



The duty of support after life partnership termination: a common law development conundrum

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ABSTRACT

Millions of South Africans live in life-partnership arrangements, but there is a lack of formal legal protection for financially vulnerable individuals. Despite changes to marriage legislation since 1994, there are still gaps in the current legislation. The South African Law Reform Commission's (SALRC) plans to introduce a single piece of marriage legislation exclude the right to maintenance following the termination of heterosexual life partnerships, leading to legal uncertainty and potential discrimination. Heterosexual life partners are not eligible for the ancillary relief granted to married couples in divorce or the benefits available to surviving spouses when marriage ends due to death. This study examines the historical application of common law in life partnership cases, looks at the post-constitutional developments and the Department of Home Affairs and SALRC'S efforts to protect life partnerships. The study then analyses the findings and makes recommendations.

KEY WORDS: Heterosexual Life Partnership, Cohabitation, Maintenance, Duty of Support

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LIST OF ABBREVIATIONS

CILSA	Comparative and International Law Journal of Southern Africa
DHA	Department of Home Affairs
ISA	Intestate Succession Act 81 of 1987
MPA	Matrimonial Property Act 88 of 1984
MSSA	Maintenance of Surviving Spouse Act 27 of 1990
PER/PELJ	Potchefstroom Electronic Law Journal
RCMA	Recognition of Customary Marriages Act 120 of 1998
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
Stats SA	Statistics South Africa
STELL LR	Stellenbosch Law Review

CHAPTER 1: INTRODUCTION

1.1 Background

In recent years, marriage patterns and the structure of family units have changed in South Africa due to a decline in the number of marriages and the increase in instances of cohabitation.¹ According to Madzika,² there were around 2.3 million South Africans in domestic partnerships by 2001. By 2011 the figure had risen to 3 million.³ Statistics South Africa (Stats SA) published that 106 499 marriages were concluded in the year 2021 compared to 161 112 in 2012.⁴ On the other hand, divorces have increased by 13,1% since 2020.⁵ This decline in the number of marriages and the increase in instances of cohabitation has been attributed to economic factors, the HIV/AIDS epidemic, rural-urban migration, urbanisation, globalisation, and high dowry payments in black communities.⁶

Cohabitation as a form of living arrangement has been referred to by various terms, such as life partnerships, domestic partnerships, or simply living together.⁷ In law, two terms were mainly used to describe this type of relationship before the promulgation of the Civil Union Act 17 of 2006, namely domestic partnerships and life partnerships.⁸ In this study, , the term "life partnerships" is used to refer to partners living together by choice as a family in a marriage-type relationship.⁹ The focus on heterosexual life partners and not all life partners, is because unmarried same-sex couples find themselves in a more favourable legal position than their heterosexual counterparts.¹⁰

¹ Moore and Govender 2013 *Journal of Comparative Family Studies* 623.

² Madzika 2020 *De Jure* 396.

³ Madzika 2020 *De Jure* 396.

⁴ Statistical Release P0307 in P03072021 of 27 April 2023.

⁵ Statistical Release P0307 in P03072021 of 27 April 2023.

⁶ Moore and Govender 2013 *Journal of Comparative Family Studies* 623.

⁷ Heaton and Kruger *South African Family Law* 255. See also Smith B "The Dissolution of Life or Domestic Partnership" 393–395.

⁸ Coetzee, Bester and Louw 2014 *PELJ* 2951.

⁹ *EW v VH and Another (12272/2022) [2023] ZAWCHC 27* para 37 (hereafter the *EW v VH* case).

¹⁰ Smith 2016 *De Rebus*.

1.1.1 Current marriage framework

Historically, South African marriage law has been fragmented, resulting in legal confusion.¹¹ The existing legal system regulating marriages in South Africa is in need of more coherence, with separate statutes covering different forms of marriages.¹² In 2006 the SALRC¹³ reported on the lack of legal protection for life partners. In certain instances, the roles assumed within a life partnership result in one or both partners experiencing financial hardship upon the dissolution of the relationship.¹⁴ This problem led to the drafting of the Domestic Partnership Bill, which has not been successfully enacted.¹⁵

In an attempt to give legal protection to life partnerships, the SALRC¹⁶ drafted the Single Marriage Statute in 2021, a Bill that seeks to bring together all existing South African marriage laws into one document that also recognises life partnerships.¹⁷ Meanwhile, the Department of Home Affairs drafted the Draft Marriage Bill, 2022, which seeks to recognise all forms of intimate partnerships irrespective of gender, sexual orientation, or religious, cultural, and other beliefs. This Draft Bill is, however, silent on life partnerships.¹⁸

¹¹ Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa>.

¹² Oliphant 2021 *De Rebus*.

¹³ SALRC Project 118.

¹⁴ Barratt 2015 *STELL LR* 110.

¹⁵ Barratt 2015 *STELL LR* 110.

¹⁶ SALRC Project 144. Released in January 2021, discussion paper 152 (project 144) – the Single Marriage Statute.

¹⁷ Osman 2021 *PELJ* 13. Discussion paper 152 on a single marriage statute (project 144). The Single Marriage Statute would enable South Africans of various religious and cultural persuasions to conclude legal marriages that will correspond with the idea of equality as reflected in the Republic of South Africa's Constitution. See also Burnett Attorneys & Notaries 2024 <https://www.burnett-law.co.za/the-new-marriage-law-in-south-africa/>.

¹⁸ The Conversation 2023 <https://theconversation.com/south-africas-new-marriage-bill-raises-many-thorny-issues-a-balancing-act-is-needed-210343>. See also Draft Marriage Bill in GG 48914 of 7 July 2023. The Draft Marriage Bill of 2022, despite acknowledging its importance, lacks a mention of life partnerships due to the contentious nature of formally recognizing such partnerships. Critics argue this legislative avoidance delays resolution of legal concerns, such as inheritance, maintenance, and property rights.

1.1.1.1 Types of marriages

The proposed legislation aims to unify these existing laws; the *Marriage Act*,¹⁹ the *Civil Union Act*²⁰ and the *Recognition of Customary Marriages Act*.²¹ These legislations are briefly discussed below.

1.1.1.1.1 The Marriage Act²²

The *Marriage Act*, initially enacted in 1961, involves the legal criteria and processes for monogamous marriages between opposite-sex partners in South Africa.²³ It addresses the prerequisites for marriage, such as age, consent, and solemnisation.²⁴ The Act does not define marriage, but is based on the historical Western Judeo-Christian understanding of marriage as "the union of one man with one woman, to the exclusion of all others, while it lasts."²⁵ For a union to be recognised under this act, monogamous marriages must under this statute be registered with the Department of Home Affairs for legal recognition.²⁶

It is important to note that before 1988, civil marriages concluded by black people were governed by section 22(6) of the *Black Administration Act*,²⁷ exempting profit and loss.²⁸ To be married in community of property, couples had to declare this

¹⁹ 25 of 1961.

²⁰ 17 of 2006.

²¹ 120 of 1998. (Hereafter the *RCMA*).

²² 25 of 1961.

²³ Osman 2020 *IJLP* 274.

²⁴ *Marriage Act* 25 of 1961 sections 5, 24, 25, and 27. See Heaton and Kruger *South African Family Law* 30–32 and Burnett Attorneys & Notaries 2024 <https://www.burnett-law.co.za/the-new-marriage-law-in-south-africa>.

²⁵ Osman 2020 *IJLP* 274. The definition clearly precludes same-sex and polygamous marriages from recognition. Section 30(1) of the *Marriage Act* has a default marriage formula that asks couples if they accept each other as their lawful husband or wife. The approach is gender-specific and does not allow for same-sex marriages.

²⁶ Heaton and Kruger *South African Family Law* 32. See also Burnett Attorneys & Notaries 2024 <https://www.burnett-law.co.za/the-new-marriage-law-in-south-africa>.

²⁷ 38 of 1927.

²⁸ Ncityana *The default matrimonial property system that applies to civil marriages concluded between black persons in South Africa* 51. In the case of *Molefe v Molefe (Ex parte Minister of Native Affairs: In re Molefe v Molefe* 1946 AD 315), section 22(6) of the *Black Administration Act* was construed to suggest that any marriage between black people without an antenuptial contract would be out of community of property, with the husband retaining marital authority (which existed at the time). See also *EB v ER* case para 6.

jointly before a magistrate, native commissioner, or marriage officer.²⁹ Section 22(6) was repealed in 1988, allowing black marriages to be automatically in community of property.³⁰

1.1.1.1.2 The Civil Union Act³¹

As a result of the constitutional prohibition on discrimination based on sexual orientation, the *Civil Union Act* was enacted in 2006.³² This was a watershed moment in South African legislation, legalising same-sex marriages and civil partnerships. This legislation permits couples, regardless of sexual orientation, to form civil unions or partnerships, giving them the same legal rights and protections as heterosexual married couples.³³ Couples who want a civil union can choose between civil marriage and civil partnership, giving them more flexibility while ensuring equal legal treatment.³⁴ Smith and Robinson³⁵ contend that the distinction between a civil union and a civil marriage is semantic, as civil unions have the same legal status and effects under the *Marriage Act*.³⁶ As such, they challenge the need for two marital regimes based on sexual orientation, particularly given that section 31 of the *Marriage Act* and the common law concept of marriage have been declared unconstitutional.³⁷

²⁹ Section 22(6) *Black Administration Act* 38 of 1927.

