(1) of the Divorce Act empowers the court to endorse the terms of such agreements, giving them the force of a court order.¹³⁶ Alternatively, if no settlement agreement is reached or endorsed by the court, section 7(2) of the Act allows the court to issue a maintenance order or award 'spousal maintenance'.¹³⁷ This order, based on the court's discretion, establishes a statutory duty of support. Such an order can be issued for a specified period or until the recipient's death or remarriage, with either spouse potentially responsible for providing maintenance.¹³⁸

There are many reasons why it is reasonable and fair to expect ex-spouses (generally ex-husbands) to provide ongoing maintenance after a divorce. Typical scenarios are, for example, when it is in the children's best interest to have a stay-at-home parent,¹³⁹ when the ex-spouse cannot find work at the moment,¹⁴⁰ when the ex-spouse will never find work (due to low work experience or the approaching of pension age) and when it is seen as a form of compensation for the years that have been invested in the marriage.¹⁴¹

¹³² MSSA s 2(1). Section 1 defines 'own means' as any money, property or financial benefits that may accrue to the survivor in terms of the matrimonial property law, the law of succession or otherwise at the death of the deceased spouse.

¹³³ MSSA s 3.

¹³⁴ Van Heerden *et al* op cit note 3 at 147- 148.

¹³⁵ Heaton & Kruger op cit note 5 at 157.

¹³⁶ Divorce Act s 7(1).

¹³⁷ Ibid s 7(2).

¹³⁸ Heaton & Kruger op cit note 5 at 157 – 8.

¹³⁹ *Kooverjee v Kooverjee* 2006 (6) SA 127 (C) para 13.

¹⁴⁰ Ibid.

¹⁴¹ Barratt *et al* op cit note 27 at 360-361.

To obtain a maintenance order, the requesting spouse must demonstrate a genuine need for support. The mere fact of cohabitation with another partner does not automatically disqualify someone from receiving post-divorce maintenance. Yet, if the individual is fully supported by their new partner, they will not be granted maintenance from their former spouse.¹⁴²

When deciding on maintenance orders, the court considers various factors listed in section 7(2) of the Divorce Act, such as the spouses' financial circumstances, earning capacities, and conduct during the marriage. The court aims to achieve justice between the parties, recognising that financial equality might not always be feasible or necessary. Additionally, any factor deemed relevant by the court may influence the maintenance order.¹⁴³

In instances where the maintenance debtor passes away, a spouse's claim to maintenance after a divorce decree terminates, unless a court order dictates otherwise. Van Heerden states that this stems from the common law perspective, where the mutual duty of support and liability for maintenance were inherent aspects of the matrimonial relationship, and the termination of the relationship through death marked the conclusion of that duty.¹⁴⁴

2.4.2. Reciprocal duty of support in intimate life partnerships

Case law related to life partnerships in South African family law has shown that merely being in a life partnership is insufficient for legal recognition. Life partners must either tacitly (by performance of familial and spouse-like duties) or explicitly (by contract) establish a reciprocal duty of support to be granted limited legal recognition.¹⁴⁵ While past judgments¹⁴⁶ suggested a trend towards requiring a contractual commitment for legal protection in life partnerships, Barratt notes that concerns have been raised about potential difficulties in proving contract agreements (such as in the context of pension benefits and the action of the dependants), particularly for vulnerable partners.¹⁴⁷

Heaton holds that deciding need-based claims, including those relating to maintenance, inheritance, or a dependant's claim for loss of support, must not be decided by the freedom to marry.¹⁴⁸ Heaton further states that it is preferable to determine the existence of the duty of support based on the needs of the individuals involved. Therefore, a surviving life partner like Mrs. Robinson in *Volks* should have been entitled to protection under the MSSA because she requires maintenance, regardless of whether the partners had the choice to marry. The argument of choice became relevant in cases where life partners opted not to marry to avoid the legal consequences of marriage. However, Heaton suggests that those in need of maintenance after

¹⁴² *EH v SH* 2012 (4) SA 164 (SCA) para 13.

¹⁴³ Divorce Act s 7(2).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Volks* supra note 7 para 3.

¹⁴⁶ *Satchwell* supra note 35 para 34; *Du Plessis* supra note 105 para 14 – 16; *Gory* supra note 48 para 51 – 53; *Butters* supra note 61 para 34.

¹⁴⁷ Amanda Barratt 'In Which the Partners Undertook Reciprocal Duties of Support' – A Discussion of the Phrase as Used in *Bwanya v Master of the High Court, Cape Town* 2022 *PER / PELJ* 25 at 13.

¹⁴⁸ Jacqueline Heaton *The law of divorce and dissolution of life partnerships in South Africa* 1 ed (2014) 424.

the termination of a life partnership by death should be eligible for support if their partner provided maintenance during the partnership.¹⁴⁹ The *Volks* case's approach is criticised for not assisting vulnerable life partners who require support.¹⁵⁰

When reflecting on the *Volks* decision, the *Bwanya* case initially focused on the ability to choose not to marry. It held that the "question of choice" was a matter of fact, not law, and was not bound by *Volks*' conclusions.¹⁵¹ Additionally, the court in *Bwanya* had access to supplementary factual information that had been deemed inadmissible due to irrelevance during the hearing of the *Volks* case.¹⁵² This included evidence presented by the Women's Legal Centre Trust acting as *amicus curiae*.¹⁵³ The court found this evidence compelling and highlighted that many South African women find themselves "trapped" in life-partnerships due to lacking bargaining power (to persuade their partners to marry) and economic independence (to initiate a fresh start independently). Consequently, in many enduring life partnerships, the decision not to marry is essentially illusory.¹⁵⁴ While the court questioned whether the issue of choice was the appropriate focus of the matter as permanent life-partners who consciously opt not to marry are still entitled to legal protection for their chosen family structure; it addressed the matter because the notion of "choice" formed a central aspect of the rationale in the *Volks* case.¹⁵⁵

In terms of the automatic duty of support, the court in *Volks* had emphasised that the duty of support could persist even if spouses lived separately and was simply dependent on the existence of the marriage. The court, however, held that the law did not impose an identical automatic reciprocal support duty on those unmarried partners in life-partnerships.¹⁵⁶ On the contrary, the *Bwanya* majority asserted that this reasoning in *Volks*, which distinguished between automatic reciprocal support duties for married partners and the absence of such duties for unmarried life partners, was outdated as common law has since significantly been developed.¹⁵⁷ The court in *Bwanya* referenced the *Paixão* case, where the SCA recognised a legally enforceable duty of support arising from a tacit contract in an unmarried life partnership.¹⁵⁸

In the case of *Paixao*¹⁵⁹, the court stated that proving the existence of a life partnership requires more than just cohabitation and shared financial contributions. It demands credible evidence of a marital-like relationship in which the parties support and maintain each other.¹⁶⁰ As a result, the court extended the legal action for loss of support to a heterosexual life partnership, as the life partners had formed an implicit agreement for reciprocal duty of support

¹⁴⁹ Ibid at 426.

¹⁵⁰ *Volks* supra note 7 para 194; See further *Volks* supra note 7 para 103, 118, 130-134.

¹⁵¹ *Bwanya* supra note 63 para 61-70.

¹⁵² *Volks* supra note 7 para 31 – 35; the CALS had sought to demonstrate the vulnerability of women who were unmarried life partners and how few women had the choice to marry or not.

¹⁵³ *Bwanya* supra note 63 para 62.

¹⁵⁴ Ibid.

¹⁵⁵ *Bwanya* supra note 63 para 67-68.

¹⁵⁶ *Volks* supra note 7 para 56.

¹⁵⁷ *Bwanya* supra note 63 para 71.

¹⁵⁸ Barratt 'Reciprocal Duties' op cit note 147 at 5-6.

¹⁵⁹ *Paixão* supra note 92.

¹⁶⁰ Ibid para 29.

during their partnership, which closely resembled marriage.¹⁶¹ The joint will they created, designating each other as sole heirs, indicated commitment and an agreement by the deceased to provide for the surviving partner.¹⁶² Similarly, according to Barratt¹⁶³, in traditional marriages and in relationships akin to traditional marriages, the court does not need to assume that the parties to such unions assumed contractual obligations but rather the court seems to suggest that the duty of support arose automatically because of various reasons and thus the court held that they were entitled to the same legal protection and benefits as those afforded to those in married couples.¹⁶⁴

However, when it comes to heterosexual partnerships, the courts do not accept that a duty of support arises automatically simply because the parties have lived together for an extended period. Instead, they require more than the mere fact of reciprocal support being provided; they look for clear evidence of a subjective contractual commitment to provide such support.¹⁶⁵

The judgement in *Bwanya* relied on *Paixão* and intentionally avoided the line of reasoning in *Volks*, as the enforceable support duty was not solely based on a contract but on a relationship akin to marriage. The court contended that the contractual element took a "back seat" in *Paixão* and emphasised the familial and spouse-like nature of the relationship as the crucial factor.¹⁶⁶ *Bwanya* overturned *Volks* on the MSSA, stating that denial of maintenance benefits to life partners with reciprocal support duties constitutes unfair discrimination.¹⁶⁷

The prevailing viewpoint among the *Bwanya* majority led them to the conclusion that distinguishing between reciprocal support duties automatically arising from the operation of law as an inevitable outcome of marriage and support duties arising from a contract within the context of life-partners was no longer legally accurate.¹⁶⁸

Bwanya recognised the vulnerability of life partners and affirmed the constitutional duty to protect the most vulnerable members of a family, regardless of its form.¹⁶⁹ Barratt further states that the judgment highlighted the importance of focusing on the needs, dependence, and vulnerability of the claimant rather than strictly requiring a contractual undertaking for reciprocal support duties.¹⁷⁰ It is important, however, to note that the *Bwanya* judgement only addressed the issue of maintenance for deceased life partners and not for partnership relationships that had dissolved as a result of separation.

In the *EW v VH* case¹⁷¹, the court had an opportunity to address the matter of post-separation maintenance but only did so partially. The case was initiated by Miss W against her partner, Mr. H, with whom she had been in a relationship for nine years. They initially entered

¹⁶¹ Ibid 21.

¹⁶² Ibid 20-21.

¹⁶³ Barratt 'Reciprocal Duties' op cit note 147.

¹⁶⁴ *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T).

¹⁶⁵ Barratt 'Reciprocal Duties' op cit note 147 at 6-11.

¹⁶⁶ *Bwanya* supra note 63 para 71.

¹⁶⁷ Barratt 'Reciprocal Duties' op cit note 147 at 6-7.

¹⁶⁸ *Bwanya* supra note 63 para 71.

¹⁶⁹ Ibid para 32.

¹⁷⁰ Barratt 'Reciprocal Duties' op cit note 147 at 18.

¹⁷¹ *EW* supra note 77.

the relationship while still involved with previous partners but later moved in together and lived as a couple until April 2022. During their relationship, they had three children together.¹⁷² At the termination of the relationship, Miss W brought the case before the court to request an order compelling Mr. H to provide financial support, cover her medical aid and vehicle expenses, and contribute to her legal fees.¹⁷³ This was a claim for interim maintenance in terms of Rule 43 of the Uniform Rules of Court.¹⁷⁴ The majority judgement concluded that a “permanent romantic relationship” could not be considered equivalent to a life partnership.¹⁷⁵ They emphasised that Miss W needed to establish that she had a familial connection with Mr. H before being eligible to seek maintenance.¹⁷⁶ Additionally, the judges pointed out that Miss W would not be in a financially precarious situation if she did not receive maintenance. This was because she had already obtained a court order covering the financial needs of her children, including educational and medical expenses, as well as rental and utility costs.¹⁷⁷ Similar to the *Bwanya* case, Miss W had been entirely dependent on Mr. H. The couple had taken part in a ceremony that was akin to a wedding, they shared a home, and the general public believed them to be married.¹⁷⁸ The court, however, held that she could not make a claim for interim maintenance, as would generally happen in divorce proceedings because the legislation surrounding life partnerships was simply not finalised, thus prejudicing the applicant.¹⁷⁹

2.4.3. Duty of support and delictual claims by dependants

Where life partners or spouses have agreed that one will financially support the other, this agreement is safeguarded under common law through the action for damages for loss of support. This remedy becomes available when a third party causes injury or death to the partner who bore the duty to provide such support. The common law, as shaped by judicial decisions, permits the dependents of the affected spouse or partner to bring forth a delictual claim for loss of support against the responsible party.¹⁸⁰

In the matter of *Du Plessis v The Road Accident Fund*¹⁸¹, the SCA determined that this common-law claim required expansion to encompass same-sex life partners engaged in a permanent life partnership who had tacitly undertaken to support each other.¹⁸² While

¹⁷² Ibid para 1.

¹⁷³ Ibid para 2.

¹⁷⁴ Ibid para 43.

¹⁷⁵ Ibid para 39.

¹⁷⁶ Ibid para 41.

¹⁷⁷ Ibid para 2.

¹⁷⁸ Ibid para 60.

¹⁷⁹ Ibid para 62; ‘The common law recognises a reciprocal legal duty of support between spouses during the subsistence of a marriage, and it is regarded as an invariable consequence of marriage. Thus, following the breakdown of a marriage and the institution of divorce proceedings and before its termination, spouses in marriages can enforce this duty of support on an interim basis utilizing the procedures provided for in the court rules. However, parties in life partnerships are left with no remedy regarding interim financial relief during the subsistence and following the termination of their relationships.’

¹⁸⁰ Heaton & Kruger op cit note 5 at 260.

¹⁸¹ *Du Plessis* supra note 105.

¹⁸² Ibid para 12 – 16.

delivering a unanimous judgment, Cloete JA explicitly left open the inquiry into whether the common law should also evolve to include heterosexual life partners.¹⁸³

This was later addressed and resolved in *Paixão*, where the SCA recognised the existence of a tacitly formed, legally binding duty of support between heterosexual life partners.¹⁸⁴ The court clarified that the dependent's action is a distinctive remedy and not a 'spousal benefit resulting from a legally recognised marriage.'¹⁸⁵ Van Heerden holds that in essence, the *Volks* judgment did not present a barrier in extending the common-law dependent's action for loss of support to heterosexual life partners if these were based in contract.¹⁸⁶

2.4.4. Duty of support in customary, religious and same-sex marriages

a) Customary marriages

According to the Recognition of Customary Marriages Act 120 of 1998, customary marriages enjoy the same status and standing as non-customary civil marriages.¹⁸⁷ The non-recognition of customary marriages is untenable in terms of the Constitution, which forbids discrimination on the grounds of race, ethnic, social origin or culture.¹⁸⁸ Furthermore, the Bill of Rights protects freedom of religion, belief and opinion and expressly provides for marriages that are concluded under any tradition, or system of religions, personal or family laws.¹⁸⁹ Customary law allows for duty of support among family members that go well beyond what is prescribed in the common law. Bonthuys notes that in customary law, wives and children born within a marriage (prior to divorce) are the responsibility of the husband's family, while unmarried women and their children are the responsibility of the woman's family.¹⁹⁰

Regarding maintenance, at the dissolution of a customary marriage by divorce, the Recognition of Customary Marriages Act mandates that the court must consider any agreements or arrangements established in accordance with customary law¹⁹¹. According to Heaton, this likely includes the payment of ilobolo and isondlo, which involve the transfer of an animal from a father to the caregiver of his child.¹⁹²

Surviving spouses in any customary marriage are entitled to claim reasonable maintenance from the estate of their deceased spouse until their death or remarriage.¹⁹³ In the context of a polygynous marriage, the presence of multiple wives will naturally influence the determination

¹⁸³ Van Heerden et al op cit note 3 at 252.

¹⁸⁴ *Paixão* supra note 92 para 19, 35-36.

¹⁸⁵ Ibid para 26.

¹⁸⁶ Van Heerden et al op cit note 3 at 252.

¹⁸⁷ Heaton & Kruger op cit note 5 at 384-388.

¹⁸⁸ The Constitution s 9(3).

¹⁸⁹ Ibid s 15(3)(a)(i).

¹⁹⁰ Bonthuys *The Limits of Cohabitation* op cit note 12 at 2.

¹⁹¹ Recognition of Customary Marriages Act 120 of 1998 s 8(4)(d).

¹⁹² Heaton & Kruger op cit note 5 at 232.

¹⁹³ The MSSA s 2(1).

of each wife's maintenance needs.¹⁹⁴ If the maintenance claims of surviving wives in a polygynous customary marriage conflict with each other due to limited available resources, it can be assumed all claims will be proportionately reduced.¹⁹⁵ This is by analogy to the rule that pertains to the competing claims of a surviving spouse and a deceased's dependent child.¹⁹⁶

b) Religious marriages

There are no reported cases addressing the legal recognition of religious marriages outside of Muslim and, to a lesser extent, Hindu traditions - particularly in terms of post-relationship rights. The one of the earliest and most notable instances of judicial recognition of a religious marriage has been demonstrated in the 1997 case of *Ryland v Edros*¹⁹⁷. The parties had been married according to Muslim rites and they did not conclude a civil marriage. The court allowed Ms. Edros to claim arrear maintenance (*nafaqah*) for part of the period she had been married. The claim for consolatory gift (*mata'a*) was also upheld.¹⁹⁸

Later, in the 1999 case of *Amod v Multilateral Motor Vehicle Accidents Fund*¹⁹⁹, Mrs. Amod filed a claim against the fund for loss of support after her husband's death in a motor vehicle accident. Her claim was based on her role as the surviving spouse in a monogamous Muslim marriage. The Durban High Court dismissed her claim, arguing that the marriage, being potentially polygynous, was not legally valid.²⁰⁰ The Fund contended that, under these circumstances, it had no legal obligation to compensate her for the loss of support. Mrs. Amod appealed, and the SCA overturned the Durban High Court's decision, asserting that the pertinent inquiry should not revolve around the lawfulness of the marriage between the plaintiff and the deceased but rather whether the deceased was obligated by law to support the plaintiff in a relationship deserving recognition and protection according to common law.²⁰¹ Considering the historical context and development of the dependant's action, the court determined that a dependant, even if not legally married to the deceased, could seek compensation for loss of support (if the deceased had a duty to support the dependant) that was legally enforceable; this duty was rooted in a marriage that had been solemnised in alignment with a recognised and accepted faith's tenets and; such a duty was worthy of recognition and protection within the framework of the action of the dependant.²⁰² According to Van Heerden, the court held that societal morals dictate the acknowledgment and legal enforceability of the contractual duty of support arising from a Muslim marriage under common law.²⁰³

¹⁹⁴ Ibid s 3.

¹⁹⁵ Ibid s 2(3)(b).

¹⁹⁶ Heaton & Kruger op cit note 5 at 234.

¹⁹⁷ *Ryland v Edros* 1997 (2) SA 690 (C).

¹⁹⁸ Ibid, *Mata'a* is a gift given to the wife when the dissolution of the marriage is at the unjustified behest of her husband.

¹⁹⁹ *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

²⁰⁰ Ibid para 17.

²⁰¹ Ibid para 18 – 19.

²⁰² Ibid para 6 – 8.

²⁰³ Van Heerden op cit note 3 at 237.

In the 2005 case of *Khan v Kahn*²⁰⁴, it was established that a husband owed a duty of support to his ex-wife, with whom he had entered into a polygamous marriage under Muslim rites. The Court deliberated on whether the appellant, through the enforcement mechanisms of s 2(1) of the Maintenance Act²⁰⁵, had a legal responsibility to support the respondent, to whom he had been married.²⁰⁶ The court asserted that the common-law duty of support, being an adaptable concept, had evolved and broadened over time to encompass a broader spectrum of relationships.²⁰⁷ To ascertain if a specific relationship warranted a duty of support, the court considered factors such as the financial needs of the complainant and whether the relationship inherently imposed a duty of maintenance. The prevailing societal norms and conditions were also considered.²⁰⁸ The court's rationale was that the marital relationship bestowed a contractual duty of support upon the involved parties. It was held that irrespective of the marriage's nature, the plaintiff successfully demonstrated that the deceased had committed to providing support and intended to fulfil this obligation.²⁰⁹ Despite the limited recognition of Muslim marriages, under the Maintenance Act²¹⁰, Muslim wives, including those in polygynous marriages, have the ability to enforce their right to maintenance orders. Additionally, in accordance with the MSSA, a Muslim wife has the right to claim for support following her husband's passing and may also pursue claims from the Road Accident Fund provided that all other conditions are fulfilled.²¹¹

c) Same-sex marriages

The reciprocal duty of support extends to those in same-sex marriages and (in this context) this duty had been recognised in the *Minister of Home Affairs v Fourie*²¹² case, whereby the same-sex parties had been in a permanent relationship and residing in a common home. Similarly to other unions recognised by the Civil Union Act, this duty ceases upon dissolution of the same-sex marriage through death or divorce, yet exceptions exist, such as claims against the deceased's estate or via maintenance orders post-divorce.²¹³

In the past, same-sex life partners were granted more spousal benefits compared to heterosexual life partners. According to Heaton, this distinction arose because same-sex life partners were

²⁰⁴ *Khan v Kahn* 2005 (2) SA 272 (T).

²⁰⁵ Maintenance Act s 2(1).

²⁰⁶ *Khan* supra note 204 para 8.

²⁰⁷ Ibid para 10.

²⁰⁸ Ibid.

²⁰⁹ Ibid para 10 - 11.

²¹⁰ Maintenance Act s 2(1).

²¹¹ Van Heerden et al op cit note 3 at 495.

²¹² *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) para 65.

²¹³ Mothokoa Mamashela and Marita Carnelley 'Cohabitation and the Same-Sex Marriage. A Complex Jigsaw Puzzle. *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC): case' (2006) 27 *OLJ* 379-390 at 383.

not afforded the option to marry, while heterosexual partners had the choice to marry.²¹⁴ This was rooted in the difficulty they faced in choosing to marry due to societal homophobia. Since the implementation of the Civil Union Act, same-sex partners no longer face this barrier to marriage but despite this, Bonthuys states that heterosexual life partners still encounter challenges in exercising their choice to marry, primarily due to issues of inequality within intimate relationships.²¹⁵

The duty of support, a fundamental aspect of ensuring fairness and justice in intimate relationships, must be thoroughly addressed in all forms of partnerships to uphold the constitutional values of equality, dignity, and access to justice. This chapter's exploration of historical developments, current legal recognition, and the duty of support sets the stage for a deeper understanding of the necessary legal reforms.