³⁰ West and Bekker 2012 *Obiter* 352. All civil marriages in South Africa were treated equally, and the *Matrimonial Property Act* (88 of 1984) was made applicable to black marriages, taking effect on December 2, 1988. Marriages concluded on or after December 2, 1988, were automatically in community of property unless an antenuptial contract was concluded and registered in the deeds registry within three months of the completion.

³¹ 17 of 2006.

³² Osman 2020 *IJLP* 275. Such discrimination is presumed unfair unless proved otherwise as stated in ss 9(3), (4), and (5) of the *Constitution of the Republic of South Africa*, 1996.

³³ Heaton and Kruger *South African Family Law* 205. See also Burnett Attorneys & Notaries 2024 <https://www.burnett-law.co.za/the-new-marriage-law-in-south-africa>.

³⁴ Heaton and Kruger *South African Family Law* 205. See also Burnett Attorneys & Notaries 2024 <https://www.burnett-law.co.za/the-new-marriage-law-in-south-africa/>.

³⁵ Smith and Robinson 2010 *PELJ* 29.

³⁶ Osman 2020 *IJLP* 276. See also s 13 of the *Civil Union Act*.

³⁷ Osman 2020 *IJLP* 276. Osman states that the non-recognition of same-sex marriages resulted in the Fourie ruling, which deemed the definition of marriage and section 31 of the *Marriage Act* illegal. The *Civil Union Act* was enacted to remedy the unconstitutionality by allowing same-sex couples to marry. See Osman 2020 *IJLP* 275.

South Africa currently acknowledges same-sex unions as an "alternative marriage" that provides the same status and protection but under a different legislative scheme. As a result, there have been arguments that this discriminatory treatment between same-sex and opposite-sex couples is a "separate and unequal" regime, where heterosexual couples are referred to as "special" or "superior" to homosexual couples.³⁸ While this recognition is an achievement on the African continent and the world at large, it has been argued that it should be seen as a starting point rather than an end in itself, as it perpetuates discriminatory treatment between same-sex and opposite-sex couples.³⁹

1.1.1.1.3 The Recognition of Customary Marriages Act⁴⁰ (RCMA)

South African law acknowledges the validity of customary marriages under the *Recognition of Customary Marriages Act* (hereinafter *RCMA*), which was enacted in 1998, addressing years of non-recognition and the negative consequences, particularly for women.⁴¹ This legislation seeks to safeguard the rights of persons in customary marriages by guaranteeing legal recognition and access to marital benefits and protections.⁴² The Act outlines three requirements for a valid customary marriage: parties must be over 18, consent to marry according to customary law, and the marriage must be negotiated, entered into, or celebrated in accordance with customary law.⁴³ It further recognises both monogamous and polygynous marriages, but excludes cohabitation.⁴⁴ However, this recognition has been problematic in practice⁴⁵ because each of these laws covers various aspects of marriage in South African culture, reflecting the country's diverse cultural, religious,

³⁸ Osman 2020 *IJLP* 276.

³⁹ Osman 2020 *IJLP* 276.

⁴⁰ 120 of 1998.

⁴¹ Osman 2020 *IJLP* 276. See s 2 of the *RCMA*.

⁴² Madzika 2020 *De Jure* 393, the *RCMA* afford women in customary marriages the same protection as those in civil marriages. See also Burnett Attorneys & Notaries 2024 <https://www.burnett-law.co.za/the-new-marriage-law-in-south-africa/>.

⁴³ Osman 2020 *IJLP* 276. See s 3(1) of the *RCMA*.

⁴⁴ Heaton and Kruger *South African Family Law* 217. Section 2 of the *RCMA* recognise both monogamous and de facto polygynous customary marriages. See also Mashinini 2021 *De Rebus*.

⁴⁵ Osman 2020 *IJLP* 276.

and social terrain.⁴⁶ Therefore, the fragmentation of these regulations has resulted in discrepancies and inequities in the legal recognition of marriages.⁴⁷

1.1.1.2 Legal consequences

1.1.1.2.1 Civil marriages

The current framework of marriage as briefly discussed above has the following basic consequences: Firstly, the matrimonial property system in South Africa comprises of two main types of marriages, in community of property and out of community of property.⁴⁸ By default, a marriage is in community of property if no antenuptial contract is not in place providing otherwise, so marriage *ex lege* establishes a community of property, profit, and loss (*communio bonorum*).⁴⁹ The joint estate includes both the partners' pre-marital assets and any assets acquired after the marriage.⁵⁰ Upon dissolution of marriage by divorce, the divorce orders for marriages in community of property immediately divide the joint estate,⁵¹ which is a protection that life partnerships do not have. On the other hand, dissolution by death of a spouse in a community of property marriage terminates both the marriage and joint estate, eliminating the need for court order and removing spousal consent requirements from the Matrimonial Property Act.⁵²

The latter is marriage out of community of property, in which both spouses retain separate property and manage their own property independently during the

⁴⁶ Moore and Himonga 2018 *Children, Families and the State* 61 – 62. Iya 1998 *CILSA* 240 – 242. See also Burnett Attorneys & Notaries 2024 <https://www.burnett-law.co.za/the-new-marriage-law-in-south-africa/>.

⁴⁷ Moore and Himonga 2018 *Children, Families and the State* 61 – 62. Iya 1998 *CILSA* 240 – 242. See also Burnett Attorneys & Notaries 2024 <https://www.burnett-law.co.za/the-new-marriage-law-in-south-africa/>.

⁴⁸ Robinson 2007 *PER* 3. See Heaton and Kruger *South African Family Law* 63.

⁴⁹ Robinson 2007 *PER* 3. Community of property comes into being by operation of law as soon as the marriage is solemnised (meaning the default matrimonial property regime for all three types of marriage is in community of property). See Heaton and Kruger *South African Family Law* 63 and Monareng 2023 *De Jure* 77.

⁵⁰ Heaton and Kruger *South African Family Law* 63.

⁵¹ Heaton and Kruger *South African Family Law* 130. If the couples cannot reach an agreement on how to split the estate in terms of s 7 of the *Divorce Act*, then the court may either order the division that it considers reasonable or appoint a liquidator (or receiver) to divide the joint estate.

⁵² Heaton and Kruger *South African Family Law* 115.

marriage.⁵³ This system excludes community of property and allows for valid antenuptial contracts before marriage.⁵⁴ Assets acquired after marriage fall into the spouses' separate estates.⁵⁵ Marriages out of community of property may be concluded with or without accrual.⁵⁶ The accrual system was introduced to address inequity in divorce laws. It allowed spouses who married subject to complete separation of property to share in the other spouse's assets.⁵⁷ Section 3(1) of the *Matrimonial Property Act*⁵⁸ allows a spouse with smaller or no accrual estate to claim half the difference between their respective estates upon dissolution. In *EB v ER*⁵⁹ it was found that a spouse who married out of community of property without accrual can get a redistribution order to transfer assets from one spouse's estate to the other upon divorce or death.⁶⁰

In terms of section 7(3) to (6) of the *Divorce Act*, the courts are empowered to transfer assets to the other spouse if deemed just.⁶¹ This introduced the concept of redistribution of assets upon divorce, aiming to remedy inequity caused by the law's failure to recognise a spouse's right to adjust a disparity between their assets. This discretion has since been extended to all customary marriages terminated by divorce.⁶² Antenuptial contracts are not terminated by the death of either spouse, therefore the outstanding marriage settlements and agreements concerning the devolution of an estate should still be implemented.⁶³

⁵³ Robinson 2007 *PER* 6. May be with or without the accrual system, see Heaton and Kruger *South African Family Law* 91 – 101.

⁵⁴ Robinson 2007 *PER* 6.

⁵⁵ Robinson 2007 *PER* 6. In contrast to marriage in community of property, spouses who marry out of community of property are often co-owners of property obtained together. Each person retains full power to act in relation to his or her own estate, and spouses may contract separately.

⁵⁶ Heaton and Kruger *South African Family Law* 90 – 92. Accrual is a method of ensuring that both spouses in a marriage receive an equitable part of the estate when the marriage ends, when concluded without accrual, there is no sharing of assets.

⁵⁷ Heaton and Kruger *South African Family Law* 138.

⁵⁸ 88 of 1984.

⁵⁹ 2024 1 BCLR 16 (CC). (Hereafter *EB v ER* case).

⁶⁰ *EB v ER* case para 148.

⁶¹ Heaton and Kruger *South African Family Law* 138.

⁶² Heaton and Kruger *South African Family Law* 138.

⁶³ Heaton and Kruger *South African Family Law* 116.

When a marriage ends, the common-law responsibility of support between spouses ceases.⁶⁴ However, upon divorce, a new responsibility of support may arise in one of two ways; the parties may agree that one of them will pay maintenance to the other, or the court may order maintenance of one party by the other in terms of section 7 of the *Divorce Act*.⁶⁵

Civil marriages are also subject to forfeiture of benefits. The entire aim of forfeiture of patrimonial advantages is to guarantee that a person does not benefit from a marriage that he or she has destroyed.⁶⁶ Section 9(1) of the *Divorce Act* states that an order for forfeiture of benefits can only be given if the court determines that the absence of the order will unfairly advantage one spouse over the other.⁶⁷ Forfeiture of benefits does not imply that a spouse loses his or her own assets, it simply means that the spouse loses their entitlement to the financial gains earned by the other spouse.⁶⁸

1.1.1.2.2 Civil Unions

As stated above, the *Civil Union Act*⁶⁹ allows same-sex and opposite-sex couples to formalise their relationships through marriage or civil partnership.⁷⁰ Both options have the same legal recognition and consequences as a civil marriage under the *Marriage Act*.⁷¹

1.1.1.2.3 Customary Marriages

Divorce in a customary marriage has similar financial effects as in a civil marriage and civil union.⁷² Section 8(4)(a) of the *RCMA*⁷³ grants the court⁷⁴ that dissolves a

⁶⁴ Heaton and Kruger *South African Family Law* 157.

⁶⁵ 70 of 1979. Heaton and Kruger *South African Family Law* 157.

⁶⁶ Sibisi 2022 *PER* 7.

⁶⁷ Heaton and Kruger *South African Family Law* 135.

⁶⁸ Heaton and Kruger *South African Family Law* 136.

⁶⁹ 17 of 2006.

⁷⁰ S 1 definition of 'civil union' *Civil Union Act* 17 of 2006. See Lekhuleni *The Constitutionality of the Civil Union Act 17 Of 2006* 6.

⁷¹ s 13 of the *Civil Union Act* 17 of 2006.

⁷² Heaton and Kruger *South African Family Law* 229 – 230.

⁷³ 120 of 1998.

⁷⁴ Heaton and Kruger *South African Family Law* 229 – 230.

customary marriage the powers contemplated in sections 7, 8, 9, and 10 of the *Divorce Act*.⁷⁵ Thus, the court can make an order in line with the provisions.⁷⁶

Section 8(4)(b) of the *RCMA* allows the court to make a redistribution order for the dissolution of a polygynous customary marriage.⁷⁷ The court, when dissolving a customary marriage, must consider all relevant factors and make an equitable order.⁷⁸

When it comes to pension interest, many views have been raised, but the court's decision in *Gumede v President of the Republic of South Africa*⁷⁹ suggests that excluding pension interests from this scope would be unjustifiable and unconstitutional.⁸⁰

In respect of maintenance after divorce, the *RCMA* mandates courts to consider customary law provisions, such as payment of *lobolo* and *isondlo*, in maintenance arrangements.⁸¹

Looking at the maintenance of a surviving spouse in *Hassam v Jacobs*,⁸² the court ruled that the *MSSA* can apply to multiple surviving spouses without straining its language.⁸³ Therefore, in a customary marriage, a surviving spouse can claim their deceased spouse's estate for reasonable maintenance needs until death or remarriage.⁸⁴ In polygynous marriages, multiple wives determine each wife's maintenance needs. If maintenance claims compete and resources are insufficient, the needs are reduced proportionately.⁸⁵

⁷⁵ 70 of 1979. Heaton and Kruger *South African Family Law* 229 – 230.

⁷⁶ Heaton and Kruger *South African Family Law* 229 – 230.

⁷⁷ Heaton and Kruger *South African Family Law* 231.

⁷⁸ Heaton and Kruger *South African Family Law* 231.

⁷⁹ 2009 (3) BCLR 24 (CC), 2009 (3) SA 152 (CC).

⁸⁰ Heaton and Kruger *South African Family Law* 231.

⁸¹ Heaton and Kruger *South African Family Law* 231.

⁸² [2008] 4 All SA 350 (C).

⁸³ Heaton and Kruger *South African Family Law* 234.

⁸⁴ Heaton and Kruger *South African Family Law* 234.

⁸⁵ Heaton and Kruger *South African Family Law* 234.

1.1.1.3 The difference between marriage and life partnerships

Life partnerships do not have the same legal consequences as a marriage.⁸⁶ One of the legal consequences of a marriage is the reciprocal duty to spousal support that stems from the *consortium omnis vitae* between the spouses.⁸⁷ This duty is carried over after the death of one of the spouses and can be extended after the dissolution of a marriage through divorce.⁸⁸ It is important to note that although the partners in a life partnership may support each other during their relationship, the legal maintenance duty is limited, resulting in a lack of protection for life partnerships.⁸⁹ Life partners do not have the basic legal consequences of sharing the joint estate upon breakup like spouses in community of property.⁹⁰

Heaton and Kruger⁹¹ point out that life partners can use ordinary legal rules and remedies to safeguard their interests, such as contracts and wills.

The reason for the different legal rules when it comes to marriages and life partnership in South Africa is historical. Traditionally, marriage was regarded as a social institution worthy of legal protection as it was perceived to provide a better setting for raising children.⁹² Before the enactment of the *Constitution of South Africa* 108 of 1996 (hereinafter *Constitution*),⁹³ the legal position was that if the parties choose to marry, there is an automatic right to maintenance on the dissolution of the marriage, but if the parties choose to live in a civil partnership,

⁸⁶ Heaton and Kruger *South African Family Law* 255.

⁸⁷ Bonthuys 2018 *PELJ* 2. See also Monareng 2023 *De Jure* 77. Monareng states that another benefit that is not available to life partnerships is the division of assets according to the chosen matrimonial systems.

⁸⁸ Bonthuys 2018 *PELJ* 2. Additionally, according to Bonthuys, unless a court ruling at divorce extends it, the duty lasts for the duration of the marriage. According to the *MSSA*, this obligation may also be extended to the estate of a deceased spouse. In the event that a third party caused the death of one spouse, they will be held legally responsible for compensating the surviving spouse for the loss of support.

⁸⁹ Bonthuys 2018 *PELJ* 2.

⁹⁰ Madzika 2020 *De Jure* 397. In *Butters v Mncora*, the court established the criteria to be demonstrated if partners meant to divide assets in terms of a tacit universal partnership.

⁹¹ Heaton and Kruger *South African Family Law* 255. See also Smith and Robinson 2010 *PELJ* 39. Smith and Robinson argue that couples in life partnerships can only rely on the "ordinary rules and remedies of the law," which includes the law of contract, estoppel, and unjustified enrichment.

⁹² Madzika 2020 *De Jure* 397; *Volks v Robinson and Others* 2005 5 BCLR 446 (CC) para 154 (hereafter *Volks case*).

⁹³ *Constitution of the Republic of South Africa*, 1996.

there is no such automatic right to maintenance on the dissolution of the life partnership.⁹⁴ The common law did not recognise duties of support.⁹⁵

Two paths of the development of the rights of life partnerships are noteworthy: firstly, certain statutes gave cohabiting opposite-sex partners some spousal benefits,⁹⁶ even pre-*Constitution*;⁹⁷ and secondly, the courts extended spousal benefits to same-sex partners.⁹⁸

In *Volks NO v Robinson*, the Constitutional Court confirmed the differentiation between spouses and life partners as constitutional.⁹⁹ In the same majority judgement,¹⁰⁰ the Constitutional Court stopped the judicial extension of automatic matrimonial rights to opposite-sex life partners.¹⁰¹ Skweyiya J¹⁰² in the majority judgement stated that differentiation regarding maintenance as set out in the *Maintenance of Surviving Spouses Act*¹⁰³ does not constitute unfair discrimination and does not infringe on the dignity of a surviving partner of life partnerships, consequently confirming the common law principle.

⁹⁴ Madzika 2020 *De Jure* 397; *Volks* case para 154.

⁹⁵ Bonthuys 2018 *PELJ* 10.

⁹⁶ Heaton and Kruger *South African Family Law* 255. See also Mamashela and Carnelley 2006 *Obiter* 388. According to Mamashela and Carnelley, some laws treat spouses, same-sex partners, and heterosexual life partners equally. These laws include the *Estate Duty Act* 45 of 1955, the *Pension Funds Act* 24 of 1956, the *Maintenance Act* 99 of 1998, the Judges' Remuneration and *Conditions of Employment Act* 47 of 2001, the *Medical Schemes Act* 131 of 1998, and the *Immigration Act* 13 of 2002.

⁹⁷ *Constitution of the Republic of South Africa*, 1996. See also Bonthuys 2018 *PELJ* 12. Bonthuys states that legislation had already granted unmarried opposite-sex partners legal rights and obligations prior to the Constitution's adoption. The extension of legal rights to same-sex partners was followed by additional legislative revisions.

⁹⁸ Heaton and Kruger *South African Family Law* 255. See also Smith 2016 *De Rebus* <https://www.derebus.org.za/unmarried-sex-couples-favourable-legal-position-heterosexual-counterparts/>. Smith points out that same-sex unmarried couples are still in a better legal position than their heterosexual counterparts. The fact that unmarried same-sex couples still have the right to mutual intestate succession rights, but their heterosexual counterparts do not, is a common illustration of a significant contradiction that still exists.