In sum, this chapter has explored the limited legal recognition of life partnerships in South Africa, with a focus on the duty of support. It traced the historical exclusion of such relationships from legal protection, assessed the current legal status, and examined both legislative and common law developments. While some progress has been made through piecemeal legislation and common law remedies, the courts remain reluctant to impose maintenance obligations without legislative guidance, as seen in *EW v VH*. These findings support the argument that South African law remains inadequate and discriminatory in failing to extend maintenance rights to life partners, thereby privileging marriage over other committed unmarried relationships. Reform must be made. The next chapter turns to foreign and international law, as well as South Africa's constitutional framework, to consider how these sources may guide a more inclusive and equitable approach to maintenance for life partnerships.

²¹⁴ Heaton op cit note 85 at 253; Micheal Cameron Wood-Bodley 'Intestate succession and gay and lesbian couples' (2008) 125 *SALJ* 46-62.

²¹⁵ Elsje Bonthuys 'A Duty of Support for All South African Unmarried Intimate Partners Part 2: Developing Customary and Common Law and Circumventing the Volks Judgment' *PER / PELJ* 2018(21) at 7.

CHAPTER III: LIFE PARTNERSHIPS IN INTERNATIONAL LAW AND COMPARATIVE FOREIGN FRAMEWORKS

The increasing recognition of life partnerships in national legal frameworks is in part a response to the growing awareness of human rights norms at both the domestic and international levels. In South Africa, the country's progressive Constitution has played a key role in the protection and promotion of human rights,²¹⁶ while international human rights treaties and instruments have provided a framework for holding states accountable for the protection and promotion of human rights. This chapter situates South Africa's treatment of life partnerships within a global context. It evaluates foreign legal systems and international human rights instruments to illustrate best practices and identify areas for improvement in domestic law. In addition, it considers the mechanisms through which the Constitution integrates international law into domestic law, establishing the legal foundation for the protection of life partnerships within South Africa's legal system.

3.1. Foreign law and intimate life partnerships

Considering other domestic or national laws is important because it reveals the manner in which various societies respond to social trends,²¹⁷ such as cohabitation. By examining these diverse legal frameworks, one can identify effective practices and learn how different systems strive to balance personal freedom with protection for unmarried intimate partners. This comparative perspective also highlights how legal systems evolve to meet cultural expectations,²¹⁸ which can be invaluable for crafting cohabitation laws that reflect a society's specific values and needs.

The phenomenon of intimate unmarried relationships has become widely accepted across the globe as marriage loses its traditional role as the cornerstone of family life.²¹⁹ Political ideology, and public policy, have all contributed to the evolving approaches different countries have taken toward life partnerships. Internationally, scholars and family law experts have advocated for the law to adapt to these societal shifts,²²⁰ as statistics repeatedly show a global rise in life partnership and a decrease in marriage.²²¹ The following paragraphs will address

²¹⁶ John Dugard et al *International law: South African perspective* 5 ed (2019) 65-72.

²¹⁷ Victor Navarrete 'Judicial Globalisation. A New Model of North-South Relations for the 21st century?' (2008) 8 *Anuario Mexicano De Derecho Internacional* 361 – 397; Anne-Marie Slaughter, 'Judicial Globalisation' (2000) 40 *Virginia Journal of International Law* 1103-1124.

²¹⁸ Ibid.

²¹⁹ Elise Goossens 'One trend, a patchwork of laws. An exploration of why cohabitation law is so different throughout the Western world' (2021) 35 *International Journal of Law, Policy and The Family* 1-36 at 2.

²²⁰ Jan Miller 'Protect our cohabitants, say lawyers' (2019) 169 *New Law Journal*.

²²¹ Leslie Stratton *Marriage versus Cohabitation: How Specialization and Time Use Differ by Relationship Type* (2023) GLO Discussion Paper No 1269 1; 'The fraction of persons in the United States (US) age 18 or older who were married and living with their spouse fell from 70.0% in 1968 to 51.5% in 2019, while the fraction cohabiting rose from 0.4% to 7.4%, indicating that 14% of all couples were cohabiting in 2019.'

four approaches adopted by jurisdictions as described by various academics,²²² as well as the advantages and disadvantages of these approaches. It is important to note that some regions may adopt multiple approaches or a hybrid system and may not necessarily strictly conform to one approach.

a) Limited legal piecemeal protections

According to Van Heerden and Clark, England and Wales which shared similarities with South Africa in this regard offered only limited legal protections to life partners.²²³ This was prior to the implementation of Civil Partnership Act of 2004²²⁴ and the subsequent 2007 English Law Commission Report 'Cohabitation: The financial consequences of relationship breakdown'²²⁵. Like South Africa, due to the absence of comprehensive legal frameworks, general legal principles, such as estoppel and unjust enrichment, served as final resort remedies for life partners in these regions. This approach is adopted by certain jurisdictions aiming to address the most pressing needs of life partners and aims to safeguard the family home or secure inheritance rights for a surviving partner without actually establishing a full cohabitation regime.²²⁶

This model reflects a traditional view that marital status should primarily determine legal entitlements, leaving life partners largely reliant on general principles of law. Although this approach offers some avenues for resolving financial or property disputes, it does not extend the same safeguards or automatic rights available to married couples, often leaving life partners with limited security, especially when their relationship ends.²²⁷

In England and Wales, life partners did not receive automatic financial support rights or inheritance entitlements. If one partner dies without a will, the surviving partner had no guaranteed right to inherit shared assets; instead, they had to rely on the Inheritance (Provision for Family and Dependents) Act of 1975,²²⁸ which provides discretionary awards based on need rather than relationship status. Similarly, in cases of separation, life partners could not claim maintenance as a right, as married spouses can. According to Whiting, they had to, instead, rely on equity and trusts law, including remedies such as constructive trust and proprietary estoppel, to establish ownership or financial interests in shared property.²²⁹

²²² Brigitte Clark & Belinda Van Heerden 'Affording post-relationship rights to unmarried intimate life partners comparative analysis of the legal position' (2023) 140 *SALJ* 465 – 695; Simone Wong 'Cohabitation Reform in England and Wales: Equality or Equity' (2015) 27 *Canadian Journal of Women & the Law* 112-129; Kate Whiting 'Cohabitation in England & Wales and Scotland: the Case for Granting Equal Rights to Marital and Non-Marital Cohabitants' (2020) 4 *Edinburgh Student Law Review* 52-64; Goossens op cit note 219.

²²³ Clark & Van Heerden op cit note 222 at 618.

²²⁴ Civil Partnership Act of 2004.

²²⁵ English Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).

²²⁶ Goossens op cit note 219 at 6.

²²⁷ Wong op cit note 222 at 121.

²²⁸ Inheritance (Provision for Family and Dependents) Act of 1975.

²²⁹ Whiting op cit note 222 at 57-58; Wong op cit note 222 at 115.

This reliance on general legal principles rather than specific cohabitation rights places a significant burden on life partners. First, many individuals are unaware of the limitations in their legal rights and may assume that cohabitation alone provides certain protections, a misconception known as the common-law marriage myth.²³⁰ This may leave partners shocked and financially vulnerable when they discover otherwise. This common misunderstanding highlights the risks associated with the limited protection model: without a clear understanding of their legal status, many life partners may forego taking proactive steps, such as drafting cohabitation agreements or making wills because they assume that these measures are unnecessary.

Moreover, the limited protection model disproportionately impacts economically vulnerable partners, often women, who may have taken on unpaid domestic roles or caregiving responsibilities, foregoing career or financial advancement in the process.²³¹ Without specific legal rights to property or financial support, these individuals may be left without adequate means to support themselves after separation, regardless of the length or nature of their relationship.²³² Unlike marriage or civil partnership, which recognises non-financial contributions within the division of assets, life partnerships that exist under limited protection do not account for such factors.

While limited protection provides a certain degree of flexibility and respects the autonomy of individuals who may deliberately avoid marriage, it also raises questions about the state's role in safeguarding those who enter into life partnerships without fully understanding the legal implications.²³³

The Cohabitation Law Reform project by the Law Commission in England and Wales had highlighted that life partners frequently face financial hardship upon separation or the death of a partner.²³⁴ As such, some degree of reform was necessary, such as a functional approach that could recognise such life partnerships based on their characteristics (such as the permanent nature of the relationship, their partners' commitment and intention to undertake support duties) rather than marital status alone. In the United Kingdom, the government has also confirmed that a public consultation will be launched in 2025 to explore how the law might protect couples who live together but are unmarried. The aim is to gather views and build consensus on whether new legal protections (such as claims to property, financial support, or inheritance rights) should be introduced for life partners, particularly where children or long-term mutual commitments are involved. This initiative reflects growing recognition in England and Wales that modern family-life includes diverse non-nuclear arrangements, and that the law may need to evolve so that people in non-marital partnerships are not left economically vulnerable simply

²³⁰ Wong op cit note 222 at 116; Anne Barlow et al 'Cohabitation and the Law: Myths, Money and the Media' in Alison Park et al (ed) *British Social Attitudes: The Twenty-Fourth Report* (2008) 29-52.

²³¹ Whiting op cit note 222 at 54-55; Commission on Human Rights *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living* (UN Doc E/CN.4/2005/48, 2005) at para 67.

²³² Whiting op cit note 222 at 54-55.

²³³ Ibid at 62.

²³⁴ Clark & Van Heerden op cit note 222 at 618: The proposed reforms in England face opposition due to concerns that they would impose marriage-like obligations on cohabiting couples who may not desire such legal constraints; English Law Commission op cit note 225.

because they chose not to marry.²³⁵ However, despite reform proposals and efforts, England continues to follow a piecemeal, non-statutory approach to life partnerships.

b) Opt-In Regimes

Legal scholars²³⁶ differentiate between opt-in regimes, where parties must actively choose to be included, and default regimes, which apply automatically with an opt-out provision. Both opt-in and opt-out regimes are default regimes that differ in their application.

In ‘opt-in’ regimes, partners must formally declare their intention to be included under a specific cohabitation law. Goossens holds that this typically happens through the official registration of the relationship, which is why these arrangements are often called ‘registered partnerships, particularly in European and comparative²³⁷ legal frameworks.²³⁸ The term ‘registered partnership’ includes various forms such as civil unions, life partnerships, or civil partnerships,²³⁹ and exists because governments in these regions had intended to address the increasing demand from unmarried parties who wanted to legally formalise their relationships without getting married. Depending on the jurisdiction, registered partnerships can either offer legal rights similar to marriage, as seen in places like California and New Zealand, or provide a more limited legal structure, such as in Belgium.²⁴⁰

The Civil Partnership Act of 2004 in England and Wales exemplifies this approach. Originally designed to provide same-sex couples with a marriage-like framework, it has given these couples similar protections regarding inheritance, tax benefits, and maintenance rights, without imposing marriage. However, this system historically excluded heterosexual cohabitants, who were either expected to marry or remain without such protections.²⁴¹ Although recent reforms have opened civil partnerships to heterosexual couples,²⁴² debate persists regarding the social and personal implications of applying marriage-like structures to all types of cohabiting relationships.

²³⁵ Wong op cit note 222 at 129; Monidipa Fouzder ‘Government to consult on cohabitation reform’ *The Law Society Gazette* 25 February 2025 available at <https://www.lawgazette.co.uk/news/government-to-consult-on-cohabitation-reform> accessed on 04 November 2025; Hclaw ‘Government confirm next steps for cohabitation law reform’ available at <https://www.hclaw.com/news-and-insights/government-confirm-next-steps-for-cohabitation-law-reform> accessed on 04 November 2025.

²³⁶ Clark & Van Heerden op cit note 222; Wong op cit note 222; Whiting op cit note 222; Goossens op cit note 219.

²³⁷ Goossens op cit note 219 at 7-8: these comparative frameworks refer to England, Wales, California and Belgium.

²³⁸ Ibid at 3-4.

²³⁹ Jens Scherpe, ‘Quo Vadis, Civil Partnership?’ (2015) 46 *Victoria University Wellington Law Review* 755-768 at 755: ‘In all the United Kingdom’s jurisdictions, the formal regime exclusively for same-sex couples is called civil partnership, although the generic term used, particularly in comparative law, is registered partnership.’

²⁴⁰ Goossens op cit note 219 at 3-4.

²⁴¹ Anne Barlow ‘Cohabitation law reform – messages from research’ (2006) 14 *Feminist Legal Studies* 167 – 180 at 170.

²⁴² Goossens op cit note 219 at 25-26: refers to the 2018 UK Supreme Court case of *Steinfeld and Keidan v. Secretary of State*, [2018] UKSC 32 where it was held that ‘the exclusion of different-sex couples from registered partnership was discriminatory and violated the European Convention of Human Rights.’

Opt-in models offer several advantages. By allowing couples to select formal legal protections, this approach respects personal choice and relationship diversity, accommodating partners who may want financial or property rights without marriage.²⁴³ Furthermore, Barlow notes that this system provides flexibility, enabling partners to decide when and how to access legal protection, which can be particularly valuable for those with children or significant shared property.²⁴⁴ In regimes like England and Wales, which operate as a limited legal piecemeal protection system (where life partners may access limited remedies through property, trust, and contract law because there is no coherent legislative framework conferring automatic rights or obligations), the opt-in nature of civil partnerships can also allow an additional pathway to legal recognition and access to broader rights and entitlements than those which are available by default.

However, opt-in regimes have limitations. First, the onus is on couples to understand and pursue registration, which assumes they are aware of both the registration process and the consequences of forgoing it.²⁴⁵ As a result, many life partners who are unaware of their legal standing or mistakenly believe that their partnerships automatically affords them certain rights and thus often end up lacking recourse in cases of separation, death, or financial need. Additionally, imbalances in bargaining power between partners may mean that one partner (typically the woman) wants to opt in, while the other does not, further complicating the decision and potentially leaving the more vulnerable partner unprotected. Thus, while opt-in regimes offer an appealing balance of autonomy and protection, they depend on informed, proactive choices and equitable decision-making that not all couples may be equipped (or willing) to make.²⁴⁶

c) Default (Opt-out) regimes

An alternative method of addressing life partners, whether in cases of death or separation, is to automatically provide them with similar legal rights and remedies as married couples, provided they meet specific conditions. These jurisdictions employ a status-based approach.²⁴⁷ Default (or presumptive) regimes of this nature have been recognised in Australian law as ‘*de facto* relationships’ since 2009, which refers to relationships between two people who are not legally married or related but live together as a couple.²⁴⁸ Typically, default legal regimes are designed for life partners who share a stable, committed, and intimate relationship,

²⁴³ Anne Barlow, Carole Burgoyne & Janet Smithson ‘*The Living Together Campaign – An investigation of its impact on legally aware cohabitants*’ (Ministry of Justice Research Series 5/07, University of Exeter, 2007) at 10.

²⁴⁴ Ibid at 10, 20.

²⁴⁵ Whiting op cit note 222 at 63.

²⁴⁶ Whiting op cit note 222 at 64 holds, however: ‘With careful regulation to ensure, such decisions are based on genuine party agreement and not, for example, exploitation or manipulation by a more powerful party, this approach appears to offer a very appealing compromise.’

²⁴⁷ Goossens op cit note 219 at 7.

²⁴⁸ Property (Relationships) Act 147 of 1984 (New South Wales, Australia) s 5(1)(a); Clark & Van Heerden op cit note 222 at 621.

distinguishing them from more casual or incidental relationships.²⁴⁹ This aim is evident in the eligibility criteria established by different legal systems. The federal Australian Family Law Act 1975 (Commonwealth) outlines various factors to assess the existence of a *de facto* relationship such as the relationship having lasted at least two years and there being a child involved.²⁵⁰

This approach addresses many of the shortcomings associated with opt-in systems. By conferring rights automatically, Wong highlights that default regimes protect partners who may be unaware of their legal status or who have not taken proactive steps to formalise their relationship.²⁵¹ Additionally, default models help protect economically vulnerable partners, often women, who may rely on the relationship for financial stability.²⁵² This is especially important in relationships with shared assets or children, where one partner may be disadvantaged in the event of separation or death. Moreover, Goossens notes that such partners usually have the option to ‘opt out of the default regime should they desire to avoid its application.’²⁵³

Nonetheless, default regimes also face challenges. Wong argues that imposing legal obligations on life partners without their explicit consent can infringe on personal autonomy.²⁵⁴ For some couples, the appeal of life partnership unions lies in avoiding the formal commitments associated with marriage, and automatically applying marital obligations to them may not align with their intentions. Additionally, defining the criteria for legal recognition can be complex;²⁵⁵ determining the length of cohabitation, level of financial dependency, or mutual commitment often requires subjective assessments, which can create legal ambiguity. Thus, while default regimes offer substantial protections and reduce legal vulnerability, they may not suit couples who view life partnerships as a deliberate alternative to marriage.

d) Contract-based Approaches

In some jurisdictions, a contract-based approach is relied on as such jurisdictions do not have specific cohabitation regulations. In such jurisdictions, life partners must rely on cohabitation agreements, general legal principles, or equitable remedies to resolve disputes.²⁵⁶

In the U.S., the rights and remedies of life partners are based on explicit or tacit cohabitation agreements,²⁵⁷ often driven by a policy objective to preserve the traditional family. This was

²⁴⁹ Goossens op cit note 219 at 3-4.

²⁵⁰ Family Law Act 53 of 1975 s 4AA (2).

²⁵¹ Wong op cit note 222 at 117.

²⁵² *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 374-76, [2013] 1 SCR 61: Abella J highlighted that a default regime with an option to opt out was preferable for achieving both the objective of protecting vulnerable parties and respecting freedom of choice of the couples.

²⁵³ Goossens op cit note 219 at 2.

²⁵⁴ Simone Wong ‘Cohabitation and Law Commission’s Project’ (2006) 14 *Feminist Legal Studies* 145-166 at 161.

²⁵⁵ Ibid.

²⁵⁶ Clark & Van Heerden op cit note 222 at 617.

²⁵⁷ Goossens op cit note 219 at 2.

seen in the landmark *Marvin v Marvin* case²⁵⁸ which established that cohabiting partners could base their claims on contractual agreements, whether written or inferred from behaviour.²⁵⁹

The advantages of contract-based approaches lie in their flexibility and respect for individual autonomy.²⁶⁰ A limited legal protections approach, for instance, offers only basic rights and relies heavily on general legal principles, such as unjust enrichment, to address disputes between life partners. By negotiating and agreeing on their own terms, partners can create arrangements tailored to their unique circumstances, free from the constraints of marriage or state-imposed standards.²⁶¹ For instance, partners may specify how shared property will be divided, define financial obligations, or outline support arrangements in a way that reflects their relationship's dynamics. This model is particularly attractive for couples who value independence and want to avoid a "one-size-fits-all" approach.

However, contract-based models also have significant limitations. First, they assume a level of legal awareness and willingness to negotiate that many couples may lack.²⁶² While some couples are proactive about drafting agreements, others may avoid doing so due to cost, complexity, or discomfort with discussing financial matters. Furthermore, contract-based models place the burden of enforcement on the individuals involved, which can be challenging, Wong highlights, if one partner is more financially or legally knowledgeable than the other.²⁶³ As a result, economically disadvantaged partners, who may be unaware of their rights or unable to negotiate favourable terms, are particularly vulnerable under this approach.

Clark and Van Heerden note that many couples in South Africa do not actively choose to enter into life partnerships – many life partnerships occur naturally out of socioeconomic circumstance, and thus this approach would not adequately protect such couples or those in polygamous relationships, hence the existence of piecemeal protections.²⁶⁴

The debate over whether to prioritise the preservation of traditional marriage or the protection of vulnerable partners often shapes a country's preference for either a contractual, hands-off approach or a default status-based legislative framework. The contractual, laissez-faire model emphasises safeguarding the institution of marriage and supports the notion that couples who opt not to marry should not be bound by legal structures resembling marriage.²⁶⁵ Those of this perspective argue that life partners' autonomy should be respected, and they should not be subjected to legal obligations they may have deliberately chosen to avoid. Essentially, they contend that life partnerships should remain outside the reach of legal

²⁵⁸ *Marvin v Marvin* 18 Cal 3d 660.

²⁵⁹ Goossens op cit note 219 at 2.

²⁶⁰ Whiting op cit note 222 at 58.

²⁶¹ Wong op cit note 254 at 161.

²⁶² Whiting op cit note 222 at 58.

²⁶³ Wong op cit note 254 at 162.

²⁶⁴ Clark & Van Heerden op cit note 222 at 617.

²⁶⁵ See Rebecca Probert *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600–2010* 1 ed (2012) 165-220.

intervention, unlike marriage.²⁶⁶ Conversely, the main purpose of default regimes governing informal cohabitation is to ensure protection for the more vulnerable partner in the event of a breakup. In these systems, legal rules - whether enacted through legislation or established by court rulings - are applied to couples based on their life partnership, offering safeguards that compensate for the absence of formal marriage.

3.2. International treaties and instruments

International law does not explicitly and directly address unmarried partnerships as a distinct legal category separate from marriage. However, it provides a framework for protecting individuals' rights within *all* forms of intimate relationships by focusing on broader human rights principles, such as the right to equality, and non-discrimination. Moreover, various international instruments highlight the importance of family life.²⁶⁷ As a signatory to these instruments, South Africa is obligated to align its national laws with international standards, ensuring protections for unmarried partners.

a) Obligations of states under international law regarding unmarried partnerships

International human rights law obliges states to enact laws and take measures that protect individuals' rights within all intimate relationships, which may indirectly include unmarried partnerships. These obligations are not direct grants of rights to individuals but require states to incorporate international standards into their national laws, thereby offering protection against discrimination and ensuring equality.²⁶⁸

i. Equality Before the Law and Non-Discrimination

South Africa is a party to the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), both of which establish the principles of equality before the law and non-discrimination. Article 7 of UDHR holds that 'All are equal before the law and are entitled without any discrimination to equal protection of the law.'²⁶⁹ Furthermore Article 26 of the ICCPR holds that: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective

²⁶⁶ Goossens op cit note 219 at 20.

²⁶⁷ *Volks* supra note 7 para 8.