⁹⁹ Madzika 2020 *De Jure* 397; *Volks* case para 154. *Volks* is discussed in Chapter 3.

¹⁰⁰ *Volks* case para 154.

¹⁰¹ Smith 2010 *PELJ* 238.

¹⁰² *Volks* case para 68.

¹⁰³ *Maintenance of Surviving Spouse Act* 27 of 1990 (Hereafter *MSSA*).

In 2022, however, the same court in *Bwanya v The Master*¹⁰⁴ granted opposite-sex partners inheritance rights¹⁰⁵ in terms of the Intestate Succession Act.¹⁰⁶ This in effect overruled the *Volks* ruling on the Maintenance of Surviving Spouse Act and acknowledged that the reciprocal duty of support could be founded on an agreement rather than being an invariable result of marriage.¹⁰⁷ This is striking because *Volks v Robinson* is widely seen as blocking unmarried couples for "good reason" based on the choice argument.¹⁰⁸

It is apparent that a lack of protection based on the choice not to marry is no longer sustainable as society is constantly changing. This argument is supported by the statutory protection already present in legislation, the legal developments in the *Laubscher case* regarding same-sex partners, and the ruling on Islamic polygamous marriages in *Hassam v Jacobs*.¹⁰⁹ The courts have endeavoured to tackle contemporary trends with traditional remedies.¹¹⁰

1.1.2 Call for development

The call for further change is highlighted by Willie J in the dissenting judgment in *EW v VH and Another*.¹¹¹ He advocates for the development of common law to recognise a legal duty of support between life partners during the life partnership and after its termination:

"It is no longer appropriate to distinguish between reciprocal support duties that arise by autonomic operation of law as an invariable consequence of marriage and support duties that arise in the context of permanent life partners. It must be that permanent life partnerships deserve some constitutional and legal protection. As the common law does not currently recognize such a legal duty between life partners, such lack of recognition is unconstitutional as it discriminates on the grounds of marital status and thus is constitutionally offensive."¹¹²

¹⁰⁴ *Bwanya v The Master* 2022 (3) SA 250 (CC) (Hereafter the *Bwanya case*). *Bwanya* is discussed in Chapter 3.

¹⁰⁵ Osman 2021 *SALJ* 527.

¹⁰⁶ 81 of 1987 (Hereafter *ISA*).

¹⁰⁷ Barratt 2022 *PELJ* 8.

¹⁰⁸ Osman 2021 *SALJ* 527. Both the *Volks* case and the *Bwanya* case are discussed in Chapter 3.

¹⁰⁹ Madzika 2020 *De Jure* 395.

¹¹⁰ Madzika 2020 *De Jure* 395 – 396.

¹¹¹ *EW v VH* case para 88 & 89.

¹¹² *EW v VH* case para 88 & 89.

In this matter, the applicant not only sought maintenance from the defendant after the dissolution of their relationship,¹¹³ but she also wanted the court to:

"...develop the common law in a manner that promotes the spirit, purport, and objects of the Bill of Rights by recognising an *ex lege* duty of support for unmarried opposite-sex permanent life partners."¹¹⁴

The court dismissed the application, stating that a permanent life partnership cannot be put on the same footing as a marriage, because in a romantic life partnership, the partners undertake a duty of reciprocal support in the familial situation.¹¹⁵ In the majority judgement, the court argued that there was no need to develop common law¹¹⁶ because the *Bwanya case* had already done so. I submit that there should be legislative intervention by enacting legislation that affords heterosexual life partnerships recognition and protection. Such protection should include the right to claim maintenance from their deceased partner's estate and duty to support following the termination of the life partnership. Apart from the developments in the courts, legislative developments to protect permanent heterosexual life partners have been slow.

As stated above, courts have put forward the choice argument, stating that when couples in life partnerships choose not to get married, they accept that they will be excluded from the legal responsibilities and entitlements attached to a marriage.¹¹⁷ They should therefore bear such consequences. This argument speaks to freedom of choice, and Coetzee et al.¹¹⁸ state that this argument "is as a result of an explicit or positive choice." The choice argument assesses the availability of choice for couples by examining the presence or absence of an absolute legal impediment to marriage.¹¹⁹ It disregards subjective circumstantial impediments, such as economic or social hardship, as it focuses on the presence of an absolute legal impediment to

¹¹³ *EW v VH* case para 2.

¹¹⁴ *EW v VH* case para 2.

¹¹⁵ *Businesstech* 2023 <https://businesstech.co.za/news/lifestyle/676003/new-case-relating-to-life-partnerships-in-south-africa/>.

¹¹⁶ *EW v VH* case para 36.

¹¹⁷ Coetzee Bester and Louw 2015 *PER* 2953. See *Volks* case para 154.

¹¹⁸ Coetzee Bester and Louw 2015 *PER* 2953.

¹¹⁹ Coetzee Bester and Louw 2015 *PER* 2953.

marriage,¹²⁰ which makes it unsuitable for application.¹²¹ The potential harm of the focus on choice here, as well as the specific interpretation of choice, is not limited to the *Volks case* context.¹²² Feminist studies argue that choice is frequently invoked in legal systems to legitimise discriminatory legal restrictions by suggesting that women "choose" to be exposed to negative repercussions.¹²³ This understanding is based on two liberal thought mechanisms: the concept of an ideal legal subject acting autonomously and rationally, and the public/private dichotomy, which categorises certain socioeconomic realities, such as family and intimate relationships, as exempt from legal intervention.¹²⁴ The choice argument should therefore be discarded because it ignores the circumstances in which the decision is made, considering solely an objective legal barrier to marriage.¹²⁵ This argument also disregards the individual autonomy of both partners in a life partnership.¹²⁶ The choice argument also fails to distinguish between informed and ignorant choices.¹²⁷

The Constitutional Court has emphasised the significance of establishing a legislative framework to guarantee that economically weak spouses are not "unfairly taken advantage of."¹²⁸ A family law system that permits one partner to take undue advantage of the other appears to violate the broader objectives of equality and

¹²⁰ Coetzee Bester and Louw 2015 *PER* 2953.

¹²¹ The freedom of choice argument is insufficient to assess the legal status of cohabiting couples as it ignores subjective barriers such as poverty, cultural norms or systemic exclusion. In South Africa, for example, couples who have been living together for a long time and come from economically disadvantaged backgrounds live together without formalizing their relationship due to financial reasons, distrust of the legal system or customary law. This can lead to one partner losing their right to inheritance, spousal support or property rights.

¹²² Bonthuys and Coetzee 2023 *Stell LR* 195.

¹²³ Bonthuys and Coetzee 2023 *Stell LR* 195.

¹²⁴ Bonthuys and Coetzee 2023 *Stell LR* 195.

¹²⁵ Coetzee Bester and Louw 2015 *PER* 2956. For some couples, social and economic challenges might be so intense that their power to choose becomes worthless. See Schäfer 2006 *SALJ* 641. Also see *Volks case* para 162. Using such a decontextualised approach to choice would undoubtedly result in very unfair anomalies.

¹²⁶ Coetzee Bester and Louw 2015 *PER* 2957. Lind 2005 *Acta Juridica* 123 states that it seems as though the law gives effect to the autonomy of only the more powerful partner in the relationship.

¹²⁷ Coetzee Bester and Louw 2015 *PER* 2957. However, the argument does not account for choices made in ignorance or error. The choice argument presupposes that the choice reflects the parties' intentions. Partners may not be in control of their life, or incorrectly assume they are entitled to spousal benefits due to a "common law marriage." See Schäfer 2006 *SALJ* 642, Bonthuys 2004 *SALJ* 895, and Sinclair *Law of Marriage* 273.

¹²⁸ Barratt 2015 *STELL LR* 112 – 113. The same should be applicable to women in heterosexual life partnerships.

justice that the legal system is intended to foster.¹²⁹ The state and family law system have a responsibility "to protect the vulnerable and weak in society."¹³⁰

In the *EB v ER* case, the court quoted Prof Bonthuys and Dr Coetzee and stated that the legal system fails to address the exploitation of women's care and domestic labour, often to the advantage of men, due to the lack of an equitable division of assets after marriage dissolution.¹³¹ Women are often financially worse off than their male partners, and when the law binds couples to their marriage contracts without giving courts the discretion to make adjustments, it often disadvantages women.¹³² This system devalues care labour and keeps women financially dependent on their husbands, while protecting the interests of wealthier spouses by not requiring them to share with their spouses.¹³³ This results in a system that disadvantages women and perpetuates the inequality between men and women.¹³⁴ This should also apply to women in heterosexual life partnerships as they are left destitute after the termination of their partnership.¹³⁵ They are the most affected group when it comes to the dissolution of intimate relationships.¹³⁶

This was also the stance of the Constitutional Court in the *Bwanya* case, where the court found that traditionally, women are the ones who suffer after years of dedication and support for the livelihood of a permanent life partnership, as they are left with nothing.¹³⁷

In *Volks NO v Robinson*, Sachs J emphasised that achieving substantive equality requires addressing gender inequality in the law.¹³⁸ He argued that the

¹²⁹ Barratt 2015 *STELL LR* 113.

¹³⁰ Barratt 2015 *STELL LR* 113.