²⁶⁸ Hennie Strydom *International Law* 1 ed (2016) 68.

²⁶⁹ UN General Assembly *Universal Declaration of Human Rights* (GA Res 217A (III), 1948) (hereinafter UDHR) art 7.

protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’²⁷⁰

Similarly, Article 3 of the African Charter on Human and Peoples’ Rights (hereinafter the African Charter) holds that ‘Every individual shall be equal before the law’²⁷¹ and that ‘Every individual shall be entitled to equal protection of the law’²⁷² Article 28 of the African Charter further holds that ‘every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance’.²⁷³ As a party to the African Charter, having ratified it in 1996, South Africa is bound by these provisions and is therefore obligated to uphold the principles of equality and non-discrimination in its national legal framework.

Mirroring these provisions, both Article 2 of the African Charter²⁷⁴ and Article 2 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa²⁷⁵ (hereinafter the Women’s Protocol) emphasise the principle of non-discrimination, prohibiting discrimination based on factors such as ‘sex, language, religion, political or other opinions, national or social origin, wealth, birth, or any other status.’²⁷⁶ Additionally, the Article 2 of the Women’s Protocol focuses on specific areas where discrimination against women continues to exist, such as marriage, inheritance, and access to justice. Additionally, this article also requires State Parties to actively combat all forms of discrimination against women by implementing legislative, institutional, and other measures. Article 8 of the Women’s Protocol strengthens this principle, further affirming that ‘women and men are equal before the law and shall have the right to equal protection and benefit of the law’.²⁷⁷

The Convention on the Elimination on Elimination of All Forms of Discrimination Against Women (CEDAW), which South Africa has ratified, recognises that in situations of poverty, women have the least access to food, health, education, training, employment opportunities, and other essential needs. The CEDAW addresses discrimination, emphasising the need to ensure that women, regardless of their marital status, have equal access to rights and protections.²⁷⁸

‘...the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, *irrespective of their marital status*, on a basis of

²⁷⁰ International Covenant on Civil and Political Rights (1966) UN Doc A/6316 (hereinafter the ICCPR) art 26.

²⁷¹ Organisation of African Unity *African Charter on Human and Peoples’ Rights* (1981) (hereinafter the African Charter) art 3(1).

²⁷² *African Charter* supra note 271 art 3(2).

²⁷³ *Ibid* art 28.

²⁷⁴ *Ibid* art 2.

²⁷⁵ African Union *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (2003) (hereinafter the Woman’s Protocol) art 2: South Africa is also party to the Woman’s Protocol, having signed and ratified it in 2004.

²⁷⁶ *African Charter* supra note 271 art 2; *Ibid* art 2.

²⁷⁷ *Woman’s Protocol* supra note 275 art 8.

²⁷⁸ Convention on the Elimination of All Forms of Discrimination against Women (1979) UN Doc A/RES/34/180 (hereinafter CEDAW) art 1.

equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’

This means that persons who are married and those who are unmarried, especially intimate life partner are entitled to the right against discrimination. This right includes rights related to property, housing, and social security, which are particularly relevant to unmarried partners, especially upon the termination of the partnership.

ii. Right to Family Life

The African Charter emphasises the protection of the family unit by the state, including providing for the rights of women within this context. Article 18 holds that the family unit shall be protected by the State,²⁷⁹ which has the duty to assist the family.²⁸⁰

South Africa, as a signatory to the ICCPR, is further bound by Article 23 which states that:²⁸¹

‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’

Notably, this article does not restrict the definition of family solely to married couples, suggesting that unmarried partnerships and diverse family arrangements could reasonably fall within its scope. This broader interpretation aligns with General Comment No. 19 from the UN Human Rights Committee (CCPR), which further emphasises that whilst the notion of ‘family’ may vary between various countries or even within regions of a single state, diverse family structures such as nuclear, extended, unmarried couples with children are entitled to acknowledgment and protection by domestic laws:²⁸²

‘The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23.²⁸³ Consequently, States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system. Where diverse concepts of the family, “nuclear” and “extended”, exist within a State, this

²⁷⁹ *African Charter* supra note 271 art 18 (1): ‘The family shall be the natural unit and basis of society. It shall enjoy protection and support of the state for its establishment and development.’

²⁸⁰ *Ibid* art 18 (2): ‘The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.’

²⁸¹ ICCPR supra note 270 art 23 (1); South African Law Reform Commission op cit note 1 at 178: ‘The Constitution requires that regard be had to international law, in particular international treaties which South Africa has ratified when interpreting the Constitution, other legislation and developing the common law.’

²⁸² Human Rights Committee *General Comment No 19: Protection of the family, the right to marriage and equality of the spouses (Art 23)* (1990) UN Doc CCPR/C/21/Rev.1/Add.1. para 2-3.

²⁸³ See also *Bwanya* supra note 63 para 30-32; *VJV and RT v Minister of Social Development* (CCT 94/22; 29 June 2023) para 35-36; *Centre for Child Law v T S & Others* (CCT 157/22; 29 June 2023) para 34; *Volks* supra note 7 para 106-107; *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 31-32; *Du Toit and Another v Minister for Welfare and Population Development and Others* 2003 (2) SA 198 (CC) para 18-19; *Daniels v Campbell NO and Others* [2004] ZACC 14; 2004 (7) BCLR 735 (CC) para 75.

should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognised and protected by domestic law and practice.’

Similarly, the Yogyakarta Principles²⁸⁴ offer an inclusive and broader perspective on the right to family life, aiming to protect diverse family structures beyond the boundaries of traditional marriage. These principles, developed by international human rights experts, are designed to ensure that all people - regardless of sexual orientation or gender identity - receive equal treatment and protection under the law. Notably, Principle 24 calls on states to recognize families formed not only through marriage but also through other ties, whether they stem from partnership, descent, or shared responsibility.²⁸⁵ This principle indirectly urges governments to offer the same rights and benefits to unmarried couples that married couples enjoy, fostering a more equitable approach to family recognition.

Though the Yogyakarta Principles were created with a focus on protecting LGBTQ+ individuals, the foundational ideas in Principle 24 have broader relevance. The principle’s push for equality and non-discrimination underscores that the state should value family bonds themselves, rather than prioritise marital status alone. This approach is highly applicable to all unmarried couples, suggesting that family structures of various kinds; that is, unmarried families, should be respected and protected by the law. O’Flaherty²⁸⁶ recognised this notion by quoting from the court in *Schalk and Kopf v Austria*, which held,²⁸⁷

‘a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.’

This mirrors the similar case of *Atala Riffo and Daughters v Chile*, which held that:²⁸⁸

‘...that the concept of family life is not limited only to marriage and must encompass other *de facto* family ties in which the parties live together outside of marriage.’

²⁸⁴ Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2007); Juliana Santos de Carvalho ‘Doing legality as doing drag: the Yogyakarta Principles and the productive power of performing international law making’ (2024) 12 *London Review of International Law* 155-180 at 166 – 178: ‘The Yogyakarta Principles, though not legally binding, hold significant influence in advancing LGBTQ+ rights. Created by experts rather than states, they are considered “soft law”—a set of guidelines that clarify how existing international human rights laws apply to issues of sexual orientation and gender identity. While they do not create new legal obligations, their resemblance to binding treaties gives them credibility and impact. They are widely used to shape legal arguments, guide court decisions, and influence policies worldwide. By filling gaps in the interpretation of human rights law, they challenge traditional legal frameworks and push for greater inclusion and protection of LGBTQ+ individuals. Despite their non-binding nature, the principles have become a powerful tool for advocacy and change.’

²⁸⁵ Yogyakarta Principles op cit note 284 principle 24B: ‘Ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative.’

²⁸⁶ Michael O’Flaherty, ‘The Yogyakarta Principles at Ten’ (2015) 33 *Nordic Journal of Human Rights* 280-298 at 295.

²⁸⁷ *Schalk and Kopf v Austria*, Application No 30141/04, Judgement of 24 June 2010 para 94.

²⁸⁸ *Atala Riffo and Daughters v Chile*, JUDGMENT OF NOVEMBER 21, 2012 (Request for Interpretation of Judgment on Merits, Reparations and Costs) para 142.

By extending these principles to encompass all unmarried families, the spirit of Principle 24 aligns with the core values of fairness and inclusivity, which support the idea that legal protections should adapt to reflect the diversity of modern family life.

While the Yogyakarta Principles do not explicitly address financial maintenance or support within family units, they emphasise the importance of equal access to all social, public, and family benefits available to married partners.²⁸⁹ This implies that the protections provided to married couples should be accessible to all intimate partners, ensuring that families in diverse forms receive the same essential support. This position reflects a broader commitment to substantive equality for all families, pushing states to recognise that all families (whether married or unmarried) deserve legal and social support.

Lastly, comment no. 13 of the CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations holds that the structure and definition of a family may differ across various states, and even within different regions of the same state;²⁹⁰

‘Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the [CEDAW] convention requires.’

This mirrors comment by the committee on the Elimination of Discrimination against Women in the General recommendation on article 16 of the CEDAW, which affirmed:²⁹¹

‘Statements by other entities in the United Nations system confirm the understanding that “the concept of ‘family’ must be understood in a wide sense”’

Limiting family rights to married couples introduces a hierarchy that discriminates against unmarried families; specifically, life partners, who are often denied basic legal protections. By placing marriage as the qualifying criterion for family rights, the law imposes an artificial distinction, failing to address the fundamental need for stability, security, and legal support that all family structures share. This hierarchy becomes particularly problematic for vulnerable members within these families - those who rely on the partnership for financial and emotional security but lack the legal recourse to claim support in times of crisis. A comprehensive

²⁸⁹ Yogyakarta Principles op cit note 284 principle 13: ‘States shall take all necessary legislative, administrative and other measures to ensure equal access, without discrimination...to social security and other social protection measures, including employment benefits, parental leave, unemployment benefits, health insurance or care or benefits... other social insurance, family benefits, funeral benefits, pensions and benefits with regard to the loss of support for spouses or partners as the result of illness or death.’

²⁹⁰ Committee on the Elimination of Discrimination against Women *General Recommendation No 21: Equality in Marriage and Family Relations* (1994) UN Doc A/49/38, comment no. 13 under ‘various forms of family’.

²⁹¹ Committee on the Elimination of Discrimination against Women *General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)* CEDAW/C/GC/29, 30 October 2013.

interpretation of the right to family life would grant equal protection to all families, ensuring that no one is left without necessary support simply due to the nature of the union.

Treaties such as the African Charter,²⁹² CEDAW and the ICCPR²⁹³ support the argument for a broad, inclusive understanding of family life, urging states to protect families in all their forms. By aligning with these international norms, the law would not only honour a broader conception of the family but also uphold a more consistent standard of human rights. This inclusive approach is increasingly relevant in a global society that values family life for its contributions to social cohesion and individual well-being, irrespective of formal marriage.

As societal views on family life evolve, so too must the legal protections extended to these relationships. The law's reluctance to recognise non-marital partnerships ignores the practical reality that many people today find stability and commitment outside of marriage. By expanding the interpretation of the right to family life as done by international standards, the law can reflect a more accurate and respectful understanding of how families operate, supporting not only married couples but all individuals committed to nurturing family bonds. In this way, the right to family life upholds its true purpose: to protect the essential support and care that families provide, regardless of the forms they take.

3.3. The integration of international law into domestic law by the Constitution

South Africa's constitutional design deliberately integrates international law reflecting a profound commitment to global human rights standards.²⁹⁴ This integration imposes practical obligations on the state to ensure that domestic laws and policies uphold principles of equality, fairness, and human dignity. As such, it is submitted that South Africa has a clear duty to extend legal protections to unmarried partners, aligning its family law framework with international standards.

Section 232 of the Constitution, for instance, incorporates customary international law into domestic law, mandating that these global norms apply unless explicitly contradicted by the Constitution or parliamentary legislation.²⁹⁵ According to Dugard, this approach, known as the monist perspective, ensures that international norms (such as the prohibition of discrimination or the promotion of equality) do not require separate legislative enactment to be effective domestically.²⁹⁶ In the 1971 case of *South Atlantic Islands Development Corporation*

²⁹² *African Charter* supra note 271 art 18, 27.

²⁹³ ICCPR supra note 270 art 23 (1).

²⁹⁴ Ayalew Getachew Assefa 'The impact of the African Charter and Women's Protocol in South Africa' in Susan Mutambasere, Ashwanee Budoo-Scholtz and Davina Murden (eds) *Impact of the African Charter and Women's Protocol in selected African states* 1 ed (2012) 161-174 at 161.

²⁹⁵ The Constitution s 232.

²⁹⁶ Dugard et al op cit note 216 at 57: '...Monists argue that municipal courts are obliged to apply rules of international law directly without the need for any act of adoption by the courts, or transformation by the

Ltd v Buchan,²⁹⁷ for instance, the court rejected an affidavit from an expert on international law, asserting that international law was not a foreign system and did not require proof through affidavits.²⁹⁸ The court further explicitly recognised that international law ‘forms part of our law’²⁹⁹ and emphasised the duty of municipal courts to identify and apply the appropriate rule of international law. This approach reflected the courts’ strong inclination towards a monist perspective, particularly in matters involving the incorporation of customary international law.

By constitutionalising customary international law, South Africa elevates these norms above ordinary domestic law, creating a legal environment in which principles like non-discrimination and the protection of human dignity have a heightened level of influence. This approach obligates courts to apply international legal standards even in cases where no explicit domestic law addresses the issue, ensuring that South Africa’s legal system remains responsive to evolving global norms.

The Constitution further incorporates international treaties into South African law. Section 231 requires parliamentary approval of treaties before they become binding, while self-executing treaty provisions automatically hold legal force upon ratification.³⁰⁰ Instruments such as the CEDAW (which was ratified by the South African parliament in 1995) and the ICCPR (which was also ratified by the South African parliament in 1998) demand that states protect the rights of all individuals equally, regardless of marital status. Failing to safeguard the rights of unmarried partners violates these obligations and is thus contrary to the Constitution.

Moreover, South Africa’s Constitution ensures that international law informs the interpretation of domestic rights.³⁰¹ Section 39 of the Constitution requires courts to consider both binding and non-binding international treaties when interpreting the Bill of Rights, regardless of whether the treaty has been formally incorporated into domestic law. In the pivotal case of *S v Makwanyane*,³⁰² regarding the constitutionality of the death penalty, the President of the Constitutional Court noted:³⁰³

‘Public international law would include both binding and non-binding agreements. They may both be used as tools of interpretation. International agreements and customary international law accordingly provide a framework within which the Bill of Rights can be evaluated and understood.

legislature. For them, international law is incorporated municipal law without any act of adoption or transformation – hence the fact that the monist position is often described as lending support to a ‘doctrine of incorporation.’

²⁹⁷ *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) 238B-F; *Southern Africa Litigation Centre v Minister of Constitutional Development* 2015 (5) SA 1 (GP) para 5.

²⁹⁸ *South Atlantic Islands Development Corporation* supra note 297 at 234.

²⁹⁹ Ibid.

³⁰⁰ The Constitution s 231.

³⁰¹ The Constitution s 39(1)(b): ‘When interpreting the Bill of Rights, a court, tribunal or forum must consider international law’.

³⁰² *S v Makwanyane* 1995 (3) SA 391 (CC).

³⁰³ Ibid at 413-414.

This perspective allows decisions of international tribunals - such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights - to offer interpretative guidance. Even reports from specialised UN agencies, like the International Labour Organisation, can assist in interpreting the Bill of Rights.³⁰⁴

It is important to note that Section 39(2) of the Constitution requires when interpreting legislation, every court, tribunal, or forum is to advance the values, objectives, and principles embodied in the Bill of Rights.³⁰⁵ Such interpretation is only permitted if the words are ‘reasonably capable of such an interpretation or are not unduly strained.’³⁰⁶ In formulating a new rule of common law, the court in *Carmichele v Minister of Safety and Security*,³⁰⁷ referenced decisions from the European Court of Human Rights,³⁰⁸ the CEDAW,³⁰⁹ and various United Nations³¹⁰ guidelines. Reflecting on this case, Botha held that:³¹¹

‘The Constitutional Court has shown clearly that the spirit, purport and objects of the Bill of Rights—which reflects the underlying precepts of the Constitution and the fabric of South African society—are inextricably linked to international law and the values and approaches of the international community and international role players.’

Section 233 of the Constitution further mandates that, when interpreting legislation, courts must favour any reasonable interpretation that aligns with international law over one that does not.³¹² This was seen in the *S v Okah* case,³¹³ which concerned the prosecution of a Nigerian national residing in South Africa for alleged terrorist activities. The charges were brought under South Africa’s anti-terrorism legislation, which includes provisions for extraterritorial jurisdiction. In the case, Cameron J noted that Section 233 requires courts to adopt interpretations of legislation that are compatible with South Africa’s international legal obligations, including unincorporated treaties to which the country is a party, and that these obligations serve as guiding principles for judicial interpretation.³¹⁴ He warned that adopting an interpretation inconsistent with international law could result in South Africa breaching its international obligations.³¹⁵ Interestingly, the court took into account a range of international treaties related to terrorism and human rights. Some of these treaties had not been formally incorporated into South African domestic law but were still used to inform the interpretation

³⁰⁴ Ibid.

³⁰⁵ The Constitution s 39(2).

³⁰⁶ Ibid s 125 (4).

³⁰⁷ *Carmichele* supra note 119,

³⁰⁸ Ibid para 45-48.

³⁰⁹ Ibid para 62.

³¹⁰ Ibid para 73.

³¹¹ Neville Botha ‘The role of international law in the development of South African common law’ (2001) 26 *South African Yearbook of International Law* 253 at 259.

³¹² The Constitution s 233.

³¹³ *S v Okah* 2018 (1) SACR 492 (CC).

³¹⁴ Ibid para 38.

³¹⁵ Ibid para 38-43.

of the anti-terrorism statute.³¹⁶ This reflects the principle that unincorporated international treaties can influence domestic law when interpreting ambiguous legislation.

South Africa's domestic policies clearly cannot ignore international interpretation without violating the Constitution's directives and demonstrates a clear commitment to aligning South African law with international law, especially in the realm of human rights.

Dugard notes that this integration of international law into domestic law demonstrates the nation's commitment to protecting human rights, portraying an emphasis of international law in South Africa's foreign policy and judicial decisions.³¹⁷ As a result, even though specific instruments are not directly incorporated into domestic law, the 1996 Constitution ensures their influence in South African courts and legislation-making.

The following are ways in which international law has influenced South African law as empowered by the Constitution:

a) Legislative reforms inspired by the African Charter and Women's Protocol

The African Charter and Women's Protocol have had a significant effect on legislative reforms in South Africa, particularly in the realm of gender equality and the protection of vulnerable groups.

The Domestic Violence Act 119 of 1998 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, for instance, are direct reflections of the Women's Protocol's provisions on the elimination of gender-based violence. These laws aim to combat violence against women and children by providing comprehensive legal remedies and protections, thus advancing the objectives of the Women's Protocol. Moreover, the Promotion of Equality and Prevention of Unfair Discrimination Act³¹⁸ furthers the commitment of the African Charter and Women's Protocol by establishing frameworks to prevent discrimination based on gender, race, and other factors. This Act provides legal recourse for victims of unfair discrimination, reinforcing the principles enshrined in both the African Charter and the Women's Protocol. The influence of the Women's Protocol is also evident in the area of reproductive rights and property law. The Choice on Termination of Pregnancy Act³¹⁹, which gives women legal access to abortion, aligns with the Protocol's provisions on women's health and reproductive autonomy. Similarly, the Recognition of Customary Marriages Act³²⁰ ensures that women in customary marriages have the same property rights as

³¹⁶ Ibid para 35-36.

³¹⁷ John Dugard *International law: South African perspective* 3 ed (2005) 26.

³¹⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 stems from the Equality Legislation Drafting Project, a collaborative effort between the Ministry of Justice and the South African Human Rights Commission.

³¹⁹ Choice on Termination of Pregnancy Amendment Act 8 of 2004.

³²⁰ Recognition of Customary Marriages Act.

their male counterparts, addressing the Women's Protocol's call for the eradication of discriminatory practices in marriage and family life.³²¹

These reforms demonstrate South Africa's legislative commitment to embedding the principles of the African Charter and Women's Protocol into its state laws, ensuring that women and other marginalised groups are afforded the protections and rights promised by these international instruments.

- b) Court judgments reflecting the African Charter and Women's Protocol and other relevant international instruments

South African courts have played an instrumental role in interpreting and applying the principles of the African Charter and the Women's Protocol, particularly through the Constitutional Court, which often references these instruments in its rulings. The mandate of the South African judiciary, as set out in Section 39(1) of the Constitution,³²² requires them to consider international law,³²³ and this has allowed the African Charter and Women's Protocol to influence judicial decisions, particularly on issues relating to socio-economic rights, gender equality, and non-discrimination.

In cases involving socio-economic rights, such as access to housing,³²⁴ healthcare,³²⁵ and education,³²⁶ the Constitutional Court has drawn on the international instruments to reinforce the interpretation of the right to dignity and other socio-economic protections guaranteed by the Constitution. For instance, in *Fourie*³²⁷ the Court explored whether the Universal Declaration of Human Rights (UDHR) and ICCPR could potentially prevent it from ruling that the common-law definition of marriage was unconstitutional, as it discriminated unfairly against same-sex couples.³²⁸

Similarly, in cases of corporal punishment, courts have relied on the Constitution and international instruments to ensure the protection of fundamental rights. In *S v Williams*,³²⁹ the Court found that corporal punishment was unconstitutional, as it violated the Constitution's prohibition against 'cruel, inhuman, or degrading treatment or punishment'.³³⁰ The Court noted that this section, like many other constitutional rights, closely mirrors international human

³²¹ Assefa op cit note 294 at 166-167.

³²² The Constitution s 39 (1).

³²³ *Vienna Convention on the Law of Treaties* (1969) 1155 UNTS 331 art 2 defines international law as an agreement made between states in written form, which is regulated by international law. This agreement may be contained in one document or spread across two or more related documents, regardless of its specific title or designation.

³²⁴ *Dladla v City of Johannesburg* 2018 (2) SSA 327 (CC) para 29 and 54.

³²⁵ *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1102 (T) 1125.