¹³¹ *EB v ER* case para 123.

¹³² *EB v ER* case para 123.

¹³³ *EB v ER* case para 123.

¹³⁴ *EB v ER* case para 123.

¹³⁵ Madzika 2020 *De Jure* 404.

¹³⁶ Madzika 2020 *De Jure* 404.

¹³⁷ *Bwanya* case para 171. Madzika 2020 *De Jure* 403.

¹³⁸ Bonthuys and Coetzee 2023 *Stell LR* 194.

discriminatory effects of the legislation¹³⁹ should be considered, considering gendered poverty and disadvantage as an intrinsic part of the interpretive enquiry.¹⁴⁰

1.2 Research question

The study aims to answer the following research question: Should common law be developed to include an automatic duty of support for heterosexual life partners after termination of the life partnership to promote the spirit, purport, and objectives of the *Constitution*?¹⁴¹

The main aim of the study is to determine whether common law should be developed to include an automatic duty of support for heterosexual life partners after termination of the life partnership to promote the spirit, purport, and objectives of the *Constitution*. In order to do so, the objectives are:

1. To discuss the pre-constitutional position on heterosexual partnerships and examine the application of common law in life partnership cases;
2. To evaluate the post-constitutional developments to determine whether the courts promote the spirit, purport, and objects of the Bill of Rights when applying the common law to heterosexual life partnerships cases, taking into consideration the judgements in the *Volks* case, the *Bwanyana* case, the *VH v EW* case, and others;
3. To review the legislative development by scrutinising the efforts of the SALRC in developing legislation that will afford heterosexual life partners legal protection following the termination of the relationship; and
4. Make recommendations on how the legislator can grant heterosexual partners the same legal protection as other forms of intimate relationships in order to solve the problem of discrimination on the basis of marital status.

¹³⁹ He was referring section 7(3) of the *Divorce Act*.

¹⁴⁰ Bonthuys and Coetzee 2023 *Stell LR* 194.

¹⁴¹ *Constitution of the Republic of South Africa*, 1996.

This study was conducted by means of a literature review. Both primary sources and secondary sources were reviewed. The primary sources consist of legislation and case law. The secondary sources included textbooks, journal articles, academic publications, theses, newspaper articles, and South African Law Reform Commission papers.

1.3 Framework of the study

The remainder of this study is structured as follows: Chapter 2 discusses the pre-constitutional position on heterosexual partnerships and examines the application of common law in life partnership cases.

Post-constitutional developments are discussed in Chapter 3. The study considers that the *Bwanya* and *Volks* cases have provided opposite-sex permanent life partners with some legal protection, although this legal protection is not adequate. Heterosexual life partners still do not enjoy the same benefits that other intimate partners enjoy, despite the increase in the number of life partnerships in South Africa.¹⁴²

Chapter 4 focuses on legislative development – new proposals. The SALRC has drafted the Single Marriage Statute, a bill that seeks to combine all existing South African marriage laws in one document that also recognises life partnerships.¹⁴³ However, the bill still does not recognise domestic partnerships such as cohabitation. This still leaves intimate heterosexual life partners with legal uncertainty when it comes to claiming maintenance at the dissolution of the partnership. As a result of the legal uncertainty, the legislation will be challenged as discriminatory.¹⁴⁴

Chapter 5 provides concluding remarks and recommendations with respect to the research question.

¹⁴² Madzika 2020 *De Jure* 395–396.

¹⁴³ Osman 2021 *PELJ* 13.

¹⁴⁴ The Conversation 2023 <https://theconversation.com/south-africas-new-marriage-bill-raises-many-thorny-issues-a-balancing-act-is-needed-210343>.

CHAPTER 2: HISTORICAL DEVELOPMENT

2.1 Introduction

Chapter 1 outlined the background to the study, taking into account the current framework for marriage, the various legislation regulating marriage in South Africa, and the basic consequences of the different marriages available. The discussion highlighted that marriages and life partnerships do not have the same consequences. It examined the reason for a call to develop marriage law, looking at gender issues, the SALRC proposals, as well as the Draft Marriage Bill.

The purpose of this chapter is to discuss the pre-constitutional position on heterosexual partnerships by examining the historical overview of marriage and looking at how life partnerships emerged in South Africa. The chapter further looks at the problems that arose because of life partnerships and the legal relief afforded to life partners prior to 1994. It also examines the application of common law in life partnership cases. Finally, the chapter investigates if the duty of support between life partners existed before 1994.

2.2 Historical overview of marriage

Before South Africa transitioned to a constitutional democracy, the country's legal principles and societal values predominantly mirrored the strict Calvinist beliefs of the white minority, enforced by a legal system where the parliament held ultimate authority.¹⁴⁵ The dictum of Blackstone, which states that "what the parliament doth, no authority upon earth can undo," significantly influenced formal attitudes towards marriage in South Africa.¹⁴⁶ As a result, the legal framework pertaining to family law scarcely acknowledged and often disregarded intimate life partnerships beyond civil marriage.¹⁴⁷

¹⁴⁵ Mochela and Smith 2020 *TSAR* 481. The courts of law did not have the authority to challenge the validity of parliamentary legislation, see Robinson 2005 *Obiter* 489. This era was marked by discriminatory policies and a lack of acceptance of different family arrangements, see Schäfer 2006 *SALJ* 626 – 627.

¹⁴⁶ Robinson 2005 *Obiter* 489.

¹⁴⁷ Mochela and Smith 2020 *TSAR* 481.

The concept of marriage in this period was heavily influenced by Canon law and Roman-Dutch law.¹⁴⁸ Canon law, which was adapted to the needs of the medieval church, was integrated into Roman-Dutch law.¹⁴⁹ The Catholic Church at the time was not only a spiritual institution, but it had its own legislature and courts of law, covering matters related to its organisation, property, faith, sacraments, and sin.¹⁵⁰ The church's jurisdiction overlapped with secular courts, with excommunication being the primary method for enforcing decrees.¹⁵¹ The Roman Dutch law's exclusive definition of marriage was adopted into South African law.¹⁵² However, South African courts frequently referred to the English decision in *Hyde v Hyde and Woodman*.¹⁵³ This decision ruled that marriage, as conceived in Christendom, could be defined as the voluntary union of one man and one woman for life.¹⁵⁴

2.3 The emergence of domestic partnerships

The emergence of heterosexual life partnerships in South Africa still has its roots in the apartheid era, which was marked by significant male migration to urban areas, notably for employment in industries such as mining.¹⁵⁵ As a consequence of this migration, married men residing in urban areas for extended durations often established non-marital familial arrangements in these cities.¹⁵⁶ According to the national census and surveys done by Stats SA in 1996, 1,2 million persons indicated that they were in a domestic relationship.¹⁵⁷ It is important to note that 1996 was

¹⁴⁸ Robinson 2005 *Obiter* 489.

¹⁴⁹ Robinson 2005 *Obiter* 489.

¹⁵⁰ Robinson 2005 *Obiter* 489.

¹⁵¹ Robinson 2005 *Obiter* 489.

¹⁵² Robinson 2005 *Obiter* 490.

¹⁵³ Robinson 2005 *Obiter* 490.

¹⁵⁴ Robinson 2005 *Obiter* 491.

¹⁵⁵ Madzika 2020 *De Jure* 396. See Meyersfeld 2010 *Constitutional Law Review* 275. Meyersfeld states that apartheid policy was associated with the separation of families due to the migration of large numbers of men from the rural areas to urban areas.

¹⁵⁶ Madzika 2020 *De Jure* 396 – 397. See *Volks* case 165, in his dissenting judgement in the *Volks* case, Sachs J characterises the migrant labour system as a deliberate and focused dismantling of established and stable African family structures in rural regions, with the aim of supplying cheap labour to the mining industry and urban areas.

¹⁵⁷ Women's Legal Centre 2020 <https://wlce.co.za/victory-for-opposite-sex-couples-in-domestic-partnerships-but-the-fight-for-equality-continues>.

the first time the post-apartheid government conducted a population census,¹⁵⁸ and it revealed that millions of South Africans were already in life partnership settings.

2.4 Relationships outside civil marriage: Legal response

Prior to 1994, the Westminster system of government applied in South Africa. As discussed above, the Parliament was sovereign in this system, so the courts could only apply the law and not question it.¹⁵⁹ Parliament sovereignty had a direct effect on the conventional attitude to marriage.¹⁶⁰ During this time, South African family law did not give significant consideration to acknowledging relationships beyond civil marriage, because these relationships were disregarded by the law.¹⁶¹ The outcome was that there was a lack regulations to guide these relationship or their termination.¹⁶²

During the previous dispensation, South African courts were challenged to reconsider the nature of marriage, with a relatively simple position taken in *Seedat's Executors v The Master (Natal)*.¹⁶³ The issue in this case was a marriage that did not adhere to the rule of "voluntary union of one man and one woman for life," and the court ruled in favour of the rule.¹⁶⁴ In addition to the legal measures, the provisions of Roman-Dutch law for marriages were void *ab initio* and had none of the consequences of a valid marriage, which is accepted as a putative marriage.¹⁶⁵ If

¹⁵⁸ Stats SA 2020 https://www.statssa.gov.za/?page_id=3836.

¹⁵⁹ De Ru 2013 *Fundamina* 221 – 222.

¹⁶⁰ De Ru 2013 *Fundamina* 221 – 222.

¹⁶¹ Smith *The development of South African matrimonial law with specific reference to the need for and application of a domestic partnership rubric* 185.

¹⁶² Smith *The development of South African matrimonial law with specific reference to the need for and application of a domestic partnership rubric* 185. See Human and Smith "The legal position of life partners in South Africa." Prior to the implementation of the Bill of Rights in 1994, Human and Smith states that South African family law exclusively acknowledged monogamous civil marriages between individuals of opposite sexes, conducted and officially registered according to the provisions outlined in the *Marriage Act*. Smith states that life partnerships, regardless of the genders involved, did not carry the legal consequences associated with valid civil marriages.

¹⁶³ Robinson 2005 *Obiter* 491.

¹⁶⁴ The court held that "Bearing in mind the essential characteristics of marriage, the union in question was not a marriage, as we understand it. It was a relationship recognized no doubt by the legal system under which the parties contracted but forbidden by our own and fundamentally opposed to our principles and institutions. And it is impossible for our courts when dealing directly with the position of a party to such a union to say that she ever was the wife in the sense in which our law uses that term ..." see Robinson 2005 *Obiter* 491.

¹⁶⁵ Robinson 2005 *Obiter* 491.

the marriage had been solemnised with prescribed formalities and at least one of the spouses had contracted the marriage in good faith, some of the effects of a legal marriage would attach to it.¹⁶⁶ However, notwithstanding that, the law still did not recognise the marriage.

It was quite foreseeable how courts would handle matters that were beyond the scope of the Roman-Dutch definition of marriage in the framework outlined above.¹⁶⁷ The courts were faced with heterosexual life partnerships cases from time to time, and in all of these cases, the courts applied the concept of marriage as expressed in Roman-Dutch law: it was fundamentally a bond between one man and one woman, and no exceptions would be made,¹⁶⁸ therefore there was no legal relief for cohabitants.

Considering South Africa's conservative and Calvinist history, the acceptance of cohabitation was slower and less enthusiastic compared to countries such as Canada, Sweden, England, and the United States of America.¹⁶⁹ This slow acceptance came with an array of problems, most of these arising when the parties wanted to terminate their life partnership.¹⁷⁰

Prior to 1994, life partnerships in South Africa were not forbidden, but as already stated, they still did not receive recognition or protection.¹⁷¹ If the life partnership ended while both partners were alive, there was no legal obligation for mutual support between them, and unlike in divorce cases, there was no division of property and partners were not automatically entitled to each other's pension benefits.¹⁷²

Another problem was that some life partnerships emerged because people in South Africa misunderstood the law and believed that if they cohabited for a certain period of time, the mere passage of time would qualify their partnership to become

¹⁶⁶ Robinson 2005 *Obiter* 491.

¹⁶⁷ Robinson 2005 *Obiter* 492.

¹⁶⁸ Robinson 2005 *Obiter* 492.

¹⁶⁹ Hutchings and Delpont 1992 *De Rebus* 121.

¹⁷⁰ Hutchings and Delpont 1992 *De Rebus* 122.

¹⁷¹ Hutchings and Delpont 1992 *De Rebus* 122. Madzika 2020 *De Jure* 393.

¹⁷² Hutchings and Delpont 1992 *De Rebus* 122. Under section 7 of the *Divorce Amendment Act 7 of 1989*, pension benefits are considered assets in a divorce, and they are included in the distribution of marital property.

common law husband and wife.¹⁷³ When partners in a customary marriage fail to register their partnership and to obtain a certificate, the law did not and still does not consider it a marriage. It therefore lacks protection and when the partnership dissolves, partners find that they have no protection at all.¹⁷⁴

When such a partnership terminated upon the death of one of the partners, no automatic right of inheritance existed.¹⁷⁵ In case of an intestate succession, a partner was not automatically regarded as an heir or dependant.¹⁷⁶ However, Hutchings and Delpont¹⁷⁷ state that there was no hindrance to making specific provision for a for a life partner in a will.

On the other hand, when these partnerships dissolve, the distribution of money and assets is determined solely by the consent of the parties involved.¹⁷⁸ Unlike marital relationships, inequalities originating from such a situation are currently not subject to statutory regulation.¹⁷⁹

2.5 Legal relief for life partners prior to 1994

This section deals with the legal relief prior to 1994.

2.5.1 Protection through contract and wills

To safeguard their interests, life partners could choose to regulate various aspects of their relationship by means of contracts and wills.¹⁸⁰ Such contracts were not contra *bonos mores* and could thus be enforced between the cohabitants.¹⁸¹ The contract has a very important role to play in regulating cohabitation in South Africa, it may regulate the partner's relationship during its existence and upon its

¹⁷³ Meyersfeld 2010 *Constitutional Law Review* 275.

¹⁷⁴ Meyersfeld 2010 *Constitutional Law Review* 275.

¹⁷⁵ Hutchings and Delpont 1992 *De Rebus* 122.

¹⁷⁶ Hutchings and Delpont 1992 *De Rebus* 122.

¹⁷⁷ Hutchings and Delpont 1992 *De Rebus* 122.

¹⁷⁸ Meyersfeld 2010 *Constitutional Law Review* 275.

¹⁷⁹ Meyersfeld 2010 *Constitutional Law Review* 275.

¹⁸⁰ Hutchings and Delpont 1992 *De Rebus* 123. Heaton and Kruger *South African Family Law* 255.

¹⁸¹ Hutchings and Delpont 1992 *De Rebus* 123. As it was decided in *Ally v Dinath* and there was no reference to the question of *boni mores* in this case.

termination.¹⁸² Contracts that life partners could and still can conclude include contracts for purchasing assets, entering into joint ventures, or determining each other's rights and duties.¹⁸³ They would typically be joint owners of assets and debtors for obligations incurred under such contracts.¹⁸⁴ However, they could not exclude each other from using and controlling the asset without consent of the other partner.¹⁸⁵ If the partnership breaks down and they cannot agree on asset division, they can invoke the *actio communi dividundo*, which allows the court to order the division or appoint a receiver to divide the assets.¹⁸⁶

2.5.2 Unjustified enrichment

In instances where an unmarried couple separates while still alive, should one partner, typically the woman, have become financially reliant on the other, her entitlement is limited to seeking redress for services rendered based on the grounds of unjust enrichment to achieve "justice between man and woman."¹⁸⁷

2.5.3 The requirements for universal partnerships prior to 1994

Prior to 1994, according to various court rulings, for a partnership to be deemed a universal partnership, the involved parties must mutually consent to combining all their assets, both existing and prospective.¹⁸⁸ Therefore, the courts acknowledged Pothier's essential elements of a partnership, which includes:¹⁸⁹

- (i) Each partner must contribute something to the partnership, whether it be financial capital, labour, or expertise, or commit to doing so.

¹⁸² Jacobs 2004 *Fundamina* 80.

¹⁸³ Heaton and Kruger *South African Family Law* 256.

¹⁸⁴ Heaton and Kruger *South African Family Law* 257.

¹⁸⁵ Heaton and Kruger *South African Family Law* 257. Unless they had entered into a partnership agreement, either party could alienate his or her share of the jointly owned asset without the other's consent.

¹⁸⁶ Heaton and Kruger *South African Family Law* 257.

¹⁸⁷ Hutchings and Delpont 1992 *De Rebus* 122. This remedy is available to a person unjustly impoverished at the expense of another person in a life partnership. The same principle would apply if the woman had made a genuine financial contribution, for example, in the case where the man and the woman with whom he cohabits contributed jointly to the purchase of a house that is registered in the man's name.

¹⁸⁸ Subramanien 2013 *Obiter* 547. See *Isaacs v Isaacs* 1949 (1) SA 952 (C) 955; *Ally v Dinath* 1984 (2) SA 451 (T).

¹⁸⁹ Subramanien 2013 *Obiter* 546.

- (ii) The partnership's operations should be conducted for the mutual benefit of all parties involved.
- (iii) The primary objective of the partnership should be to generate profit.
- (iv) The contractual agreement between the partners must be legally valid.

Subramanien¹⁹⁰ states that if these four elements are present and there is no evidence to the contrary, the court is obliged to recognise the agreement as a partnership, regardless of what the parties call it. Whether they label it as a joint venture or a lease agreement, the court's determination is based on the substance of the agreement rather than its form.¹⁹¹ These criteria for the legal recognition of a partnership, have consistently been endorsed by judicial authorities in our jurisdiction.¹⁹²

Considering the above, it is trite that in addition to specific partnerships formed for the purpose of a particular enterprise, both Roman and Roman Dutch law acknowledged the concept of universal partnerships.¹⁹³

Although both Roman and Roman Dutch law recognised universal partnerships, there were two categories of partnerships.¹⁹⁴ The first category is *societas universorum bonorum*, which was also known as the *societas omnium bonorum*.¹⁹⁵ It is characterised by parties agreeing to put in common all their property present and future.¹⁹⁶

The second category of partnerships acknowledged by the Roman and Roman Dutch law is *societas universorum quae ex quaestu veniunt* – the parties are required to enter into a contract for all that they may acquire during the partnership and from every kind of commerce.¹⁹⁷ This form of partnership is established when the parties

¹⁹⁰ Subramanien 2013 *Obiter* 546.