³²⁶ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757; *In re Gauteng School Education Bill* 1996 (3) SA 165 (CC).

³²⁷ *Fourie* supra note 212.

³²⁸ *Ibid* para 99 – 105.

³²⁹ *S v Williams* 1995 (3) SA 632 (CC).

³³⁰ The Constitution s 12(e).

rights standards.³³¹ It then considered Article 5 of the African Charter,³³² jurisprudence of the UN Human Rights Committee and the European Court as well as Commission of Human Rights on similar provisions in these treaties.

Furthermore, the Constitutional Court in *Bhe*³³³ has addressed issues of gender discrimination within the family, recognising the principles of various international instruments³³⁴ that address issues surrounding customary law and inheritance rights.³³⁵ In his partial dissenting opinion, Ngcobo J drew on the section 18 of the African Charter to support his argument that member states are obligated to eliminate gender inequality within their respective countries,³³⁶ after stating that:

‘The obligation to care for family members is a vital and fundamental value in African social system. This value is now entrenched in the African (Banjul) Charter on Human and Peoples’ Rights. The Preamble to the Charter urges member states to take “into consideration the virtues of their historical traditions and values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples’ rights”. Article 27(1) provides that “every individual shall have duties towards his family and society”. Article 29(1) provides that an individual shall . . . have the duty: “to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need”.’³³⁷

In this and other similar cases,³³⁸ the court has consistently ruled in favour of gender equality, ensuring that women are not unfairly treated in matters of property and inheritance, thus reflecting both the Constitution’s equality provisions and the Women’s Protocol’s as well as the African Charter’s focus on eliminating discriminatory practices in family law.³³⁹

c) Policy Formulation in Line with International Standards

³³¹ *Williams* op cit note 329 para 21.

³³² *Ibid* para 24.

³³³ *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

³³⁴ CEDAW supra note 278; *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) 660 UNTS 195; *African Charter* supra note 271; *Women’s Protocol* supra note 275.

³³⁵ *Woman’s Protocol* supra note 275 para 51: ‘A number of international instruments, to which South Africa is party also underscore the need to protect the rights of women, and to abolish all laws that discriminate against them as well as to eliminate any racial discrimination in our society.’

³³⁶ *African Charter* supra note 271 art 18; *Bhe* supra note 333 para 209.

³³⁷ *Bhe* supra note 333 para 166.

³³⁸ *Daniels* supra note 283 at para 56; *S v Baloyi* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) para 13: ‘[t]he Convention on the Elimination of Discrimination Against Women imposes a positive obligation on States to pursue policies of eliminating discrimination against women by, amongst other things, adopting legislative and other measures which prohibit such discrimination. Similarly, the African Charter on Human and Peoples’ Rights obliges signatory States to ensure the elimination of discrimination against women.’

³³⁹ *Assefa* op cit note 294 at 165-167.

The South African government, as empowered by the Constitution has incorporated the principles of the international instruments into its national policies aimed at promoting human rights and gender equality.

The National Gender Policy Framework,³⁴⁰ for example, aligns with the provisions of the Women's Protocol on gender equality by mainstreaming gender considerations across government programs.³⁴¹ This policy promotes women's empowerment and participation in decision-making processes, reflecting the Constitution's commitment to non-discrimination.³⁴² The Policy in its vision and principles for gender equality highlights that it draws its core values from the Constitution, which upholds human dignity, the achievement of equality, the advancement of human rights and freedoms, and the principles of non-sexism; 'The Constitution acknowledges that to promote the achievement of equality, measures designed to protect or advance categories of persons disadvantaged by unfair discrimination may be taken. Women comprise such a group of persons who, because of unfair discrimination, require special legislative and other measures to facilitate the achievement of full equality as citizens of South Africa.'³⁴³

Moreover, South Africa's National Development Plan (NDP),³⁴⁴ which outlines the country's strategy for addressing poverty, inequality, and unemployment, integrates elements of the African Charter's socio-economic rights framework. By prioritising access to healthcare, education, and housing, the NDP indirectly advances the African Charter's focus on the right to development and the upliftment of marginalised communities,³⁴⁵ ensuring that South Africa's policies are in line with its international obligations. The NDP states: 'Realising such a [more inclusive] society will require transformation of the economy and focused efforts to build the country's capabilities. To eliminate poverty and reduce inequality, the economy must grow faster and in ways that benefit all South Africans – especially young people and women.'³⁴⁶

International instruments have significantly shaped South Africa's legal and policy frameworks, reinforcing commitments to gender equality, non-discrimination, and human rights. Through legislative reforms and court decisions, these instruments have been integrated into domestic law via constitutional mechanisms, ensuring that international human rights norms influence the recognition and protection of intimate life partnerships. Comparative

³⁴⁰ Republic of South Africa *National Policy Framework for Women's Empowerment and Gender Equality* (Office on the Status of Women, 2002) (hereinafter the *National Gender Policy Framework*).

³⁴¹ Ibid at 20-21.

³⁴² Ibid at vi: 'The emphasis in this document is to operationalise recommendations made by the women's movement as well as those contained in national, regional and international instruments into core principles for the National Gender Programme.'

³⁴³ *National Gender Policy Framework* op cit note 340 at 20.

³⁴⁴ Republic of South Africa *National Development Plan 2030: Our Future – Make it Work* (National Planning Commission, 2012) (hereinafter the NDP).

³⁴⁵ *African Charter* supra note 271 art 22: 'All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.'

³⁴⁶ NDP op cit note 344 at 6.

foreign legal systems further highlight the need for South Africa to address gaps in legal protections for unmarried partners, particularly regarding financial support and maintenance. These developments underscore the global trend towards recognising and protecting vulnerable individuals in intimate partnerships. While challenges persist, international law continues to centre human rights within South Africa's evolving legal landscape. It is submitted that domestic law must not only recognise the vulnerabilities of unmarried intimate partners but must also extend meaningful rights aligned with international standards. The next chapter turns to the Bill of Rights and extensively considers how the rights to equality, dignity, and other constitutional protections can further guide the recognition of life partnerships within South Africa's legal system.

CHAPTER IV: THE BILL OF RIGHTS AND LIFE PARTNERSHIPS

Having considered how international law informs South Africa's legal obligations, the focus now shifts to the Constitution itself, specifically the guarantees contained in the Bill of Rights. These constitutional rights serve as the foundation for assessing the adequacy of the current legal framework governing life partnerships and support obligations. This chapter explores the key rights that underpin such an assessment, such as the rights to equality and non-discrimination, and the right to dignity. These rights are central to evaluating whether the exclusion of life partners from maintenance protections can be constitutionally justified. Their interpretation by the courts provides critical insight into the extent to which South African law upholds the values of inclusivity, human dignity, and substantive equality in intimate unmarried relationships.

4.1. The right to equality and protection from unfair discrimination

4.1.1. Formal and substantive equality

According to Smith, formal equality, or equality as consistency, mandates that individuals in similar circumstances receive the same treatment and that differences in treatment should not be based on arbitrary characteristics like religion, race, or gender.³⁴⁷ According to the concept of formal equality, as long as individuals or groups are treated uniformly, discrimination does not occur. Consequently, formal equality merely demands that the law be applied in exactly the same way, without taking into account the unique circumstances or context of those affected, which may overlook the discriminatory effects of the law or policy.³⁴⁸ Albertyn and Goldblatt hold that formal equality often employs legal formalism, where issues are narrowly defined and separated from the broader realities of social life, and as a result, the genuine social and economic disparities between individuals and groups are overlooked in the legal process.³⁴⁹ Formal equality does not account for differences nor does it make accommodations, resulting in the same treatment for individuals from disadvantaged groups, even if it perpetuates inequality.³⁵⁰

³⁴⁷ Anne Smith 'Equality constitutional adjudication in South Africa' (2014)14 *AHRLJ* 609-632 at 611.

³⁴⁸ *Ibid* at 612.

³⁴⁹ Catherine Albertyn & Beth Goldblatt 'Equality' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2007) 35-6.

³⁵⁰ Henriët De Ru 'The Civil Union Act 17 of 2006 : a transformative act or a substandard product of a failed conciliation between social, legal and political issue?' (2010) 73 *Journal for Contemporary Roman-Dutch Law* 556-568 at 556.

On the other hand, substantive equality seeks to address the shortcomings of formal equality. It acknowledges that societal power dynamics and family relationships create inequalities, and that the law plays a crucial role in addressing these social disparities.³⁵¹

Albertyn argues that a transformative approach to intimate life partners would involve recognising and understanding the factors that have historically led to the legal exclusion of these intimate unmarried relationships, along with the social and economic inequalities influencing women's decisions in relationships.³⁵² It would also establish guidelines for recognising a wider variety of relationships beyond marriage as essential to society.³⁵³ Additionally, it would provide protections and support for those in these relationships, aiming to broaden the options available to vulnerable individuals within them.³⁵⁴ That is; substantive equality, particularly concerning life partnerships, is necessary to rectify the marginalisation of such groups in society. The court in *Hugo*,³⁵⁵ held that while the ultimate goal is to treat everyone equally, simply enforcing identical treatment across the board can ignore the unique experiences of different groups of people. In each case, it is crucial to carefully consider the impact of discriminatory actions on the specific groups involved, as the same actions can have different effects in different contexts. The concept of unfair discrimination, therefore, must evolve to reflect the ongoing struggle for equality in society, acknowledging that what is considered unfair in one situation may not be in another.³⁵⁶

Barratt holds that 'The protective rationale of family law buttressed by the constitutional goal of achieving substantive equality requires that economically vulnerable dependent parties should not be left impoverished at the termination of dependence-inducing relationships...'³⁵⁷ Substantive equality is, thus, crucial when discussing maintenance rights for life partners, as it compels the law to provide equal protection and benefits to all, irrespective of their choice to marry.³⁵⁸ That is; applying substantive equality to permanent life partnerships would be more appropriate to safeguard vulnerable individuals.³⁵⁹

³⁵¹ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 81.

³⁵² Catherine Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253-276 at 265.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) para 41.

³⁵⁶ *Ibid.*

³⁵⁷ Barratt 'Reciprocal Duties' op cit note 147 at 22.

³⁵⁸ *Ibid.*

³⁵⁹ South African Law Reform Commission op cit note 1 at 63; 'In South Africa gender inequality, disempowerment of women, poverty and ignorance of the law all contribute towards removing real choice from many people, especially poor women. The Constitutional Court, in its equality jurisprudence, has shown a willingness to consider the actual impact of laws on people's lives and to view law in its social context (often by having to resort to sociological evidence).'

4.1.2. The *Volks* and *Bwanya* judgement as examples of formal and substantive equality respectively

According to Albertyn, the court in the *Volks* case, opted for a formalistic legal approach that lacks an understanding of the diversity and disadvantage in an unequal society.³⁶⁰ The majority judgment in *Volks* found that the exclusion of life partners from the benefits of the MSSA did not constitute unfair discrimination on the basis of marital status. The Court held that the differentiation between married and unmarried unions was justified based on the unique legal obligations attached to marriage, which are not automatically present in life partnerships.³⁶¹ The dissenting opinion by O'Regan J and Mokgoro J argued that the majority's decision undermines the constitutional prohibition on discrimination based on marital status and perpetuates the privileged status of marriage.³⁶² This dissent aligns more closely with substantive equality as it considers the complexities of marriage, cohabitation, and women's roles in these relationships.³⁶³ Sachs J further criticised the majority for failing to recognise the context of intimate unmarried relationships and for treating gender equality issues as legally neutral.³⁶⁴

Albertyn further states that the majority judgment acknowledges systemic inequalities affecting women's choices but disconnects the law from social realities.³⁶⁵ It privileges marriage as an institution and assumes that choice to enter into a life partnership (rather than marriage) is absolute, which does not align with substantive equality principles that consider constraints from history, power, socialisation, and identity factors.³⁶⁶ In the broader sense, the majority judgment leads to stereotypical reasoning, portraying women as victims needing protection rather than as individuals entitled to equality. Ultimately, the majority judgment fails to apply the principles of substantive equality, lacking a genuine examination of context and failing to grasp the complexities of disadvantage. In contrast, the minority judgments promote a transformative view of society, recognising diverse relationships and the inequalities of choice.³⁶⁷

In contrast, the *Bwanya v Master of the High Court* case adopted a more substantive approach. A central theme in the Constitutional Court's ruling is the recognition that diverse family structures exist beyond traditional marriage. The judgment highlighted that millions of South Africans live in unmarried intimate relationships that deserve legal acknowledgment and protection because they function with the same mutual support and commitment as marriages.³⁶⁸ The judgment also affirmed that all family forms, including permanent life

³⁶⁰ Albertyn op cit note 352 at 267; *Volks* supra note 7 para 46 – 60.

³⁶¹ *Volks* supra note 7 para 56.

³⁶² Madzika op cit note 454 at 402; *Volks* supra note 7 para 132.

³⁶³ *Volks* supra note 7 para 118

³⁶⁴ Ibid para 103, 130-134; See further *Volks* supra note 7 para 194.

³⁶⁵ Albertyn op cit note 352 at 267.

³⁶⁶ Ibid.

³⁶⁷ Ibid at 267-268.

³⁶⁸ *Bwanya* supra note 63 para 1.

partnerships, deserve respect and legal protection.³⁶⁹ This recognition is essential as it validates various forms of family units that exist within contemporary society, moving away from a narrow focus on families that are centred around marriage. This approach shifts the legal focus from rigid formalities to the substantive realities of relationships, reflecting a nuanced understanding of justice and society. The judgment requires legal protection for those in permanent life partnerships to ensure fairness and dignity. Formal equality would ignore these realities, applying marital laws only to those persons who are formally married, leaving others unprotected.

Although dissenting opinions raised important considerations about the differences between marriage and intimate life partnerships holding:³⁷⁰ ‘...marriage has a range of proprietary regimes attendant to it. And it cannot be correct to readily assume that in the case of unmarried permanent life partners only one preference or outcome with regard to maintenance and inheritance is inevitable,’ the majority opinion emphasised that all family forms warrant equal protection under the law.³⁷¹ This engagement illustrates a broader understanding of equality that goes beyond mere legal definitions and does not hinge on the form a union may take.

Despite this, this dissertation submits that the practical implementation of the recognition of unmarried family structures may present challenges. For instance, how should courts determine the existence of a permanent life partnership? Without clear legislative guidelines, this assessment may become inconsistent, subjecting vulnerable individuals to unpredictable outcomes. Moreover, the emphasis on recognising diverse family forms could inadvertently de-emphasise the legal protections associated with formal marriage, potentially disincentivising marriage as an institution – life partnerships must exist alongside marriage unions but should not outweigh them in any shape or form.

A significant aspect of the court’s reasoning was its focus on protecting vulnerable individuals, particularly women. In many cases, societal norms or economic constraints prevent women from formalising their relationships through marriage.³⁷² The court acknowledged that this lack of formalisation often leaves them without legal protection, especially upon the death of a partner.³⁷³ By extending the rights of inheritance and maintenance to permanent life partners, the judgment recognised and sought to address this systemic vulnerability and provide a safety net for those who might otherwise be left destitute. The court’s decision also recognised that many individuals do not consciously choose to forgo marriage but are instead constrained by their circumstances.³⁷⁴ This understanding reflects a shift towards a more empathetic and context-sensitive application of the law, where the focus is on the substance of the relationship

³⁶⁹ Ibid para 52.

³⁷⁰ Ibid para 101.

³⁷¹ Ibid para 51: ‘Whatever I will say presently is not calculated to detract from this or to devalue the institution of marriage; not in the least. The institution of marriage is not that fickle. In fact, I do not see how giving deserved protection to surviving permanent life partners can devalue marriage. How exactly does that take away from the institution of marriage?’

³⁷² Ibid para 63-67.

³⁷³ Ibid para 69.

³⁷⁴ Ibid para 63-67.

rather than its formalities. The court's approach aligns with the principle of substantive equality.

This emphasis on vulnerability may, however, raise practical and ethical concerns. First, the assumption that women in life partnerships are inherently vulnerable risks stereotyping their roles. Not all partners in such relationships are economically dependent,³⁷⁵ and a more individualised assessment of vulnerability might have been preferable as it influences the nature and substance of the life partnership. Second, while the judgment rectifies immediate injustices, it places the onus on courts to fill legislative gaps, perpetuating reliance on judicial intervention instead of comprehensive legislative reform.³⁷⁶

The court's ruling also places significant emphasis on the concept of reciprocal duties of support within permanent life partnerships. The court acknowledged that partners often undertake mutual support obligations similar to those found in marriages.³⁷⁷ By legally affirming these duties, the court not only validates the emotional and financial interdependence typical in such relationships but also ensures that surviving partners are not left vulnerable upon their partner's death. This ensures that the parties within such partnerships receive the same protections and benefits as married spouses, reflecting the outcomes of substantive equality.

The undertaking of reciprocal duties of support is inherently flexible, which can be both an advantage and a limitation. While it allows courts to adapt to diverse relationship dynamics, it also introduces uncertainty. What constitutes sufficient evidence of reciprocal support? Financial contributions, shared household responsibilities, emotional support, and caregiving might all qualify,³⁷⁸ but their relative weight remains unclear and vague. Furthermore, the emphasis on reciprocal support may exclude relationships where support is not evenly distributed. For instance, a partner who is entirely dependent on the other for economic or social reasons and does not undertake child-care duties might fail to meet the reciprocity requirement, despite being in a committed permanent life partnership.

Despite its possible limitations, by adopting a substantive approach to equality, the *Bwanya* ruling not only affirms individual rights but also reflects an evolving societal understanding of family dynamics in South Africa, setting a precedent for future legal interpretations aimed at achieving true equality for all persons regardless of their marital status or family structure

4.1.3. What is unfair discrimination? – the *Harksen* test

Unfair discrimination occurs when individuals are treated differently on the basis of prohibited grounds such as race, gender, or marital status, resulting in impairments to their ability to enjoy

³⁷⁵ See South African Law Reform Commission op cit note 1 at 205-207, which acknowledge that while many women remain economically vulnerable, others have attained independence.

³⁷⁶ See the *EW* supra note 77 para 96.

³⁷⁷ Ibid para 113.

³⁷⁸ *National Coalition* supra note 33 para 34 and 38.

their rights.³⁷⁹ In South Africa, the Constitutional Court's decision in *Harksen v Lane*³⁸⁰ established a two-part test for determining whether an action or differentiation constitutes unfair discrimination. The test requires that:³⁸¹

(1). There must be discrimination on a specified or analogous ground.

(2). If discrimination is found, the court must assess whether it is fair or unfair by considering factors such as the impact on dignity,³⁸² the purpose of the measure, and the interests of the parties that are involved.³⁸³

a) Discrimination on the basis of marital status

In the *Van der Merwe v Road Accident Fund* case,³⁸⁴ discrimination based on marital status was seen as 'where the law withholds from unmarried people a protection or right which it grants to married people'³⁸⁵ and not where 'the law denies one class of married people a protection that another class enjoys.'³⁸⁶ That is; discrimination based on the listed ground of marital status typically concerns the rights or disadvantages tied specifically to whether a person is married or unmarried.³⁸⁷

A significant case illustrating the implications of marital status discrimination is *Hassam v Jacobs*,³⁸⁸ whereby the Western Cape High Court extended the ISA and the MSSA to include spouses from polygynous Muslim marriages. Van Reenen J ruled that the term 'survivor' in the MSSA could apply to multiple surviving spouses, including those in polygynous marriages, without distorting the language of the law.³⁸⁹ The court noted that polygynous marriages did not enjoy the status of marriage under the Marriage Act,³⁹⁰ - essentially deeming them unmarried. Furthermore, the court found that section 1(4)(f) of the ISA³⁹¹ was problematic, as it assumed only one spouse, thus excluding spouses in *de facto* polygynous marriages.³⁹² This exclusion was declared unconstitutional due to its discriminatory nature based on marital status, as it treated these individuals differently compared to those in monogamous marriages.³⁹³ When the matter was referred to the Constitutional Court, it ruled that the exclusion of widows

³⁷⁹ The Constitution s 9(3)-(5).

³⁸⁰ *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300.

³⁸¹ *Ibid* para 53.

³⁸² *Ibid* para 51(c).

³⁸³ *Ibid* para 51(b), 93.

³⁸⁴ *Van der Merwe v Road Accident Fund and Another* (CCT48/05) [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC).

³⁸⁵ *Ibid* para 45.

³⁸⁶ *Ibid*.

³⁸⁷ *Ibid* para 46.

³⁸⁸ *Hassam v Jacobs* 2009 (5) SA 572 (CC).

³⁸⁹ *Ibid* para 48.

³⁹⁰ *Ibid* para 31.

³⁹¹ Intestate Succession Act s 1(4)(f).

³⁹² *Hassam* supra note 388 para 34, 39.

³⁹³ *Ibid*.

in polygynous Muslim marriages from the ISA amounted to unjustifiable unfair discrimination based on marital status,³⁹⁴ gender,³⁹⁵ and religion.³⁹⁶

In another matter, the court in the *Volks* case, upheld the distinction between married couples and unmarried life partners, denying the latter maintenance rights under the MSSA. The Court reasoned that marriage creates unique legal obligations, including a reciprocal duty of support, which do not automatically exist in life partnerships unless explicitly agreed upon.³⁹⁷ It emphasised that individuals who choose not to marry consciously opt out of the legal framework and protections tied to marriage, and that extending the MSSA to life partners would disregard this choice.³⁹⁸ Recognising marriage as a constitutionally and socially significant institution, the Court concluded that it was fair for the law to reserve certain benefits, such as maintenance rights, for those who enter into marriage, given the public and legal commitments it entails.³⁹⁹ Therefore, the differentiation was deemed justified and not in violation of the Constitution. *Albertyn* holds that court's prioritisation of marriage, without recognising its historical racial and gender biases, led to the conclusion that it is fair to discriminate between married and unmarried intimate relationships, to the detriment of the latter.⁴⁰⁰ Although the Court conceded that life partners deserve some legal protection, it argued that expanding the MSSA would not help those most in need, such as poor women who cannot marry and become victims in life partnerships.⁴⁰¹ This reasoning has been criticised for ignoring the socio-economic realities faced by unmarried partners. O'Regan JJ in her dissenting judgment highlighted how many intimate life partnerships function similarly to marriages in terms of emotional and financial interdependence.⁴⁰² She argued that the law should recognize these intimate unmarried relationships as deserving of the same protections afforded to married couples, particularly regarding maintenance claims after the death of a partner.⁴⁰³ O'Regan JJ asserted that treating individuals in similar relationships differently amounted to discrimination on the basis of marital status without justifiable reasons.⁴⁰⁴

Interestingly, the case of *EB v ER*⁴⁰⁵ involved a differentiation between spouses based on whether their marriage ended through divorce or death, rather than purely on marital status. The Court considered the exclusion of a redistribution remedy in instances where marriages ended by death,⁴⁰⁶ noting that this exclusion created inequitable distinctions among spouses married out of community of property under old antenuptial contracts (pre-1 November 1984). Section 7(3) of the Divorce Act, which provides for asset redistribution, applied only to

³⁹⁴ Ibid para 11.