¹⁹¹ Subramanien 2013 *Obiter* 546. *Joubert v Tarry & Co* 1915 TPD 277–279.

¹⁹² Subramanien 2013 *Obiter* 546. *Joubert v Tarry & Co* 1915 TPD 277–279.

¹⁹³ Subramanien 2013 *Obiter* 547.

¹⁹⁴ Subramanien 2013 *Obiter* 547.

¹⁹⁵ Subramanien 2013 *Obiter* 547.

¹⁹⁶ Subramanien 2013 *Obiter* 547.

¹⁹⁷ Subramanien 2013 *Obiter* 547.

explicitly declare their intention to enter into a partnership without specifying further details.¹⁹⁸

2.5.3.1.1 Problems in a relationship context

In the case of *Ally v Dinath*¹⁹⁹, the dispute centred around the nature of the relationship between the parties, who had cohabited in an Islamic arrangement resembling marriage for 15 years. The plaintiff contended that their shared living arrangements constituted a universal partnership, implying joint ownership and responsibilities. Conversely, the defendant argued against the existence of an express agreement for such a partnership, as well as the absence of profit-seeking intentions from both parties.²⁰⁰ The court, however, rejected these arguments, stating that any contract can be brought about by conduct; and the objective of the accumulation of an appreciating joint estate was found to be sufficient.²⁰¹

In *Francis v Dhanai*,²⁰² the plaintiff claimed that she and the defendant had lived together as husband and wife from May 1992 until February 2002.²⁰³ They entered into a universal partnership in August 1992, where the plaintiff conducted a home industry, handed income to the defendant for joint household maintenance, contributed to the purchase of immovable property, and supported the defendant financially.²⁰⁴ The defendant denied the existence of a universal partnership, arguing that the plaintiff lived with him because she was destitute and he had provided her with food and shelter out of benevolence.²⁰⁵ The court concluded that the plaintiff failed to prove essential elements of alleged universal partnership, including the existence of a joint venture or commercial enterprise, a consensual contract, the exact terms of the partnership, and the exact assets acquired by the partnership.²⁰⁶

¹⁹⁸ Subramanien 2013 *Obiter* 547.

¹⁹⁹ 1984 (2) SA 451 (T).

²⁰⁰ Hutchings and Delpont 1992 *De Rebus* 123.

²⁰¹ Hutchings and Delpont 1992 *De Rebus* 123.

²⁰² *Francis v Dhanai* [2006] JOL 18401 (N).

²⁰³ Subramanien 2013 *Obiter* 549.

²⁰⁴ Subramanien 2013 *Obiter* 549.

²⁰⁵ Subramanien 2013 *Obiter* 549.

²⁰⁶ Subramanien 2013 *Obiter* 549.

The case of *Butters v Mncora*²⁰⁷ revolved around whether a universal partnership existed between Mr Butters and Ms Mncora. Mncora claimed their relationship was a universal partnership, therefore she sought a share of their assets.²⁰⁸ Butters disputed this claim.²⁰⁹ The court reviewed the concept of universal partnerships and the criteria for their recognition, concluding that a universal partnership did exist between *Butters and Mncora*. The factors that the court considered included the long duration of their cohabitation, mutual contributions to the assets, and the intent to share a life together.²¹⁰ This judgment is significant as it set a precedent in South African law for recognising universal partnerships in non-marital cohabitation scenarios.²¹¹ It emphasises the importance of acknowledging modern relationships and providing legal recognition and protection to parties in such partnerships.²¹² It represents a critical development in family law, particularly in contexts where traditional marriage frameworks do not apply.²¹³

2.5.4 Legislative provisions

In the previous dispensation, there were no legal remedies available to the surviving life partner against a wrongdoer who unlawfully kills their life partner.²¹⁴ However, an exception existed in terms of section 4(1) of the *Workmen's Compensation Act*,²¹⁵ which in its definition of spouses also included a life partner who was dependent on the deceased. Section 21(13) of the *Insolvency Act*²¹⁶ also afford life partners with legal protection by including a heterosexual life partner in the definition of a spouse,

²⁰⁷ *Butters v Mncora* [2012] 2 All SA 485 (SCA). (Hereafter *Butters v Mancora*) See Subramanien 2013 *Obiter* 552–553.

²⁰⁸ *Butters v Mancora* para 11. Subramanien 2013 *Obiter* 553.

²⁰⁹ *Butters v Mancora* para 12. Subramanien 2013 *Obiter* 553.

²¹⁰ *Butters v Mancora* para 17. Subramanien 2013 *Obiter* 554.

²¹¹ Family laws South Africa 2024 <https://familylaws.co.za/understanding-south-african-universal-partnerships>.

²¹² Family laws South Africa 2024 <https://familylaws.co.za/understanding-south-african-universal-partnerships>.

²¹³ Family laws South Africa 2024 <https://familylaws.co.za/understanding-south-african-universal-partnerships>.

²¹⁴ Hutchings and Delpont 1992 *De Rebus* 123.

²¹⁵ 30 of 1941.

²¹⁶ 24 of 1936.

ensuring that if one partner becomes insolvent, the other's estate vests in the Master of the High Court and trustee.²¹⁷

The following legislation also provides heterosexual life partners with protection by treating the partners like spouses: the first legislation is the *Estate Duty Act*,²¹⁸ which exempts surviving life partners from paying estate duty on property inherited from their deceased life partners.²¹⁹ Also, the *Pension Funds Act's*²²⁰ definition of "spouse" includes a permanent life partner.²²¹ The *Income Tax Act*²²² exempts gifts made between life partners from taxation.²²³

Before the *Intestate Succession Act*²²⁴ was enacted, intestate succession followed a complex array of common law regulations.²²⁵ After its enactment, Act 81 of 1987 unified, streamlined, and replaced these regulations by establishing a statutory framework applicable to individuals who passed away intestate.²²⁶ Initially this piece of legislation was tailored to accommodate spouses in civil marriages.²²⁷ It did not extend its provisions to customary marriages, typically observed in black communities.²²⁸ Life partnerships were also left out as they were not afforded any legal protection under this legislation.

On the other hand, the *Maintenance of Surviving Spouses Act*²²⁹ placed a spouse in a better position than a person in a life partnership by providing for the reasonable

²¹⁷ Heaton and Kruger *South African Family Law* 261. However, if the insolvent life partner is still legally married, their spouse's estate vests in the Master and trustee.

²¹⁸ 45 of 1955.

²¹⁹ Heaton and Kruger *South African Family Law* 262.

²²⁰ 24 of 1956.

²²¹ Heaton and Kruger *South African Family Law* 262.

²²² 58 of 1962.

²²³ Heaton and Kruger *South African Family Law* 262.

²²⁴ 81 of 1987.

²²⁵ Mochela and Smith 2020 *TSAR* 482.

²²⁶ Mochela and Smith 2020 *TSAR* 482.

²²⁷ Mochela and Smith 2020 *TSAR* 482.

²²⁸ Mochela and Smith 2020 *TSAR* 483. Meaning those who had entered into a "voluntary lifelong union between one man and one woman to the exclusion of all others while it lasts" as defined in the common law, see Hahlo *The South African Law of Husband and Wife* 21 and Mamashela and Carnelley 2006 *Obiter* 379.

²²⁹ 27 of 1990.

maintenance needs of a surviving spouse to be met by the estate of the deceased spouse.²³⁰

As already stated, life partners do not enjoy the benefits of section 7 of *the Divorce Act*.²³¹ They are not eligible for maintenance orders made by the court in terms of the *Divorce Act*.²³² The *Matrimonial Property Act*²³³ does not apply to life partners because couples in a permanent life partnership do not have the same rights, duties, and obligations as married couples.²³⁴

2.6 Conclusion

Before 1994, South Africa's societal values predominantly reflected strict Calvinist beliefs. The legal system governing family law scarcely acknowledged and often disregarded intimate life partnerships beyond civil marriage. The courts encountered problems with life partnerships, because at the dissolution of such partnerships or the death of one partner, there were no legal remedies available to the remaining partner. People in life partnership had to formalise their marriage or enter into a universal partnership agreement so that it could be proven that the relationship existed when it was dissolved, or so that the issue of receiving death benefits in the event of the death of one of the couple would not become a nightmare.²³⁵

Life partners were able to protect their interests using contracts, wills and universal partnership agreements. When life partners decided to break up, and one of the partners was financially dependent, the woman's entitlement was limited to seeking redress for services rendered for unjust enrichment. Some legislation provided heterosexual life partners with legal protection on ad hoc basis. There were some alternative options available to life partners, but they were not satisfactory.

With the establishment of a new constitutional dispensation based on the values of equality, human dignity and freedom, discrimination based on marital status

²³⁰ Hutchings and Delpont 1992 *De Rebus* 122.