³⁹⁵ Ibid para 10.

³⁹⁶ Heaton & Kruger op cit note 5 at 244.

³⁹⁷ *Volks* supra note 7 para 56-58.

³⁹⁸ Ibid para 93-94.

³⁹⁹ Ibid para 52-53.

⁴⁰⁰ Ibid para 56-60.

⁴⁰¹ Ibid para 68.

⁴⁰² Ibid para 108, 110, 121; See further *Volks* supra note 7 para 103, 118, 130-134

⁴⁰³ Ibid para 127 – 130, 132.

⁴⁰⁴ Ibid para 132-133, 136.

⁴⁰⁵ *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* (CCT 364/21; CCT 158/22) [2023] ZACC 32; 2024 (1) BCLR 16 (CC); 2024 (2) SA 1 (CC) (10 October 2023).

⁴⁰⁶ Ibid para 46.

divorces and to marriages concluded before this date.⁴⁰⁷ This narrow scope excluded similarly situated spouses (those married after 1 November 1984 or whose marriages ended through death) from accessing the same equitable remedies.

While the High Court framed the issue partly as discrimination on marital status, the Constitutional Court clarified that the differentiation did not rest on marital status but on the mode of dissolution of identical marriages.⁴⁰⁸ As the Court observed, the marital status of all affected spouses was identical; they were all parties to old ANC marriages.⁴⁰⁹ The true basis of differentiation was whether the marriage ended through death or divorce, not the marital status itself. Nevertheless, this distinction had real consequences, disproportionately affecting surviving spouses who contributed significantly to the marital estate but were denied the benefit of redistribution upon death. This gap highlighted the need to treat similarly situated spouses equally, regardless of how the marriage ended, in line with the principles of equality and non-discrimination under section 9(1) of the Constitution.⁴¹⁰

The elements of the case are not unlike those in the treatment of intimate life partners who may only rely on the MSSA for maintenance after the death of a partner,⁴¹¹ but may not make maintenance claims if the partners have merely separated and are no longer living together.⁴¹² Similarly, this exclusion ignores the contributions and commitments made by the life partners in the duration of the life partnership. It fails to account for the reality that many such life partnerships mirror the interdependence, shared responsibilities, and economic contributions of marital unions. This distinction unfairly penalises those who, for various personal, cultural, or socio-economic reasons, chose not to formalise their relationship through marriage. It perpetuates a hierarchy of relationships, placing legally recognised unions above equally significant but informal partnerships. Although this distinction does not constitute discrimination on the basis of marital status; just as seen in the *EB* case, it constitutes discrimination on the manner in which the relationship is dissolved.

b) Indirect discrimination on the basis of gender

Indirect discrimination, Van De Linde holds,⁴¹³ happens when an action, practice, or law appears neutral or fair on the surface but ends up having an unequal or harmful effect on certain individuals or groups.⁴¹⁴ While direct discrimination is often obvious and intentional, indirect discrimination is more subtle and arises from policies or behaviours that unintentionally

⁴⁰⁷ *EB* supra note 405 para 11-12.

⁴⁰⁸ *Ibid* para 54.

⁴⁰⁹ *Ibid*.

⁴¹⁰ *Ibid* para 19-25.

⁴¹¹ *Bwanya* supra note 63 para 81.

⁴¹² *EW* supra note 77 para 108-111.

⁴¹³ Delano Van der Linde 'Poverty as a Ground of Indirect Discrimination in the Allocation of Police Resources – A Discussion of *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC)' (2020) 23 *PER / PELJ* 1-29.

⁴¹⁴ *Ibid* at 5.

disadvantage people, often because of factors like race, gender, or socio-economic status.⁴¹⁵ Although not explicitly defined in the Constitution, the concept is acknowledged and addressed within its framework to ensure fairness and equality.

The *EB v ER* case also highlights how seemingly neutral legislative provisions can give rise to indirect gender discrimination within South Africa's matrimonial property laws. Section 7(3) of the Divorce Act⁴¹⁶ limits the redistribution remedy to marriages concluded before 1 November 1984; the date on which the Matrimonial Property Act⁴¹⁷ came into effect. While this cut-off appears neutral, applying equally to men and women, its impact is not. Due to entrenched social and economic patterns, women were disproportionately affected by this exclusion.

Many women entered marriages after 1984 under antenuptial contracts excluding community of property, often at a time when patriarchal norms and systemic gender inequalities continued to limit women's economic opportunities and financial independence.⁴¹⁸ These women were more likely to contribute to the marriage through unpaid domestic labour, caregiving, and supporting their spouse's career or business, rather than through direct income-generating work.⁴¹⁹ The exclusion of post-1984 marriages from the redistribution remedy therefore disproportionately disadvantaged women, as it failed to acknowledge these non-financial contributions and the economic vulnerability that often followed from them.⁴²⁰

Although the law appeared neutral in distinguishing between pre- and post-1984 marriages,⁴²¹ the Constitutional Court recognised that this distinction had a disproportionate effect on women. Women, as a group, are statistically more likely to occupy positions of economic dependence within marriages and to rely on mechanisms like asset redistribution to secure fair outcomes upon dissolution.⁴²² The failure to extend redistribution remedies to all spouses, regardless of when their marriage was concluded,⁴²³ thus constituted indirect discrimination on the basis of gender, in violation of the constitutional right to equality.

While the Court's decision to declare the relevant parts of section 7(3) unconstitutional marked an important step towards rectifying these injustices,⁴²⁴ it also highlighted how deeply the law remains intertwined with structural gender inequalities. Remedies such as inheritance or maintenance may exist, but they often fail to recognise the true value of the contributions made

⁴¹⁵ Ibid.

⁴¹⁶ Divorce Act s 7(3).

⁴¹⁷ Matrimonial Property Act 88 of 1984.

⁴¹⁸ *EB* supra note 405 para 125.

⁴¹⁹ Ibid para 127-128.

⁴²⁰ Ibid para 128-129.

⁴²¹ Ibid para 117: 'In Walker, this Court stated that the inclusion of both direct and indirect discrimination "evinces a concern for the consequences rather than the form of conduct" and "recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination".'

⁴²² Ibid para 28.

⁴²³ Ibid.

⁴²⁴ Ibid para 150.

by spouses (typically women) whose unpaid labour underpinned the financial success of the marriage.⁴²⁵

The implications of this case go beyond legal abstractions. For women like EB, the case illustrates how formal legal rules, even when seemingly gender-neutral, can perpetuate gendered disadvantages if they ignore the lived realities of economic inequality within marriage.⁴²⁶ By challenging this legislative gap, the case serves as a reminder that equality in law requires attention not only to formal rights but also to the real-world impact of laws on vulnerable groups, particularly women.

c) Intersectional discrimination and vulnerability

Intersectional discrimination is a concept which recognises that multiple forms of discrimination, such as gender and marital status, co-exist to compound the consequences of inequality, especially for vulnerable groups.⁴²⁷ Moreover, historical factors can increase the likelihood of certain forms of discrimination, such as how gender and race have been historically intertwined in South Africa. Intersectionality therefore serves as a tool for understanding and addressing the complex, overlapping forms of discrimination that individuals may experience.⁴²⁸

The concept was demonstrated in the *Hassan v Jacobs* case,⁴²⁹ which exposed how overlapping forms of differentiation - rooted in gender, religion, and marital status, can compound systemic disadvantage, particularly for Muslim women in polygynous marriages. First, the ISA exclusion of such women disproportionately affected them based on gender, as Islamic law permits only men to marry multiple wives,⁴³⁰ leaving women uniquely vulnerable to legal and economic marginalisation. This was compounded by religious discrimination, as polygynous Muslim unions, valid under Islamic law, were excluded from South Africa's civil law framework.⁴³¹ Additionally, marital status discrimination emerged in the distinction between monogamous and polygynous Muslim marriages; while widows from monogamous unions were protected under the ISA, those from polygynous unions were denied the same rights, penalised for their husbands' decisions to marry multiple wives, often without their consent.⁴³² Together, these intersecting factors not only deprived these women of their inheritance rights but also undermined their dignity, equality, and economic security. This legal framework thereby exacerbated their vulnerability, illustrating how multiple forms of

⁴²⁵ Ibid para 20, 48.

⁴²⁶ Ibid para 73: 'The High Court...observed that "only those who go blindfolded through life can deny that gender equality has not yet been achieved in South Africa".'

⁴²⁷ *Harksen* supra note 380 para 50: 'there is often a complex relationship between these grounds ... and in some cases ... a combination of one or more of these features.'

⁴²⁸ Van der Linde op cit note 413 at 20 – 22.

⁴²⁹ *Hassam* supra note 388.

⁴³⁰ *Harksen* supra note 380 para 10.

⁴³¹ Ibid para 12.

⁴³² Ibid para 34.

discrimination can intersect to create profound and unique disadvantages. In the case, it was further stated:⁴³³

‘There is often a complex relationship between these grounds. In some cases, they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted.’

Goldstone J also affirmed this, cautioning against an artificial categorisation of discrimination and pointing out that the grounds for discrimination, such as race, gender, or sexual orientation, are often interrelated and can overlap.⁴³⁴

Bonthuys highlights that in South African family law, this concept is crucial for understanding how poor, rural, and unmarried women are disproportionately affected by the non-recognition of life partnerships.⁴³⁵ Such women face intersecting forms of discrimination, including gender, race, socio-economic status, and marital status as they often enter into partnerships resembling marriage in terms of commitment and economic dependency, and yet the law denies them the same protections afforded to married women.⁴³⁶ The failure of the legal framework to protect these women perpetuates their vulnerability and socio-economic marginalisation, thereby increasing existing inequalities and reinforcing their disadvantaged status in society.

4.2. The right to dignity.

The constitutional interpretation of fundamental rights, like the right to equality and the right to life, is profoundly influenced by the right to dignity.⁴³⁷ This right as enshrined in Section 10 of the Constitution, highlights the importance of recognising and upholding the dignity of all individuals,⁴³⁸ which would include people in intimate relationships. This principle demands respect and protection for every individual and their intrinsic worth, particularly considering South Africa's history marred by oppressive legislation that undermined human dignity.⁴³⁹ According to the *Certification of the Constitution of the Republic of South Africa* judgment,⁴⁴⁰ the right to dignity also aligns closely with the right to family life,⁴⁴¹ emphasizing principles of equality, freedom, and personal autonomy. The Constitution guarantees protection for individual dignity and shields family-related decisions from

⁴³³ Ibid para 58.

⁴³⁴ Ibid.

⁴³⁵ Bonthuys ‘Developing law’ op cit note 215 at 4.

⁴³⁶ Ibid at 6-7.

⁴³⁷ *Dawood* supra note 283 para 35.

⁴³⁸ The Constitution s 10.

⁴³⁹ *Dawood* supra note 283 para 36; *Makwanyane* supra note 302 para 328-329.

⁴⁴⁰ *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

⁴⁴¹ Ibid para 97: ‘states have a duty, in terms of international human rights law, to protect the rights of persons freely to marry and to raise a family.’

discriminatory or oppressive interference. Furthermore, provisions like section 28(1)(b) of the Constitution,⁴⁴² which safeguard a child's right to family or alternative care, illustrates the integral connection between dignity and family rights within the constitutional framework.⁴⁴³

The constitutional court has underscored that the prohibition of unfair discrimination in both the interim and final Constitution serves a broader purpose beyond merely preventing discrimination against historically disadvantaged groups, such as life partners.⁴⁴⁴ It seeks to ensure equal dignity for all members of society.⁴⁴⁵ In *Dawood v Minister of Home Affairs*, the Court affirmed that dignity influences the interpretation of many rights, highlighting that family life is an essential element of dignity.⁴⁴⁶ The concept of *Ubuntu* aligns with this understanding, underscoring that human identity is shaped through relationships with others, which merit legal protection.⁴⁴⁷

The Constitutional Court in *Dawood* has also linked human dignity with the right to social assistance, showing the critical role it plays in the context of family law.⁴⁴⁸ It highlighted that dignity is deeply tied to the ability to make personal life choices, particularly those related to marriage, family, and living arrangements, without unnecessary state interference.⁴⁴⁹ It explained that dignity is not only a fundamental value in our Constitution but also a right that requires active protection.⁴⁵⁰ This means ensuring families can remain stable and receive the support they need, which may include access to social assistance.⁴⁵¹ When the state fails to provide adequate support by placing legal mechanisms to enforce the duties of support which family members have towards one another, it can lead to violations of human dignity, especially for those who are vulnerable and depend on such assistance for their basic needs.⁴⁵² According to Bannister, dignity should be viewed as both an individual attribute as well as a societal value that can inform the development of laws that address socio-economic rights, particularly for women in intimate unmarried relationships.⁴⁵³ Thus, the interpretation of dignity in legal frameworks must aim to ensure equitable socio-economic conditions that reflect the constitutional values of dignity and equality.

The court in *Volks* recognised distinctions between life partnerships and marriages, particularly concerning maintenance obligations and argued that individuals who deliberately avoid marriage should not be forced to bear the legal consequences of marriage, as this would

⁴⁴² The Constitution s 28(1)(b).

⁴⁴³ *Certification of the Constitution* supra note 440 para 100-102.

⁴⁴⁴ *Hugo* supra note 355 para 41.

⁴⁴⁵ *Ibid*.

⁴⁴⁶ *Dawood* supra note 283 para 35.

⁴⁴⁷ *Ibid*.

⁴⁴⁸ *Ibid* para 36-37.

⁴⁴⁹ *Ibid*.

⁴⁵⁰ *Ibid* para 34-35.

⁴⁵¹ *Ibid* para 30: 'Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another...'

⁴⁵² *Ibid* para 35-37.

⁴⁵³ Tarryn Bannister *The implications of a relational feminist: Interpretation of socio-economic rights for Cohabiting partners* (unpublished LLD thesis, University of Stellenbosch University 2016) 50-52.

infringe upon their autonomy and dignity.⁴⁵⁴ The majority judgment in *Volks* placed a strong emphasis on the connection between dignity and autonomy, viewing dignity as the ability to make one's own choices and have those choices respected.⁴⁵⁵ The Court reasoned that individuals in life partnerships who choose not to marry are exercising their autonomy, and forcing the legal obligations of marriage upon them would undermine both their autonomy and their dignity.⁴⁵⁶ In this view, dignity is closely tied to respecting the personal decisions persons make about their relationships. However, the dissenting opinions in the case argued that the failure to extend maintenance benefits to life partners could also be a violation of their dignity, particularly for women who may be in such intimate unmarried relationships due to societal or economic pressures, rather than by free choice.⁴⁵⁷ By not providing maintenance benefits, the law risks perpetuating these inequalities, leaving women vulnerable, unsupported and placed at the risk of homelessness or destitution if the relationship ends. The dissenting opinion thus argued that true respect for dignity should consider not only the freedom to make decisions but also the broader context in which those decisions are made, ensuring protection for those whose 'choice' may be constrained by external forces.

In contrast, in *Bwanya*, the majority judgement acknowledged the dignity of those in life partnerships by emphasising that enduring life partnerships constitute a valid family arrangement deserving of recognition and, in light of recent common law changes, warrant legal safeguarding.⁴⁵⁸ Failing to extend maintenance rights to life partners not only jeopardizes their financial security but also diminishes their dignity and the legitimacy of their relationships.⁴⁵⁹ The Constitution's commitment to dignity thus necessitates that the legal system recognises life partnerships and offers sufficient protection to ensure that the dissolution of such relationships does not lead to unnecessary suffering for the vulnerable partner.

In another case, *VJV v Minister of Social Development*,⁴⁶⁰ homosexual life partners wanted to start a family with the use artificial fertilisation. One partner provided her egg, while the other partner carried the pregnancy to term after fertilisation with a donor's sperm. However, under Section 40 of the Children's Act,⁴⁶¹ only the partner who gave birth was legally recognised as a parent, leaving the egg-providing partner without any automatic parental rights or responsibilities over the children

The Constitutional Court ruled that this exclusion was discriminatory, particularly regarding marital status and sexual orientation. The court found that the law's distinction between married

⁴⁵⁴ *Volks* supra note 7 para 55 – 60; Koshesayi Madzika 'Dawn of a new era for permanent life partners: from *Volks v Robinson* to *Bwanya v Master of the High Court*' 2020 (53) *DJLJ* 393-406 at 401: 'Skweyiya J... held that the distinction between married and unmarried persons was not unfair because there is a mutual duty of support between married persons, and no such duty is imposed on unmarried persons by statute.'

⁴⁵⁵ *Volks* supra note 7 para 154-156.

⁴⁵⁶ *Ibid* para 156.

⁴⁵⁷ *Ibid* para 221.

⁴⁵⁸ *Bwanya* supra note 63 para 141-142.

⁴⁵⁹ *Ibid* para 190.

⁴⁶⁰ *VJV* supra note 283.

⁴⁶¹ Children's Act 38 of 2005 s 40.

and unmarried couples was unfair, as it limited parental rights to married individuals.⁴⁶² Kollapen J held that this not only restricted equal treatment under the law but also sent the message that life partnerships were somehow less deserving of legal recognition than marriage.⁴⁶³

At the core of the court's decision was the right to human dignity. The court highlighted that dignity involves more than just personal worth;⁴⁶⁴

‘Dignity is about acknowledging the value and worth of individuals. It is about agency – the ability to make meaningful choices about your life.’

By failing to acknowledge both partners as legal parents, the law undermined the dignity of the non-birth mother, denying her the opportunity to fully embrace her identity and role as a parent. The court concluded that upholding both partners' parental rights is vital to preserving their dignity, ensuring that their relationship and family choices are valued equally to those within marriage.⁴⁶⁵

The Constitution's focus on substantive equality and human dignity provides a compelling basis for advocating for the recognition of maintenance rights for life partners.⁴⁶⁶ Aligning South African family law with these international and constitutional values is crucial to ensuring that all intimate relationships receive equal respect, dignity and legal protection. This constitutional mandate not only supports the rights of the vulnerable partner but also reflects a broader societal commitment to justice and fairness in intimate relationships.⁴⁶⁷ The next chapter is a detailed discussion that examines the practical challenges that remain. It will further explore how discrimination and intersectionality affect the recognition of life partnerships, reconsider the rights to dignity and family life, offer a brief international comparison, and offer a final verdict on whether legal recognition should rest on contract or status.

⁴⁶² *VJV* supra note 283 para 478.

⁴⁶³ *Ibid* para 60.

⁴⁶⁴ *Ibid*.

⁴⁶⁵ *Ibid*.

⁴⁶⁶ Madzika op cit note 454 at 394: ‘*Bwanya v Master of the High Court*...reveals the Court's willingness to move from a previous position where heterosexual partners were disadvantaged from exercising their rights during and at the end of their partnership and depicts a clear intention of grant the inalienable Constitutional rights of equality and human dignity to all persons.’

⁴⁶⁷ The Constitution s 39(2) of obliges courts to develop the law in order to ‘promote the spirit, purport and objects of the Bill of Rights’ in instances where the common or customary law unfairly discriminates.

CHAPTER V: DISCUSSION

The legal non-recognition of unmarried life partnerships in South Africa raises profound constitutional, social, and moral questions. While strides have been made in areas of equality and family law, the current framework continues to exclude those who fall outside the formal institution of marriage - especially, women in vulnerable socio-economic positions who have invested in relationships of emotional, financial, and familial significance. This discussion unpacks the multifaceted consequences of this legal gap by focusing on four interrelated dimensions. First, it examines the intersectional nature of discrimination experienced by life partners, especially where gender, race, class, and marital status intersect to reinforce systemic inequality. Second, it addresses the impact of this exclusion on the constitutional rights to dignity and family life, highlighting how the lived realities of many life partners are ignored. Third, it contextualises South Africa's position in light of international human rights standards and comparative jurisdictions, demonstrating how other legal systems have evolved to protect diverse family forms. Lastly, it considers the limitations of contract-based approaches to legal protection and argues in favour of a status-based framework that recognises functional family relationships, regardless of formalisation.

Together, these themes reveal not only the shortcomings of the existing legal regime, but also the constitutional and moral imperative to adopt a more inclusive, substantive model that reflects the realities of South African families.

5.1. Discrimination and intersectionality in the recognition of life partnerships

The South African constitutional framework promotes a transformative vision grounded in human dignity, equality, and non-discrimination. Yet, the legal regime governing intimate life partnerships continues to entrench systemic disadvantage for individuals - primarily women, on the basis of marital status, gender, race, and intersecting forms of social exclusion. As articulated in *Harksen v Lane*,⁴⁶⁸ the three-stage test for unfair discrimination requires: (1) a determination of whether a law or conduct differentiates between people or categories of people; (2) if so, whether the differentiation amounts to discrimination; and (3) whether the discrimination is unfair.⁴⁶⁹ This was highlighted in Chapter 4. When applied to the legal treatment of unmarried life partnerships, particularly those between heterosexual individuals, it becomes evident that the current framework fails to pass constitutional standards on multiple grounds.

⁴⁶⁸ *Harksen* supra note 380.

⁴⁶⁹ *Ibid* para 53.

a) Marital Status as a Ground of Discrimination

The legislative and judicial privileging of individuals who are formally married creates a disparity between those within state-sanctioned unions and those outside it.⁴⁷⁰ In *Volks v Robinson*, the Constitutional Court upheld a distinction between surviving spouses in civil marriages and surviving partners in life partnerships with regard to the MSSA.⁴⁷¹ In this case, those formally married could claim maintenance from their deceased spouses estates, while surviving life partners could not. The majority justified this exclusion on the basis that the legislature may differentiate between those who choose to marry and those who do not.⁴⁷²

In evaluating whether distinctions between married and unmarried persons are constitutionally permissible, the broader context in which such relationships exist must be carefully considered. South African courts have recognised that formal equality is not adequate in a society marked by deep structural inequalities.⁴⁷³ Thus, as reaffirmed in *Harksen v Lane NO*,⁴⁷⁴ any differentiation must be scrutinised for its impact within specific social and historical contexts.

On one hand, it can be argued that the prioritisation of marriage over life partnerships is justifiable. The majority in *Volks* reasoned that marriage creates a formal legal relationship, that has been voluntarily undertaken with full awareness of its consequences - including mutual financial duties.⁴⁷⁵ In this view, it would be inappropriate to impose the legal consequences of marriage on individuals who consciously chose not to marry, especially where testamentary freedom, maintenance or property rights are at stake.⁴⁷⁶ Admittedly, legal certainty, administrative efficiency, and respect for personal autonomy can all be advanced by drawing a clear legal line between marriage and other forms of unions.

However, this formalist approach has been increasingly criticised for overlooking the socio-economic and cultural realities that shape individual choices.⁴⁷⁷ As the Constitutional Court later recognised in *Bwanya*, the assumption that all individuals have an equal and unconstrained choice to marry is flawed.⁴⁷⁸ Many people find themselves in permanent, interdependent life partnerships due to factors like lobolo costs, migration, patriarchal family structures, or the

⁴⁷⁰ *Volks* supra note 7.

⁴⁷¹ *Ibid* para 93-94.

⁴⁷² *Ibid*.

⁴⁷³ *Hugo* supra note 355; *Harksen* supra note 380; *National Coalition* supra note 33 ; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); *Bhe* supra note 331; *Bwanya* supra note 63.

⁴⁷⁴ *Harksen* supra note 380 para 50; *Hugo* supra note 355 para 43: 'To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.'

⁴⁷⁵ *Volks* supra note 7 para 51-56.

⁴⁷⁶ *Ibid* para 57.

⁴⁷⁷ Bonthuys 'Developing law' op cit note 215 at 23-28; Madzika op cit note 454 at 400; Ben Coetzee Bester & Anne Louw 'Domestic partners and the "choice argument" quo vadis?' (2015) 18 *PELJ* 2951- 2981 at 2957, 2965; South African Law Reform Commission op cit note 1 at 20-21; Makama op cit note 17 at 29.

⁴⁷⁸ *Bwanya* supra note 63 para 62.

historical erosion of African family life through apartheid's migrant labour system.⁴⁷⁹ This was previously established in Chapter 1.

The *Bwanya* judgment marked a significant shift, recognising that survivors of such partnerships who had undertaken reciprocal duties of support should not be excluded from maintenance or inheritance rights.⁴⁸⁰ It stressed that excluding such individuals simply because their relationships were not legally formalised was a failure to honour the constitutional commitment to substantive equality and dignity.⁴⁸¹

Thus, while some differentiation between married and unmarried persons may be defensible in the abstract, the fairness of such a distinction ultimately depends on the lived context of those affected. As Sachs J asked in his dissent in *Volks*: Should a person who has shared her life with her partner in every sense be treated as a stranger in death, merely for lack of a formal legal ceremony?⁴⁸² The answer, increasingly, is no.

Thus, the differentiation based on marital status not only fails the first prong of the *Harksen* test (as it does differentiate) but also constitutes discrimination on a listed ground (marital status), and - given its disproportionate impact on life partners - clearly amounts to unfair discrimination.

b) Indirect Gender and Sex-Based Discrimination

On the surface, the failure to extend legal protections to unmarried partners applies to both men and women, seemingly avoiding direct gender differentiation. However, as the Constitutional Court recognised in *EB v ER*,⁴⁸³ discrimination can also be indirect - where a law appears neutral but disproportionately burdens a specific group due to existing social and economic disparities.⁴⁸⁴ The legal framework's failure to recognise support rights for life partners indirectly discriminates against women by reinforcing structural gender inequalities within relationships.

Women are more likely than men to be economically dependent within intimate relationships due to enduring gendered divisions of labour.⁴⁸⁵ Many women perform unpaid domestic and

⁴⁷⁹ South African Law Reform Commission op cit note 1 at 20-21; Makama op cit note 17 at 29; Neo Mohlabane, Ntombizonke Gumede & Zitha Mokoman 'Attitudes towards marriage in post-apartheid South Africa' in Zitha Mokomane et al (eds) *South African Social Attitudes: family matters: family cohesion, values and strengthening to promote wellbeing* 1 ed (2019) 156-175.

⁴⁸⁰ *Bwanya* supra note 63 para 137 – 138.

⁴⁸¹ *Ibid* para 32.

⁴⁸² *Volks* supra note 7 para 148.

⁴⁸³ *EB* supra note 405.

⁴⁸⁴ *Ibid* para 124.

⁴⁸⁵ *Ibid* para 73: 'The High Court...observed that 'only those who go blindfolded through life can deny that gender equality has not yet been achieved in South Africa'.

caregiving labour, which is neither financially compensated nor legally acknowledged.⁴⁸⁶ This socio-economic reality, as discussed in Chapter 2, places women in a structurally weaker bargaining position when relationships dissolve, making them disproportionately vulnerable to financial insecurity.⁴⁸⁷

The decision in *Paixão v Road Accident Fund*,⁴⁸⁸ while seemingly progressive in extending a delictual claim for loss of support to a life partner, still demanded a demonstration of a reciprocal duty of support - effectively setting a high evidentiary burden that undermines the lived realities of women in informal partnerships.⁴⁸⁹ This evidentiary burden does not account for the systemic factors that often prevent women from asserting legal claims,⁴⁹⁰ particularly in relationships where financial dependence was established through informal arrangements rather than explicit agreements.

Applying the Harksen test again, the differentiation on the basis of gender results in systemic inequality and passes the threshold for both indirect discrimination and unfairness. Given the historical marginalisation of women and the entrenched gender hierarchy in both public and private spheres, any legal regime that disproportionately disadvantages women - especially those outside marriage - must be presumed to violate the values of the Constitution.

c) Race and the Residual Effects of Apartheid Social Engineering

The failure to fully accommodate life partnerships is not race-neutral. As previously explored in Chapter 1, the current legal status quo is a continuation of racialised inequalities that are rooted in apartheid-era spatial planning, economic exclusion, and familial disruption.⁴⁹¹ The apartheid migrant labour system disrupted traditional family life among Black South Africans, leading to informal cohabitation that is widespread due to physical separation, poverty, and administrative barriers to marriage.⁴⁹² According to Bonthuys, this familial disruption has resulted in fluid, multi-generational, often woman-headed households in which intimate unmarried partners frequently do not live together full-time.⁴⁹³

These patterns persist. According to Mohlabane et al,⁴⁹⁴ Black women represent the demographic least likely to marry legally and most likely to be excluded from the protections of marriage-based legal regimes.⁴⁹⁵ Their precarious socio-economic status is compounded by

⁴⁸⁶ *Daniels* supra note 283 para 22: ‘The value of non-sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally backed social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women.’

⁴⁸⁷ *EB* supra note 405 para 122.

⁴⁸⁸ *Paixão* supra note 92 para 21-29.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ Bonthuys ‘Developing law’ op cit note 215 at 19.

⁴⁹¹ South African Law Reform Commission op cit note 1 at 20.

⁴⁹² *Sach J in Volks* supra note 7 para 165.

⁴⁹³ Bonthuys *The Limits of Cohabitation* op cit note 12 at 7-8.

⁴⁹⁴ Mohlabane, Gumede & Mokoman op cit note 479.

⁴⁹⁵ *Ibid* at 157.

a lack of legal remedies upon relationship breakdown, rendering them especially vulnerable to homelessness, dispossession, and destitution.⁴⁹⁶ The denial of maintenance rights thus perpetuates a racially coded system of economic and legal marginalisation.

Bonthuys further observes that many Black women believe they are married under customary law, only to discover – usually upon death or separation - that the marriage has not been properly concluded due to the necessary customary requirements not being met.⁴⁹⁷ These women, despite fulfilling the role of a spouse in every practical sense, are classified as unmarried and consequently denied the right to claim support. Thus, the continued privileging of formalised, western-style marital unions sustains a racialised legal inequality that intersects with gender and socio-economic status, leaving Black women uniquely vulnerable to dispossession and poverty.⁴⁹⁸

Under Harksen, this represents indirect discrimination on the basis of race - a listed ground.⁴⁹⁹ Given the context and the legacy of structural inequality, the discrimination is clearly unfair. The fact that the legislative framework (or lack thereof) objectively treats all races equally does not negate the unfair and negative impact it has on Black women, especially when viewed through the lens of substantive equality and the commitment to redress historical injustice, as required by section 9(2) of the Constitution⁵⁰⁰.

d) Religious and Cultural Discrimination

A further illustration of this inequality is the inconsistent treatment of Muslim marriages and life partnerships. Both forms of relationships fall outside the formal civil marriage framework in South Africa, yet Muslim marriages have received greater legal recognition in certain instances, particularly with regard to the duty of support. This was seen in Chapter 2, where the duty of support in religious marriages was addressed. In *Daniels v Campbell NO*, for instance, the Constitutional Court extended maintenance rights under the MSSA to surviving partners in Muslim marriages,⁵⁰¹ even though those marriages were not formally recognised by civil law.⁵⁰²

Life partnerships, however, do not enjoy the same protections. Even where life partners have been in long-term relationships and have supported one another financially and emotionally, the law does not automatically extend maintenance or inheritance rights to the surviving partner. This creates an arbitrary distinction between different forms of non-civil relationships, further marginalising life partners.

⁴⁹⁶ Bonthuys 'Developing law' op cit note 215 at 4.

⁴⁹⁷ Ibid at 5.

⁴⁹⁸ Ibid at 6-7, 25.

⁴⁹⁹ *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) para 31.

⁵⁰⁰ The Constitution s 9(2).

⁵⁰¹ *Daniels* supra note 283 para 10.

⁵⁰² Bonthuys 'Developing law' op cit note 215 at 5.

Many individuals in life partnerships, much like those in religious or cultural marriages, enter into these non-civil unions due to cultural, social, or economic factors rather than an explicit rejection of legal marriage. Yet, they find themselves entirely excluded from the legal framework governing relationship dissolution,⁵⁰³ leading to financial instability and social vulnerability. This scenario meets the Harksen requirements for both differentiation and discrimination based on religion and culture, and the consequences (typically economic insecurity) ensure that the discrimination is indeed unfair.

e) Intersectionality of Discrimination

The notion of intersectionality offers a critical lens for understanding how multiple forms of discrimination converge to deepen social and legal exclusion.⁵⁰⁴ In the South African context, this approach is not only theoretically sound but constitutionally necessary. As established in Chapter 4, the Harksen test requires courts to assess whether a law, policy, or practice results in unfair discrimination when considered against the backdrop of a claimant's historical and social context.⁵⁰⁵ When one examines the realities of life partners (particularly African women in economically precarious circumstances) it becomes clear that a single layered analysis is inadequate. Rather, one must engage with the compounded disadvantages that arise when marital status intersects with race, gender, class, and culture.

As discussed in Chapter 1, the socio-economic factors driving individuals into informal life partnerships are deeply rooted in apartheid-era legacies. These include the migrant labour system, patriarchal customary structures, and widespread poverty - especially among Black communities.⁵⁰⁶ Many women enter life partnerships not as a matter of genuine choice, but as a consequence of cultural, familial, and financial constraints that prevent formalisation through civil or customary marriage.⁵⁰⁷ The illusion of free choice, emphasised in cases like *Volks*,⁵⁰⁸ collapses under the weight of these systemic pressures. What appears, at first glance, to be a private decision is, in fact, the product of structural inequality.

This layered exclusion is especially felt when these relationships dissolve or end through death, as explored in Chapter 2. Women in life partnerships are often left without legal recourse for maintenance, inheritance, or property rights, despite having contributed materially and emotionally to their households.⁵⁰⁹ They are penalised not only for their marital status, but also for the racialised and gendered context in which that status exists. The law, in privileging formal marriage, effectively disregards the realities of Black women in non-marital unions,

⁵⁰³ The Department of Home Affairs, Draft Marriage Bill (B43-2023), 2023 also does not address life partnerships

⁵⁰⁴ Van der Linde op cit note 413 at 20 – 22.

⁵⁰⁵ *Harksen* supra note 380 para 50.

⁵⁰⁶ South African Law Reform Commission op cit note 1 at 20.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Volks* supra note 7 para 54-60.

⁵⁰⁹ *EB* supra note 405 para 127-128.

many of whom perform unpaid domestic labour and caregiving roles without compensation or recognition.⁵¹⁰ Their lived experiences exist outside the protection of a legal system designed for a narrow, middle-class, often white conception of family.⁵¹¹

Intersectionality therefore compels us to examine not just who is excluded, but how and why that exclusion occurs. A Black woman in a life partnership is likely to face compounded harm that a white, economically secure, unmarried partner might not.⁵¹² She may lack access to information, legal services, or the financial resources necessary to enforce her rights - even where some remedies exist. In the words of Skweyiya J:⁵¹³

‘In the case of the very poor and the illiterate the effects of vulnerability are more pronounced. The vulnerability of this group of women is, in my view, part of a broader societal reality that must be corrected through the empowerment of women and social policies by the legislature. It is a widespread problem that needs more than just implementation of what, in their case, would be no more than palliative measures. It needs more than the extension of benefits under section 2(1) to survivors who are predeceased by their partners. Unfortunately, the reality is that maintenance claims in a poverty situation are unlikely to alleviate vulnerability in any meaningful way.’

The failure to account for these multiple, reinforcing axes of disadvantage is not merely an oversight; it is a constitutional failure to give effect to the right to substantive equality under section 9(2) of the Constitution⁵¹⁴.

5.2. The right to dignity and family life

The South African Constitution, hailed for its transformative and inclusive ethos, enshrines the right to human dignity⁵¹⁵ and recognises the importance of family and private life⁵¹⁶. These rights are not ornamental; they serve as substantive guarantees that every individual, regardless of their relationship status, is entitled to live a life marked by respect, recognition, and social security.⁵¹⁷ Yet, despite the progressive values underpinning our constitutional democracy, the current legal treatment of intimate life partnerships remains patchy and exclusionary. This failure to provide a coherent and protective regulatory framework for life partners not only increases existing social inequalities but directly infringes upon the dignity⁵¹⁸ and family life⁵¹⁹ of some of the most vulnerable members of society.

⁵¹⁰ Ibid.

⁵¹¹ Bonthuys ‘Developing law’ op cit note 215 at 14.

⁵¹² Bonthuys *The Limits of Cohabitation* op cit note 12 at 4-8.

⁵¹³ *Volks* supra note 7 para 66.

⁵¹⁴ The Constitution s 9(2).

⁵¹⁵ Ibid s 10.

⁵¹⁶ Ibid s 14.

⁵¹⁷ *Bwanya* supra note 63 para 141-142.

⁵¹⁸ *Volks* supra note 7 para 221.

⁵¹⁹ *Dawood* supra note 283 para 31-32; *National Coalition* supra note 33 para 36; *Satchwell* supra note 35 para 12-13.

As highlighted in Chapter 4 of this dissertation, the right to dignity is foundational in South Africa's post-apartheid legal order.⁵²⁰ The Constitutional Court has repeatedly affirmed its central role of the right to dignity in judgments. In *Dawood*, the Court held that dignity is not only about self-worth but includes the capacity to make fundamental decisions about one's life and family relationships.⁵²¹ The legal regulation of personal relationships, including the right to marry and to form a family, therefore directly implicates the right to dignity.⁵²²

The absence of comprehensive legal protection for life partners (despite the existence of committed, long-term, and often economically interdependent relationships) deprives individuals, especially women, of their ability to make these decisions with legal security.⁵²³ It devalues their lived reality, suggesting that only marriage-worthy relationships deserve constitutional concern. This arbitrary exclusion undermines both the private dignity (self-worth and identity) and public dignity (legal recognition and societal validation) of individuals in life partnerships.⁵²⁴

As explored in Chapter 1, a significant proportion of South Africans opt for or find themselves in life partnerships due to a complex web of cultural, economic, and social reasons, including lobolo, poverty, gender inequality, and historical patterns of labour migration.⁵²⁵ Many women in these relationships function as *de facto* spouses; raising children, maintaining homes, and contributing emotionally and financially to the household - without any legal recognition or protection. When such a relationship ends, either through separation or death, the legal system often responds with silence or indifference.⁵²⁶ The absence of enforceable maintenance claims, inheritance rights, or recognition of shared contributions communicates a chilling message: these families do not matter. This reluctance in addressing the matter of maintenance right for life partners is more than a technical legal shortcoming; it is an infringement on the dignity of individuals who, in every material and emotional sense, have lived as part of a family.

Section 14 of the Constitution, though traditionally invoked in the context of privacy, also underscores the sanctity of family life and autonomy.⁵²⁷ The Court in *Dawood* recognised that the Constitution protects diverse family forms and that these forms must be treated with equal

⁵²⁰ *Dawood* supra note 283 para 328-329.

⁵²¹ *Ibid* para 36-37.

⁵²² *Certification of the Constitution* supra note 440 para 97; *Dawood* supra note 283 para 35.

⁵²³ *Dawood* supra note 283 para 35-37; *Volks* supra note 7 para 221.

⁵²⁴ Edwin Cameron *Dignity and Disgrace – Moral Citizenship and Constitutional Protection*, paper delivered at the 'Understanding Human Dignity' Conference, Oxford, 26–29 June 2012 (unpublished, revised final version on file with author) 7.

⁵²⁵ South African Law Reform Commission op cit note 1 at 20-23.

⁵²⁶ *EW* supra note 77.

⁵²⁷ The Constitution s 14.

respect⁵²⁸ and the *Certification of the Constitution of the Republic of South Africa* judgment,⁵²⁹ emphasised how the right to dignity also aligns closely with the right to family life. Yet, South African law continues to privilege marriage as the primary (and sometimes exclusive) locus of family rights and responsibilities.

This privileging is evident in the maintenance frameworks discussed in Chapter 2. Life partners (particularly opposite-sex partners) are frequently required to prove contractual obligations⁵³⁰ or resort to claims of unjust enrichment,⁵³¹ which often fail to account for non-financial contributions like caregiving or domestic labour. As Bonthuys observes, this model is ill-suited to protect women whose family lives fall outside conventional legal norms.⁵³²

Moreover, the *Volks* case illustrates the judiciary's reluctance to expand the scope of legal protection to intimate partnerships, despite clear indications of shared life and mutual dependence.⁵³³ In privileging formal marriage, the Court failed to account for the realities of many South African families, particularly those formed in contexts where marriage is not a readily accessible or culturally preferred option.⁵³⁴ This kind of narrow legal interpretation directly harms the ability of individuals to form and sustain families with dignity and security.

The Constitution was never meant to be a cold, procedural document. Its promise was, and continues to be, profoundly human: to protect people, to acknowledge lived realities, and to remedy past and present injustices.⁵³⁵ When it comes to intimate life partnerships, the gap between this constitutional vision and legal practice is stark. As detailed in Chapter 4, this disconnect manifests in a multitiered system where some families are fully recognised while others are treated as invisible.⁵³⁶

There is also a psychological dimension to this legal disregard. Many individuals in life partnerships experience a sense of exclusion, not only from legal benefits but from social affirmation.⁵³⁷ Their families are perceived as second-class, their roles as caregivers or supporters dismissed, and their losses (especially in the event of a partner's death) treated as insignificant in the eyes of the law.⁵³⁸ Such marginalisation corrodes the very core of human dignity and undermines the broader constitutional project of inclusive citizenship.

The right to dignity and the right to family life are not abstract legal doctrines; they are daily realities for millions of South Africans. To withhold legal recognition from intimate life

⁵²⁸ *Dawood* supra note 283 para 34-35.

⁵²⁹ *Certification of the Constitution* supra note 440.

⁵³⁰ *Volks* supra note 7 para 3.

⁵³¹ South African Law Reform Commission op cit note 1 at 123; Van Heerden et al op cit note 3 at 255.

⁵³² Bonthuys *The Limits of Cohabitation* op cit note 12 at 25.

⁵³³ *Volks* supra note 7 para 7, 15, 54-60.

⁵³⁴ *Ibid* para 221.

⁵³⁵ The Constitution at 1.

⁵³⁶ Bonthuys 'Developing law' op cit note 215 at 6-7.

⁵³⁷ *Hugo* supra note 355 para 41.

⁵³⁸ *Ibid*.

partnerships is not a neutral act; it is an exclusion that touches the most intimate aspects of human identity, security, and belonging.

5.3. An international comparison

The question of how South Africa treats life partnerships in law cannot be answered in isolation from comparative and international developments. As outlined in Chapter 3, South Africa's legal stance is not only domestically problematic but increasingly out of step with global trends in cohabitation and relationship recognition. Across the Western world and in several developing jurisdictions, life partners are increasingly granted automatic or semi-automatic legal protections akin to those enjoyed by married spouses - especially upon death or relationship breakdown. This dissertation holds that South Africa's continued reliance on a formalist, piecemeal model places it at odds with these evolving norms and undermines its commitment to constitutional principles and international human rights obligations.

a) Legal recognition models in other jurisdictions

Across Europe and common law jurisdictions, unmarried partnerships who cohabit are no longer treated as a legal anomaly. Jurisdictions such as New Zealand, Canada, and parts of the United Kingdom have introduced legal frameworks that extend protection to life partners, recognising the diversity of modern families.⁵³⁹ New Zealand's Property (Relationships) Act⁵⁴⁰ treats qualifying *de facto* relationships (those typically lasting at least three years, or involving children or significant interdependence) on par with marriages for the purpose of asset division and spousal support.⁵⁴¹

The United Kingdom, while not having a unified statutory framework, has engaged with life partnership reform through the work of the Law Commission, which proposed a scheme that would allow qualifying life partners to make claims for financial provision following relationship breakdown.⁵⁴² The courts in England and Wales have also relied on equitable doctrines such as constructive trusts and proprietary estoppel to provide relief, particularly for economically vulnerable partners who have contributed non-financially to the household.⁵⁴³

According to Goossens,⁵⁴⁴ legal responses to life partnerships across jurisdictions fall into three broad categories: (1) contractual regimes, where partners are required to proactively create

⁵³⁹ Goossens op cit note 219 at 11-12.

⁵⁴⁰ Property (Relationships) Act 1976.

⁵⁴¹ Ibid s 4D.

⁵⁴² English Law Commission op cit note 225.

⁵⁴³ Goossens op cit note 219 at 6.

⁵⁴⁴ Goossens op cit note 219.

enforceable agreements (e.g., most U.S. states following the *Marvin v Marvin* approach⁵⁴⁵); (2) registration systems, allowing partners to opt into a legally recognised union (e.g., Belgium, France); and (3) default legal regimes that automatically apply to couples meeting certain criteria (e.g., Sweden, New Zealand).⁵⁴⁶ Goossens notes that although cultural and religious ideologies influence national policy, there is a discernible international trend toward substantive legal recognition of life partnerships - especially where dependency and caregiving are present.⁵⁴⁷

By contrast, South Africa, as explored in Chapter 2, remains largely tethered to a fragmented legal framework where life partners must prove contract or unjust enrichment to access any form of legal redress. While the decision in *Bwanya*⁵⁴⁸ marks an important judicial step forward, it highlights the reactive nature of South African family law: recognition is granted not by design, but only in response to hardship and litigation. There is no statutory framework offering automatic or presumptive recognition based on the nature or duration of the relationship, even though such a model would be more consistent with both constitutional values and international norms.

b) The constitutional imperative for alignment with international norms

South Africa is party to numerous international human rights instruments that promote non-discrimination, human dignity, and the protection of the family in its diverse forms. The African Charter on Human and Peoples' Rights affirms the family as the natural unit of society deserving of state protection,⁵⁴⁹ and the Protocol to the African Charter on the Rights of Women in Africa (recognising the gender inequality faced by women in family units) expands on this by calling for legal protection for women in all marital regimes.⁵⁵⁰ The UN's International Covenant on Civil and Political Rights⁵⁵¹ and the International Covenant on Economic, Social and Cultural Rights⁵⁵² similarly recognise the family without mandating formal marriage as its foundation.

As discussed in Chapter 3, section 39(1)(b) of the Constitution mandates that international law must be considered when interpreting the Bill of Rights.⁵⁵³ Furthermore, section 233 of the Constitution requires legislation to be interpreted in a manner consistent with international law

⁵⁴⁵ *Marvin* op cit note 258 at 665: the Marvin doctrine is a legal principal which allows courts to enforce express or implied agreements between unmarried life partners, based on their conduct, to recognise obligations such as support or property sharing despite the absence of marriage.

⁵⁴⁶ Goossens op cit note 219 at 6.

⁵⁴⁷ Ibid at 32-35.

⁵⁴⁸ *Bwanya* supra note 63 para 137-138.

⁵⁴⁹ *African Charter* supra note 271 art 18.

⁵⁵⁰ *Women's Protocol* supra note 275 art 2.

⁵⁵¹ ICCPR supra note 270 art 17.

⁵⁵² International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3, entered into force 3 January 1976, art 10: 'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society.'

⁵⁵³ The Constitution s 39(1)(b).

whenever possible.⁵⁵⁴ These constitutional provisions create a bridge between South Africa's domestic obligations and the global human rights framework.

The right to equality, as outlined under section 9 of the Constitution and discussed in Chapter 4, requires not just formal sameness, but substantive outcomes that address disadvantage and vulnerability. The South African Constitutional Court has embraced this ethos in cases like *Van Heerden*⁵⁵⁵ and *Bhe*⁵⁵⁶, where the judiciary recognised that a context-sensitive, impact-based approach is vital to achieving true equality. In the *Bwanya* judgment, the Court expressly rejected the notion that formal marriage should be a condition for legal protection, recognising that many women are excluded from marriage due to cultural and socio-economic constraints.⁵⁵⁷ This aligns with international developments where the dignity of vulnerable life partners is prioritised over their failure to comply with formal entry requirements.

Moreover, Chapter 1 details the structural factors - such as economic inequality, historical disadvantage, and gender-based power imbalances - that inhibit formal marriage in many communities.⁵⁵⁸ South Africa's current legal model fails to acknowledge these realities, thereby reinforcing systemic exclusions under the guise of neutrality. International standards provide a compelling external benchmark for what is possible and constitutionally necessary.

Ultimately, South Africa's failure to enact a clear, inclusive legal framework for life partnerships places it out of alignment with international norms and its own constitutional values. A shift from form to function (grounded in dignity, equality, and lived experience) is no longer just an option. It is an obligation. The failure to enact legislation that protects unmarried life partners (despite global trends and treaty obligations) places South Africa in breach of both its constitutional and international duties.

5.4. Contract versus status-based recognition

One of the central debates in the legal recognition of intimate life partnerships is whether protection should be based on a contract between the parties or on the inherent status of being in a functional family-like relationship. This distinction carries significant implications for how the law treats vulnerable individuals; especially women, at the end of such relationships. South African courts and scholars alike have grappled with this question, with evolving jurisprudence increasingly pointing to the need for a status-based framework that recognises lived realities rather than rigid legal formalism.

⁵⁵⁴ The Constitution s 233.

⁵⁵⁵ *Minister of Finance* supra note 493 para 142, 146.

⁵⁵⁶ *Bhe* supra note 333 para 50.

⁵⁵⁷ *Bwanya* supra note 63 para 99.

⁵⁵⁸ South African Law Reform Commission op cit note 1 at 20-23.

Traditionally, as explained in Chapter 2, life partners seeking legal recourse for maintenance or division of property have relied on the presence of a contract - either tacit, express, or inferred from conduct.⁵⁵⁹ For instance, in *Butters v Mncora*, the court recognised the existence of a universal partnership based on the parties' joint conduct.⁵⁶⁰ However, as highlighted in *Volks*, the absence of a formal marriage or explicit legal commitment was used to deny maintenance rights, despite evidence of emotional and financial interdependence.⁵⁶¹ The majority judgment treated the choice not to marry as a legal barrier to imposing spousal obligations, suggesting that a deliberate failure to formalise the relationship barred any claims to legal recognition.⁵⁶²

This rigid reliance on contract has drawn sustained criticism for failing to account for the gendered dynamics that typically exist in life partnerships.⁵⁶³ As discussed in Chapter 1.3, many women lack the negotiating power to insist on marriage or to enter into contracts that protect their financial interests.⁵⁶⁴ In practice, one partner; often the male, can unilaterally veto the decision to marry, while the other partner, usually the woman, must either accept cohabitation or risk destitution. As Meyerson has held, this skewed power dynamic undermines the assumption of equal choice and renders the contractual model insufficient as a basis for equitable legal protection.⁵⁶⁵

Chapter 5 proposes that the law must instead consider the *status* of the relationship; that is, whether the parties lived in a functional, committed, family-like arrangement involving reciprocal duties of support. This view was affirmed in *Bwanya*, where the Constitutional Court held that relationships which reflect the core characteristics of marriage (mutual commitment, cohabitation, emotional and financial support) should not be excluded from legal protection merely due to the absence of a formal marriage.⁵⁶⁶ Importantly, the Court in *Bwanya* also rejected the *Volks* court's formalist framing of support as arising solely from legal marriage, instead advocating for a flexible, context-driven understanding grounded in the lived reality of the claimant's dependence and contributions.⁵⁶⁷

Bwanya further supports this interpretive shift, arguing that the requirement of reciprocal duties of support should be interpreted not as a contractual prerequisite but as an acknowledgment of the familial and spouse-like character of the relationship.⁵⁶⁸ This enables courts to better

⁵⁵⁹ Heaton & Kruger op cit note 5 at 257.

⁵⁶⁰ *Butters* supra note 61 para 34-36.

⁵⁶¹ *Volks* supra note 7 para 62.

⁵⁶² *Ibid* para 54-62.

⁵⁶³ June D Sinclair & Jacqueline Heaton *The Law of Marriage* (1996) 283; Elsie Bonthuys 'Family contracts' (2004) 121 *SALJ* 896-897.

⁵⁶⁴ South African Law Reform Commission op cit note 1 at 22-23.

⁵⁶⁵ Denise Meyerson 'Who's In and Who's Out? Inclusion and Exclusion in the Family Law Jurisprudence of the Constitutional Court of South Africa' (2010) 3 *CCR* 295-316.

⁵⁶⁶ *Bwanya* supra note 63 para 58; 154.

⁵⁶⁷ *Ibid* para 134.

⁵⁶⁸ *Ibid* para 71: ' , it seems to me it can no longer be fitting to distinguish the duty of support existing in the two categories of familial relationships (i.e. marriage relationship and permanent life partnership) purely on the basis that one arises by operation of law and the other arises from agreement. Today it would be simplistic to continue to hold that view.'; Barratt 'Reciprocal Duties' op cit note 147 at 7.

respond to the constitutional imperative of substantive equality and to protect individuals from the structural vulnerability that often arises from gender, class, and cultural hierarchies.⁵⁶⁹

Accordingly, a status-based framework more effectively addresses the harms faced by economically and socially marginalised life partners.⁵⁷⁰ It enables courts to evaluate claims based on the presence of familial obligations and lived dependence, rather than the presence or absence of a contract negotiated in inherently unequal circumstances. Such an approach recognises that the essence of family life cannot be reduced to a contract - it must be understood through context, care, and commitment. While contracts may remain a valuable mechanism for clarifying intentions,⁵⁷¹ they should not be the gatekeepers of legal recognition.

In conclusion, this discussion has laid bare the constitutional, social, and practical implications of excluding unmarried partners from legal protection. The intersection of race, gender, class, and marital status continues to shape the lived experiences of those in unmarried partnerships - often resulting in legal vulnerabilities that the current legal framework fails to acknowledge. These exclusions undermine the rights to equality, dignity, and family life and disregard South Africa's obligations under international human rights instruments.

The analysis has also shown that a purely contractual approach is both inadequate and inequitable, particularly for women who enter life partnerships in contexts marked by social and economic need. Recognising and regulating such relationships through a status-based model - one that reflects the realities of mutual support, emotional commitment, and shared domestic life - is not only constitutionally sound but ethically necessary. International and comparative frameworks further confirm that the rigid prioritisation of registered marriage is out of step with evolving conceptions of family.

What becomes clear from this examination is that legal reform is not just desirable: it is constitutionally mandated. The current legal vacuum fails to meet the standards of transformative constitutionalism. Therefore, the discussion now turns to Chapter 6, which outlines practical and principled recommendations for legislative and policy reform. These proposals aim to bridge the gap between the lived experiences of life partners and the protections offered by law, ensuring that all family forms are treated with equal recognition, care, and dignity.

⁵⁶⁹ Barratt 'Reciprocal Duties' op cit note 147 at 20.

⁵⁷⁰ Ibid at 22-23.

⁵⁷¹ *Verheem v Road Accident Fund* 2010 2 SA 409 (GP) para 12.

CHAPTER VI: RECOMMENDATIONS

Building on the analysis, this chapter draws together the findings of the dissertation to propose a series of practical and constitutional reforms aimed at addressing the precarious legal position of intimate life partners in South Africa. The first part reflects on existing legislative efforts, such as the Domestic Partnerships Bill and the South African Law Reform Commission's discussion papers, acknowledging both their potential and their limitations. The chapter then highlights the need to transition from a purely contractual framework to one where duties of support arise *ex lege*, and the importance of recognising the socio-economic consequences of the current gaps in protection. In light of this, the chapter then sets out specific recommendations based on the research findings, offering a way forward towards a more equitable and constitutional family law regime.

6.1. Legislative attempts at the development of a more functional approach towards the recognition of life partnerships

6.1.1. The Draft Domestic Partnership Bill

The persistent absence of a single, comprehensive statute governing all forms of intimate partnerships outside of formal marriage has led to inconsistencies, uncertainties, and a lack of protection, particularly for vulnerable parties. The Draft Domestic Partnerships Bill⁵⁷² was a significant initiative aimed at addressing these inequalities (especially regarding maintenance and property rights) and was developed by the South African Law Reform Commission as part of Project 118 and presented in Discussion Paper 104 in 2003⁵⁷³. While it acknowledged the lived realities of many South Africans, its stagnation in Parliament highlights legislator's failure to reform family law in terms of life partnerships.

Notably, the Bill proposed a statutory obligation of support between partners in both registered and unregistered domestic partnerships. Clause 18 of the Bill,⁵⁷⁴ for instance, explicitly provided for maintenance after the dissolution of a registered life partnership, with courts empowered to make equitable maintenance orders based on factors such as the duration of the partnership, the financial and non-financial contributions of each partner, and the economic impact of the relationship's termination.⁵⁷⁵ These mirror the factors that are considered at the conclusion of marriages by divorce.⁵⁷⁶

⁵⁷² Domestic Partnership Bill *supra* note 86.

⁵⁷³ South African Law Reform Commission *op cit* note 1.

⁵⁷⁴ Domestic Partnership Bill *supra* note 86 clause 18.

⁵⁷⁵ *Ibid* Clause 18(2).

⁵⁷⁶ Divorce Act s 7(2): ‘..with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities,

However, the protections extended to unregistered partnerships are less extensive and more limited. In such cases, claimants have to initiate a court application and establish the existence of a *de facto* life partnership.⁵⁷⁷ Legal consequences, including maintenance⁵⁷⁸ and property redistribution,⁵⁷⁹ were not automatic and depended on judicial discretion and the partner's ability to prove interdependence and economic vulnerability.⁵⁸⁰ This creates a burdensome evidentiary threshold, disproportionately impacting women who may have contributed to the relationship through unpaid caregiving or homemaking without accruing legally recognised assets or entitlements.

The gendered implications of this disparity are significant. As with the registration of customary marriages, where compliance rates remain low,⁵⁸¹ it is likely that most life partnerships would not have been formally registered - especially in rural and economically disadvantaged communities.⁵⁸² The resulting exclusion of the majority of life partners from the Bill's more robust protections would deepen existing socio-economic inequalities and leave many women vulnerable to destitution following the breakdown of such relationships.

6.1.2. Further legislative proposals

Two major recent reform efforts warrant closer examination: the Law Reform Commission's Discussion Paper 152 (Project 144, 2021)⁵⁸³ and the Department of Home Affairs' Draft Marriage Bill (2023)⁵⁸⁴. Both initiatives seek to develop a more inclusive legal framework, but they differ significantly in scope and execution.

a) Project 144: Single Marriage Statute – Discussion Paper 152 (2021)

The Discussion Paper titled 'Single Marriage Statute' represents a holistic attempt to consolidate the regulation of marriage and similar relationships into a unified statute.⁵⁸⁵ It introduces the notion of a 'universal' marriage statute which acknowledges cultural, religious,

financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account...

⁵⁷⁷ Clause 26-29 of the Domestic Partnership Bill *supra* note 86.

⁵⁷⁸ *Ibid* Clause 27-28.

⁵⁷⁹ *Ibid* Clause 26.

⁵⁸⁰ *Ibid* Clause 26(2)(c).

⁵⁸¹ Bonthuys *The Limits of Cohabitation* *op cit* note 12 at 4-5.

⁵⁸² *Ibid* at 13.

⁵⁸³ South African Law Commission *op cit* note 114.

⁵⁸⁴ Draft Marriage Bill *supra* note 503.

⁵⁸⁵ South African Law Commission *op cit* note 114 proposed two possible Bills: the Protected Relationship Bill and the Recognition and Registration of Marriages and Life Partnerships Bill.

and personal variations in intimate relationships.⁵⁸⁶ The proposal is commendable for recognising a wide array of unions, including life partnerships, civil marriages, customary marriages, religious marriages and polygynous marriages.⁵⁸⁷

This paper puts forward a definition for a life partnership, stating that it would encompass a relationship ‘where the parties cohabit and have assumed a permanent responsibility for supporting for each other’.⁵⁸⁸ This definition marks an initial step towards the formal acknowledgement and recognition of life partners. However, in ‘Comment on the Single Marriage Statute’⁵⁸⁹, Osman raised a critical concern regarding the requirement of cohabitation, arguing that it may exclude vulnerable parties from protection as this strict prerequisite might fail to reflect the lived realities of many families where partners may not reside together for various reasons.⁵⁹⁰ Osman recommends that instead of being a compulsory requirement cohabitation must rather be viewed as a factor for courts to consider when determining if parties have assumed a reciprocal duty of support.⁵⁹¹

In relation to the critical issue of legal consequences and maintenance, the SALRC clarified that its investigation into the Single Marriage Statute did not extend to determining the specific legal effects of life partnerships, including the right to claim maintenance. Instead, it noted that such matters would need to be addressed by other existing or future legislation.⁵⁹² Consequently, the proposed Bills do not provide substantive regulation of these highly contested areas. Nonetheless, the Discussion Paper recognised the inherent connection between legal recognition and the allocation of legal consequences.⁵⁹³ As Osman observes, ‘the effectiveness of the single marriage statute depends very much on the rights afforded to parties and the regulation of the consequences of these relationships.’⁵⁹⁴ This dissertation argues that leaving the determination of maintenance rights entirely to other statutes or future legislative initiatives is problematic. In the absence of express statutory recognition, a life partner may not qualify as a claimant under applicable maintenance frameworks, particularly where the substantive right to support has not been established in law. While the Maintenance Act provides a procedural mechanism for enforcing maintenance claims,⁵⁹⁵ it does not itself confer the right to receive maintenance. The failure to define such rights within the statute risks excluding vulnerable partners from protection, especially where existing legislative remedies are fragmented or uncertain, and where courts are left to interpret these gaps without comprehensive statutory guidance.

The Discussion Paper also considered the practical aspects of registration of life partnerships. While views from respondents varied on whether registration should be mandatory or optional,

⁵⁸⁶ Ibid at 2.

⁵⁸⁷ Ibid para 1.34-1.35; para 1.44.

⁵⁸⁸ Ibid para 2.141, 2.16.1 - 2.16.2.

⁵⁸⁹ Fatima Osman ‘Comment on the Single Marriage Statute: Implications for Customary Marriages, Polygynous Marriages and Life Partnerships’ (2021) 24 *PER / PELJ* 1-18.

⁵⁹⁰ Ibid at 8.

⁵⁹¹ Ibid at 9.

⁵⁹² South African Law Commission op cit note 114 para 1.47.

⁵⁹³ Ibid para 2.6.1 (4) and 2.6.2 (4).

⁵⁹⁴ Osman op cit note 589 at 3.

⁵⁹⁵ Maintenance Act s 2.

the SALRC proposed even if a relationship is not registered, such a relationship should still be protected.⁵⁹⁶ This view sufficiently addresses the reality of those who do not or cannot register and supersede the views of the Draft Domestic Bill. Many vulnerable partners, especially women in economically dependent relationships, may thus be entitled to legal recourse at the conclusion of the relationship.

In light of the Discussion Paper, this dissertation recommends that any future legislation must include automatic and comprehensive legal consequences for qualifying life partnerships, regardless of registration status. Such a model would better reflect the constitutional imperative to protect dignity, equality, and access to justice for all partners, particularly in cases of relationship breakdown.

b) The Draft Marriage Bill (B43-2023) 2023

The introduction of the Marriage Bill (which was produced by the Department of Home Affairs and not through the investigative efforts of the SALRC) marks a significant step towards harmonising South Africa's fragmented marriage laws. Its primary focus lies in unifying the recognition, solemnisation, and registration of civil, customary, and religious marriages. However, despite the Bill's broader commitment to equality and non-discrimination, as mandated by section 9 of the Constitution,⁵⁹⁷ the Bill notably fails to address the rights of life partners. By omitting any direct recognition or regulation of committed relationships outside formal marriage, the Bill leaves a substantial gap in legal protection for individuals, particularly those in economically vulnerable positions.

While the Bill meticulously defining the rights and obligations of spouses in monogamous and polygamous unions,⁵⁹⁸ the Bill inadvertently exposes the vulnerability of life partners who remain outside formal marriage frameworks. In doing so, it reinforces a legal framework in which only formally recognised unions are afforded rights and protections. This is especially problematic given the increasing number of South Africans who, for cultural, financial, or personal reasons, choose not to marry but nonetheless form enduring and interdependent partnerships.⁵⁹⁹

Schedule 1 of the Bill includes amendments to several statutes such as the Insolvency Act,⁶⁰⁰ Estate Duty Act,⁶⁰¹ Transfer Duty Act,⁶⁰² and Pension Funds Act⁶⁰³. These statutes had already included life partners, however, the Bill explicitly broaden the definition of spouse to include

⁵⁹⁶ South African Law Commission op cit note 114 para 2.107-2.108.

⁵⁹⁷ The Constitution s 9(1).

⁵⁹⁸ Draft Marriage Bill supra note 503 s 5 and s 6.

⁵⁹⁹ *Bwanya* supra note 63 para 181.

⁶⁰⁰ Insolvency Act s 21.

⁶⁰¹ Estate Duty Act s 1.

⁶⁰² Transfer Duty Act 40 of 1949 s 1.

⁶⁰³ Pension Funds Act s 1.

permanent life partners in specific contexts.⁶⁰⁴ These piecemeal efforts, however, still fall short of offering meaningful or comprehensive protection.⁶⁰⁵ Rather than signalling a shift toward genuine inclusivity, they highlight the inconsistency and uncertainty that arises when life partnerships are only sporadically acknowledged across different areas of law.

Accordingly, while the Marriage Bill's immediate purpose is to reform marriage law,⁶⁰⁶ it cannot be regarded as a progressive step for the recognition of life partners. Its failure to extend legal consequences to such relationships leaves many individuals without recourse, perpetuating vulnerability and inequality for parties of such relationships. A truly inclusive legal framework must move beyond marriage as the sole basis for legal protection and actively incorporate life partnerships into the broader family law regime.

6.2. Acknowledging the legal and socio-economic implications of the non-recognition of maintenance rights and duties for intimate life partners

To address disparities in maintenance laws for life partnerships, it's essential to recognise the legal and socio-economic implications of not acknowledging maintenance rights and duties in these relationships. Non-recognition worsens gender inequality within South African family law, particularly affecting women's socio-economic status.⁶⁰⁷ Bannister suggests that the absence of regulation for life partnerships means women cannot claim support from their partner, and thus women often face disproportionate burdens in cases of family dissolution, leading to increased vulnerability to destitution, homelessness, and violence.⁶⁰⁸ The current regulatory framework often leaves women in life partnerships vulnerable to eviction, homelessness, and difficulties accessing socioeconomic rights such as healthcare (should such women rely on their partners medical aid coverage) upon relationship termination.⁶⁰⁹ This vulnerability is compounded by factors such as property ownership and childcare responsibilities.⁶¹⁰ A non-owning life partner lacks the legal right to occupy the family home, thus increasing the risk of homelessness and eviction for women,⁶¹¹ the issue being primarily due to the family property often being registered solely in the name of the male partner, leaving the non-owning partner without legal recourse or protection of occupation rights upon

⁶⁰⁴ Draft Marriage Bill supra note 503 s 19: the amendment to the Insolvency Act for instance, broadens the definition of spouse to include 'also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another.'

⁶⁰⁵ Heaton & Kruger op cit note 5 at 255.

⁶⁰⁶ Draft Marriage Bill supra note 503 at 17.

⁶⁰⁷ This was recognised by the Constitutional Court in the case of *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23: 'There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter ... The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.'

⁶⁰⁸ Bannister op cit note 453 at 1-3.

⁶⁰⁹ Clark & Van Heerden op cit note 222 at 611.

⁶¹⁰ Elsje Bonthuys 'Developing the Common Law of Breach of Promise and Universal Partnerships: Rights to Property Sharing for All Cohabitants?' (2015) 132 *SALJ* 76-99 at 92.

⁶¹¹ Ibid.

termination of the relationship. After the end of a partnership, women often also tend to lose access to shared economic resources, leading to socio-economic disadvantages. While the universal partnership doctrine does provide a legal avenue for claiming a share in property acquired during the relationship,⁶¹² this remedy is neither automatic nor consistently accessible. It requires the claimant to prove a tacit agreement and contributions to a joint venture - often through legal representation and extensive evidence, which many women in informal or economically imbalanced relationships may not have the resources or knowledge to pursue.⁶¹³ Moreover, the remedy is reactive and private in nature, offering no systemic protection or proactive entitlement.⁶¹⁴ As such, while the doctrine is conceptually inclusive, it cannot replace the need for a broader, rights-based framework. Given South Africa's history of inequality and the prevalence of life partnerships in poorer segments of society, there's a pressing need for positive socio-economic intervention by the state to address these issues.

Nevertheless, when recognising or establishing of a right the right to maintenance, it is necessary to acknowledge the nature of today's economy. Morei notes that the majority of South Africans, including men, are black and poor.⁶¹⁵ Even though maintenance can be considered, there is a need to move away from the idea that romantic unions, such as marriages and life partnerships, must provide a woman with a 'bread-ticket for life'.⁶¹⁶ While this dissertation has highlighted the deep structural inequalities that continue to disadvantage women, it's also important to recognise that many men, too, are navigating poverty and limited opportunities. Assuming they are always in a position to provide financial support simply because of their gender ignores the broader socioeconomic reality. Creating a right to maintenance against an impoverished individual may not be effective and it is better to provide a more generous social security net - one that still protects vulnerable partners but also reflects the economic pressures shared across gender lines in South Africa today.

While prior SALRC reports⁶¹⁷ and Constitutional Court judgments⁶¹⁸ have acknowledged the precarious position of partners - particularly women - in life partnerships, this has yet to result in a substantive, codified framework of protection. This dissertation recommends that future legislative action must treat socio-economic dependence not as an incidental feature but as a structural reality requiring targeted legal safeguards, particularly in the context of maintenance and support duties.

⁶¹² Van Heerden et al. op cit note 3 at 256.

⁶¹³ *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) at 124: 'From this it follows that, unless a wife has rendered services manifestly surpassing those ordinarily expected of a wife in her situation, a Court will not easily be persuaded to infer a tacit agreement of partnership between the spouses.'

⁶¹⁴ Van Heerden et al op cit note 3 at 256: 'the practical implications caused by having to prove the existence and content of such a tacit agreement have the effect that such a tacit agreement does not offer a means of protection that is particularly suitable, comprehensive or user-friendly in a family law context.'

⁶¹⁵ Neo Morei 'Should Spousal Maintenance be Left Solely to Judge's Discretion?' (2014) 5 *Mediterranean Journal of Social Sciences* 109-116 at 112.

⁶¹⁶ *Grasso v Grasso* [1987] 3 All SA 47 (C).

⁶¹⁷ South African Law Reform Commission op cit note 1.

⁶¹⁸ *Bwanya* supra note 63; *Volks* supra note 7 dissent, *Paixão* supra note 92; *Satchwell* supra note 35; *Gory* supra note 48.

6.3. Recommendations based on research findings

This dissertation suggests that, in addressing the legal and social inequities faced by partners in intimate life partnerships, South Africa must transition towards a legal framework that fully recognises and protects these relationships. The research findings indicate that while the judiciary has made important strides in acknowledging the vulnerability of life partners, legislative reform remains inconsistent and incomplete. Based on the analysis undertaken in this study, several specific recommendations are proposed.

6.3.1. Transitioning from contractual to *ex lege* duties of support

First, this dissertation recommends a formal shift from a purely contractual foundation for the duty of support in life partnerships to a duty arising *ex lege* - that is, imposed by law once certain criteria are met.

Ex lege (or automatic) duty of support and maintenance refers to the legal obligation imposed by operation of the law, rather than arising from a specific contract between parties or even legal obligation that may be inferred by the conduct of the parties. Moreover, *ex lege* duties of support entails that certain legal consequences must follow once the objective requirements that have been set by the law have been met,⁶¹⁹ rather than depend on the agreements between the parties. In the context of permanent life partnerships, where couples cohabit and share responsibilities akin to spouses but may choose not to marry, the issue of legal recognition and protection becomes paramount.

Establishing an *ex lege* duty of support for life partnerships would signal to both individuals and courts that this duty is worthy of protection and that the legal obligation is worthy of being tied to certain legal consequences. It would offer greater legal certainty and stability for permanent life partnerships by providing a clearer criterion for the establishing dependence and by offering more predictable outcomes for those vulnerable unmarried partners who experience may difficulty demonstrating a contractual undertaking.⁶²⁰

Contracts for mutual support between intimate partners are seldom documented. While they might be verbal, they are more frequently tacit. Proving tacit contracts is particularly challenging due to courts' usual hesitation to accept claims of tacit terms.⁶²¹ The difficulty increases when a party asserts not only a tacit term within an explicit contract but also that the

⁶¹⁹ Ernest Marais and Petrus Maree 'At the Intersection between Expropriation Law and Administrative Law: Two Critical Views on the Constitutional Court's Arun Judgment' (2016) 19 *PER / PELJ* 1-59 at 15: 'The phrase *ex lege* or by operation of law means that certain legal consequences follow upon satisfaction of objective requirements set by law'

⁶²⁰ See for example Barratt 'Reciprocal Duties' op cit note 147 para 13-18, who notes how facts relied upon by the courts are usually insufficient to infer that the parties had subjectively bound themselves in contract.

⁶²¹ *Wilkins v Voges* 1994 3 SA 130 (A) 143H-I; *Adhu Investments CC and Others v Padayachee* (1410/2016) [2019] ZASCA 63; *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA).

entire contract was tacitly agreed upon. To prove a tacit contract, one must demonstrate, by a balance of probabilities, unequivocal actions that can only reasonably be interpreted as an agreement on the alleged terms.⁶²² Accordingly, in *Joel Melamed and Hurwitz v Cleveland Estates* it was held:⁶²³

‘a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence’

In family contexts, where individuals are bound by moral, social, and religious duties, and where actions are driven by affection and altruism, it is understandably difficult to prove that a support contract is the most plausible explanation for partners' actions. Thus, basing the duty of support on contracts, particularly tacit ones, inherently complicates the task of proving such a duty's existence.⁶²⁴

Transitioning to *ex lege* duties of support would, slightly or entirely, diminish the importance placed on the choice to marry, as this decision would no longer largely determine the legal rights and obligations of life partners.⁶²⁵ As explored in Chapter 1.3, the choice model in *Volks* is oversimplified in nature and fails to consider the complex realities of unmarried intimate relationships. *Ex lege* duties of support would provide comprehensive protection for all those in various realities, promoting the values of substantive equality.

Previous judgments⁶²⁶ have highlighted that the choice argument as articulated in *Volks* fails to acknowledge the diverse social, legal, and moral complexities faced by South African unmarried partners. This choice argument has been critiqued for assuming a universal applicability of privileged contexts and disregarding the socio-economic disadvantages experienced by marginalised groups, particularly poor African, rural, and unmarried women.⁶²⁷ Additionally, the choice argument prioritises individual choice over broader social considerations, contrary to the historical imposition of legal obligations in family law. Furthermore, the argument's reliance on a binary "opt-in" model, assuming individuals do not desire marital benefits unless married, neglects the nuanced dynamics of real-life relationships and fails to account for the varied reasons and modes of unmarried partnerships in South Africa.⁶²⁸ By intentionally disregarding the complex realities of the lives of many South Africans, this choice model perpetuates the apartheid and colonial disadvantages faced by poor African, rural, and unmarried women, impacting their legal rights and obligations.⁶²⁹

An *ex lege* duty of support would afford the parties to a life partnership a sense of assurance, as they would not need to worry about encountering financial instability and destitution upon the termination of the relationship, particularly if they had been economically dependent on their partners throughout its duration. Such a legal stance can serve as an affirmation of the

⁶²² *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 165B-C.

⁶²³ Ibid.

⁶²⁴ Bonthuys ‘Developing law’ op cit note 215 at 14.

⁶²⁵ *Volks* supra note 7 para 54 – 60.

⁶²⁶ *Gory* supra note 48; *Bwanya* supra note 63.

⁶²⁷ Bonthuys ‘Developing law’ op cit note 215 at 27.

⁶²⁸ South African Law Reform Commission op cit note 1 at 19 – 24.

⁶²⁹ Bonthuys ‘Developing law’ op cit note 215 at 28.

status of permanent legal partnerships, deeming them worthy of recognition as legal valid relationships.

Additionally, an *ex lege* duty of support would send a message of acceptance and inclusion, contributing to the dismantling of stigma and discrimination against unmarried families. The divergence between family law and contract law highlights the distinction between status and agreement. In family law, many legal rights and obligations are assigned based on one's status as a spouse or child, irrespective of personal consent.⁶³⁰ Conversely, in contract law, rights and obligations stem from mutual agreement. Using contractual mechanisms introduces inconsistencies within family law, as the principles, rules, and methods of proof in commercial contracts often conflict with the foundational values of family law. This blend of status- and contract-based policies creates confusion and discrimination.⁶³¹

An *ex lege* duty of support for life partners (as created by way of statute, by incremental judicial decisions or even court-ordered at the separation of partners) would play a role in allowing permanent life partners the opportunity to progress towards the goal of comprehensive legal protections and benefits, ensuring that all couples regardless of their relationship status, are treated equally under the law.⁶³²

6.3.2. Other research-based recommendations

Next, this dissertation suggests the urgent enactment of a comprehensive domestic partnerships act. This act should not seek merely to replicate marriage but must craft a distinct legal regime that is responsive to the realities of diverse partnership arrangements.⁶³³ The research supports the inclusion of clear registration mechanisms while also offering default protections for unregistered but qualifying life partnerships, based on factual evidence of shared lives and mutual dependence. A rebuttable presumption of a duty of support after a reasonable period of cohabitation would greatly assist vulnerable partners and reduce the burden of proof currently required by courts as seen in Chapter 2.2.

Third, it is recommended that the judiciary be guided by a structured, flexible framework when assessing maintenance and support claims between life partners. Factors such as duration of cohabitation, financial interdependence, shared parenting responsibilities, and the intention to establish a permanent relationship should be considered holistically.⁶³⁴ Some of these factors mirror those considered by the court at Divorce as highlighted in Chapter 2.4.1. No single criterion should be decisive; rather, a contextual approach should be adopted. This dissertation contends that such a method would promote fairness and consistency, avoiding arbitrary distinctions between similarly situated partners.

⁶³⁰ Ibid at 13.

⁶³¹ Ibid.

⁶³² Viwe Didishe 'Legal recognition for non-nuclear families' (2012) 518 *DR* 26.

⁶³³ South African Law Reform Commission op cit note 1 at 6.

⁶³⁴ Property (Relationships) Act 1984 s 4(2); South African Law Reform Commission op cit note 1 at 304.

Fourth, this dissertation recommends the introduction of statutory provisions that allow life partners to claim proprietary relief upon separation, in a manner that mirrors the legal consequences of marriage in community of property. While the doctrine of universal partnership does offer a potential remedy for property division between life partners (as seen in Chapter 2.3.2), it remains an inadequate substitute for formal legal recognition. In order to succeed in a universal partnership claim, a partner must establish and prove the existence of a tacit agreement,⁶³⁵ demonstrate contribution towards a joint venture,⁶³⁶ and show that the relationship had the object of generating profit⁶³⁷ - requirements that may be difficult to evidence.⁶³⁸ Although courts have adopted a broad understanding of 'profit' to include the accumulation of shared domestic and economic benefits,⁶³⁹ this remedy nonetheless relies heavily on judicial discretion and may exclude many partners, particularly those engaged primarily in non-financial or caregiving roles. Moreover, the doctrine does not provide a statutory presumption of shared property, nor does it create an automatic entitlement akin to the equal division that applies to spouses on divorce. This dissertation therefore suggests that proprietary consequences should flow *ex lege* from a life partnership that meets certain criteria and not be left to uncertain common-law remedies. Doing so would provide greater certainty and protection to vulnerable partners - especially women - whose economic and non-economic contributions and dependence often go unrecognised in the absence of formal legal status.

In addition to proprietary relief, this dissertation recommends that life partners be afforded the right to claim maintenance from one another upon separation, identical to the relief available to divorced spouses under the section 7 of the Divorce Act.⁶⁴⁰ While the MSSA - as highlighted in *Bwanya*, now permits a surviving life partner to claim maintenance from a deceased partner's estate,⁶⁴¹ there remains a stark gap in protection where a life partnership ends through separation rather than death. At present, no statutory framework allows economically dependent partners to seek continued support following the breakdown of such a relationship, regardless of the duration or degree of interdependence involved. As seen in Chapter 2.5, the common law does not impose a post-separation duty of support between life partners, and courts have been unwilling to extend maintenance orders to these relationships in the absence of express statutory authority.⁶⁴² This omission disproportionately affects women, who often assume primary caregiving roles and may sacrifice earning potential during the course of the relationship.⁶⁴³ This dissertation therefore argues that legislative reform must go beyond existing frameworks and recognise an *ex lege* post-separation duty of support between life

⁶³⁵ Heaton & Kruger op cit note 5 at 258.

⁶³⁶ *Butters* supra note 61 para 31; *Cloete v Maritz* (6222/2010, 16433/2012 [2014] ZAWCHC 108 (13 June 2014) at paras 89–90.

⁶³⁷ *Ibid.*

⁶³⁸ *Khan v Shaik* [2020] ZASCA 108 (21 September) at para 8.

⁶³⁹ *Ibid* para 29.

⁶⁴⁰ Divorce Act s 7(2) allows the court the discretion to order a just maintenance arrangement.

⁶⁴¹ MSSA s 1.

⁶⁴² *EW* supra note 77.

⁶⁴³ *Sinclair & Heaton* op cit note 563 at 299: 'For deep-rooted social, religious and economic reasons and because women are unequally burdened with child-care responsibilities, they do not enjoy a capacity to earn that is equal to that of men. There are still many woman who have interrupted their careers or sacrificed them altogether to raise a family and who need post-divorce maintenance - temporary, rehabilitative maintenance if they are still young, permanent maintenance if they are not.'

partners who lived in a relationship of mutual dependence. Establishing a statutory right to claim maintenance would provide meaningful recourse to those left economically vulnerable at the end of a partnership and align the law more closely with constitutional values of dignity and substantive equality.

Finally, drawing from comparative foreign law and international human rights obligations, as is addressed in Chapter 3.1, it is suggested that South Africa should look towards jurisdictions such as Australia,⁶⁴⁴ England and Wales,⁶⁴⁵ which have implemented inclusive protections for life partners. The South African legislature must place more weight and emphasis on international instruments like the African Charter and the Protocol on the Rights of Women in Africa provide motivation for South Africa to ensure that all forms of family life receive equal legal respect and protection,⁶⁴⁶ without unjustified differentiation based on marital status.

As such, it is submitted that meaningful, rights-based reform cannot be deferred. This dissertation has shown that without decisive legislative intervention, life partners will continue to occupy a precarious legal position,⁶⁴⁷ undermining the constitutional commitments to equality, dignity, and social justice. South Africa has both the constitutional mandate and the comparative models available to design a more equitable future - one that recognises the full diversity of family life.

Ultimately, this dissertation recommends that the law must evolve to reflect the diversity and complexity of South African family life. Justice and equality cannot be achieved without a responsive legal framework that protects all intimate partners, regardless of marital status. The law must foster a more inclusive, equitable, and constitutionally sound system - one that meets the lived needs of the people it is meant to serve.

⁶⁴⁴ Family Law Act.

⁶⁴⁵ Civil Partnership Act.

⁶⁴⁶ *African Charter* supra note 271; *Women's Protocol* supra note 275; CEDAW supra note 274; ICCPR supra note 270.

⁶⁴⁷ *Volks* supra note 7 para 59.

CONCLUSION

This dissertation set out to examine the legal development of maintenance rights in the context of life partnerships in South Africa, with particular attention to the period following the termination of such relationships at separation. The study aimed to evaluate how the law has evolved in response to the realities of intimate unmarried partners, assess the adequacy of existing legal mechanisms, and propose recommendations for legislative reform grounded in constitutional values.

In answering the primary question - how the law of maintenance pertaining to the termination of unmarried life partnerships has developed - the research finds that progress has been modest, marked by significant judicial interventions rather than comprehensive legislative reform. Landmark cases such as *Volks v Robinson*⁶⁴⁸ and *Bwanya v Master of the High Court*⁶⁴⁹ have brought attention to the exclusion of life partners from key statutory protections, with *Bwanya* in particular expanding the scope of the Maintenance of Surviving Spouses Act to include surviving life partners.⁶⁵⁰ These judgments have slowly extended some maintenance rights to partners who were previously denied legal recourse, especially in cases involving death. However, the basis for these extensions remains ad hoc, primarily driven by constitutional considerations of equality and dignity, rather than a systematic redefinition of spousal-like relationships in law.

In exploring the legislative framework, the study finds that little has been enacted to concretely protect life partners whose relationships end in separation rather than death. Although universal partnerships and unjust enrichment claims offer some relief, they are dependent on litigation, evidentiary burdens,⁶⁵¹ and judicial discretion. No statutory maintenance duty arises by default between life partners on separation, unlike married spouses, whose entitlement to seek post-divorce maintenance arises from the Divorce Act⁶⁵². While life partners may, in principle, apply for maintenance under the Maintenance Act,⁶⁵³ this requires proof of an express or tacit contractual duty of support. This gap highlights a central inconsistency in the current legal landscape - that rights and duties which flow automatically from marriage remain inaccessible to many partners in long-term, marriage-like relationships, often to the detriment of economically dependent women.

The dissertation also examined how the duty to maintain is treated across different relationship forms. Civil marriages, customary marriages, and religious marriages benefit from varying degrees of statutory protection, while life partnerships remain largely excluded. The legal obligations of support and maintenance are inconsistently applied across relationship types, and no uniform principle exists to ensure equitable outcomes upon dissolution. These disparities cannot be justified on constitutional grounds. The unequal treatment of life partners

⁶⁴⁸ *Volks* supra note 7.

⁶⁴⁹ *Bwanya* supra note 63.

⁶⁵⁰ MSSA s 1; *Bwanya* supra note 63 para 137-138.

⁶⁵¹ *Butters* supra note 61 para 11.

⁶⁵² Divorce Act s 7.

⁶⁵³ Maintenance Act s 2(1).

undermines the principles of substantive equality and fails to acknowledge the lived realities of many South Africans who, for a variety of social, economic, and historical reasons, do not marry.⁶⁵⁴

In light of these findings, the dissertation identifies several key considerations for the development of a more inclusive and equitable legal framework. The law should move toward a model that recognises life partnerships as legitimate family forms capable of generating legal obligations, particularly in respect of maintenance and property. This includes transitioning from a purely contractual approach to one in which duties of support arise *ex lege* (by operation of law) where the relationship reflects long-term mutual dependence.⁶⁵⁵ Moreover, any future framework must acknowledge the socio-economic consequences of legal non-recognition, particularly for women whose financial contributions are often informal or non-monetary.⁶⁵⁶ Lessons from foreign jurisdictions and international human rights standards suggest that South Africa can develop a legal model that both protects autonomy and ensures fairness, by combining optional registration with default legal consequences for qualifying relationships.⁶⁵⁷

In conclusion, the current legal regime governing maintenance in life partnerships remains fragmented, inconsistent, and constitutionally uncompliant. While the courts have made important strides in extending certain rights, the law remains reactive and incomplete. This dissertation submits that legislative reform is not only necessary but constitutionally mandated. Until the rights and responsibilities within life partnerships are recognised and enforced with the same seriousness as those within marriage, the promise of equality,⁶⁵⁸ dignity,⁶⁵⁹ and social justice for all families in South Africa will remain unfulfilled.

⁶⁵⁴ Bonthuys 'Developing law' op cit note 215 at 27-28.

⁶⁵⁵ Domestic Partnership Bill supra note 86 clause 26(2) - (3).

⁶⁵⁶ South African Law Reform Commission op cit note 1 at 6; *EB* supra note 405 para 70, 88.

⁶⁵⁷ Goossens op cit note 219 at 3-4; Barlow op cit note 241 at 170.

⁶⁵⁸ The Constitution s 9.

⁶⁵⁹ *Ibid* s 10.

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