²³¹ 70 of 1979. Bonthuys 2018 *PELJ* 2.

²³² Heaton and Kruger *South African Family Law* 157.

²³³ 88 of 1984. (Hereafter MPA)

²³⁴ Madzika 2020 *De Jure* 397.

²³⁵ Nevondwe and Rapatsa 2012 *Pensions: An International Journal* 157.

officially became something of the past.²³⁶ Since public policy can change over time, both the law and society should acknowledge the reality of life partnerships.²³⁷

When life partners broke up, partners could not claim for duty of support or division of property, and partners were not automatically entitled to each other's pension benefits.

Chapter 3 discusses life partnerships in the new dispensation by delving into the application of constitutional rights to life partnership claims. The next chapter discusses the problems the courts encounter when dealing with life partnerships, with specific reference to Constitutional Court cases. The chapter also looks at the constitutional rights afforded to life partners.

²³⁶ De Ru 2013 *Fundamina* 250.

²³⁷ Hutchings and Delpont 1992 *De Rebus* 121.

CHAPTER 3: LIFE PARTNERSHIP IN THE CONSTITUTIONAL DEMOCRACY

3.1 Introduction

The previous chapter discussed South Africa's legal system before 1994, pointing out that it largely ignored intimate life partnerships beyond civil marriage, an emergent phenomenon that grew during that era. Life partnerships faced challenges due to lack of legal remedies at dissolution through break-up or death. The adoption of the new *Constitution* based on equality, human dignity, and freedom relegated discrimination based on marital status and affected life partnership.

The development of life partnerships in South Africa shows a significant change in the acceptance and defence of different kinds of relationships, particularly after the nation adopted its democratic *Constitution* in 1996.²³⁸ It was the *Constitution* that called for progress and inclusion, becoming the catalyst for significant legal reforms with respect to life partnerships.²³⁹ In addition, South African courts were confronted by heterosexual individuals seeking remedy after the dissolution of their life partnerships, whether through death or separation.²⁴⁰

This chapter delves into the development of the law pertaining to life partnerships; looking at the fact that the changes started with homosexual partners. The chapter discusses the applicable constitutional rights by considering the fact that the Constitutional Court has provided opposite-sex permanent life partners with some legal protection. However, this legal protection is not adequate as heterosexual life partners still do not enjoy the same benefits that other intimate partners enjoy, despite the increase in the number of life partnerships as shown in the statistics above.²⁴¹ The chapter further looks at the right to support, to inherit, and maintenance after dissolution.

²³⁸ Schäfer 2006 *SALJ* 626–627.

²³⁹ Schäfer 2006 *SALJ* 626–627.

²⁴⁰ As was the case in the *Volks, Bwanya* and *VH v EW* cases, just to name a few.

²⁴¹ Madzika 2020 *De Jure* 395 – 396.

3.2 The challenges of life partnerships

Following the enactment of the Interim Constitution in 1993, unmarried heterosexual life partnerships were gradually included in the common law duty of support.²⁴² Previously, South African family law was based on a two-tiered hierarchy of monogamous intimate relationships: the married and the unmarried.²⁴³ In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,²⁴⁴ the Constitutional Court drove a wedge through the middle of that two-tier hierarchy system.²⁴⁵ Following the Constitutional Court's major judgement in the *National Coalition for Gay and Lesbian Equality* case, the notion of "life partnership" became firmly established in South African law, protecting both same-sex and opposite-sex couples.²⁴⁶ Despite this progress, South Africa currently lacks legislation that governs the legal recognition and repercussions of life partnerships in a manner similar to matrimonial property law.²⁴⁷

Over the years, precedents have awarded same-sex partners rights and protection that heterosexual life partners are still seeking consistently.²⁴⁸ The law is inconsistent since it grants protection to one group while withholding the same level of protection from a comparable group.²⁴⁹ This is the reason why Smith and Robinson²⁵⁰ characterised unregistered life partnerships as complex.

²⁴² Bonthuys 2018 *PER* 9.

²⁴³ Schäfer 2006 *SALJ* 626 – 627.

²⁴⁴ 2000 2 SA 1 (CC) para 36 (Hereafter *National Coalition for Gay and Lesbian Equality* case).

²⁴⁵ Schäfer 2006 *SALJ* 626 – 627.

²⁴⁶ Mochela and Smith 2020 *TSAR* 481.

²⁴⁷ Mochela and Smith 2020 *TSAR* 481. Madzika concurs with this, because he has stated that the legal position of life partnerships is complex in South Africa, and what makes the situation even more complex is that same-sex permanent partners are legally recognised and provided rights and protection, although opposite-sex domestic partnerships are not, see Madzika 2020 *De Jure* 399.

²⁴⁸ Madzika 2020 *De Jure* 405.

²⁴⁹ Madzika 2020 *De Jure* 405. Madzika also states that an opposite-sex domestic partnership in South Africa falls short of a common law marriage and is subsequently not recognised under any legislation. As a result of this, the consequences of a marriage do not automatically attach to such a relationship see Madzika 2020 *De Jure* 399.

²⁵⁰ Smith and Robinson 2010 *PER* 31.

3.3 The constitutional rights applicable to life partnerships

The *Constitution* prohibits unfair discrimination based on marital status,²⁵¹ guaranteeing privacy,²⁵² human dignity,²⁵³ and equality.²⁵⁴ This commitment has led to court cases addressing issues related to life partnerships. The Constitutional Court emphasises equal concern and respect in all areas, calling for a change in South Africa's legal regulation of life partnerships and for the acknowledgment of these rights.²⁵⁵ The *Constitution's* principles of equality and human dignity have therefore led to the recognition of life partners as spouses on an *ad hoc* basis.²⁵⁶

3.3.1 The right to equality

The equality provision in South Africa aims to ensure that no one is above or beneath the law, and that everyone is subject to the same law and protected by it.²⁵⁷ In other words, the *Constitution's* equality clause is a concept of "sameness" that advocates for equal treatment.²⁵⁸ This is particularly important in the context of the past where certain categories of people were denied the protection and benefits of the law.²⁵⁹ "Equality before the law" involves equal representation on legislative bodies and equal concern and respect when the law is formulated or applied.²⁶⁰ Equal protection of the law includes laws that provide benefits and prohibit people from being

²⁵¹ Section 9(3) of the *Constitution of the Republic of South Africa*, 1996.

²⁵² Section 14 of the *Constitution of the Republic of South Africa*, 1996.

²⁵³ Section 10 of the *Constitution of the Republic of South Africa*, 1996.

²⁵⁴ Section 9(1) of the *Constitution of the Republic of South Africa*, 1996.

²⁵⁵ de Ru 2013 *Fudamina* 323.

²⁵⁶ Coetzee Bester and Louw 2015 *PER* 2964. Legislation that recognises life partnerships on *ad hoc* basis: s 20(13) of the *Insolvency Act* 24 of 1936; s 35(2)(f)(i) of the *Constitution of the Republic of South Africa*, 1996; s 1 of the *Employment Equity Act* 55 of 1998; s 1 of the *Domestic Violence Act* 116 of 1998 and finally ss 231 and 293 of the *Children's Act* 38 of 2005. In addition, domestic partnerships were provided with *ad hoc* judicial recognition in the following instances: *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *J v Director General* 2003 (5) SA 621 (CC); *Department of Home Affairs* 2003 5 BCLR 463 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA); *Gory v Kolver* 2007 4 SA 97 (CC); *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP); and *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA).

²⁵⁷ Dlamini 2002 *Journal for Juridical Science* 16. See Kituri and van der Walt 2006 *Obiter* 676, states that in *Du Preez v The Minister of Justice and Constitutional Development* 2006 5 SA 592 the court held that equality among all people in South Africa lies at the heart of the *Constitution* and is guaranteed in the Bill of Rights in section 9.

²⁵⁸ Govender 1998 *Indicator SA* 81. See Currie and de Waal *The Bill of Rights Handbook* 213.

²⁵⁹ Dlamini 2002 *Journal for Juridical Science* 16.

²⁶⁰ Dlamini 2002 *Journal for Juridical Science* 16.

subordinated or disadvantaged.²⁶¹ Legislative steps should be taken to achieve this equality, especially for those who have been disadvantaged by unfair discrimination.²⁶² However, equality does not mean treating all persons the same, but unless there are compelling and objectively justifiable reasons, people should be treated equally by the law and enjoy the same rights.²⁶³

Differentiation on the other hand refers to treating persons in the same position differently from one another.²⁶⁴ Differentiation is appropriate when it serves a legitimate goal and is rationally related to that aim.²⁶⁵ However, the *Constitution* prohibits unfair discrimination based on certain criteria.²⁶⁶ The use of the term "unfair" to qualify discrimination emphasises the fact that the thing that is forbidden is not just differentiation, but differentiation that is invidious or that inequitably advantages specific groups or persons.²⁶⁷ Thus if differentiation does not serve a legitimate goal, the legislation or action is deemed to contravene section 9(1) of the *Constitution*.²⁶⁸ In the *Prinsloo* case and *Harksen v Lane*,²⁶⁹ the Constitutional Court established that there are two types of differentiation: one based on specific reasons and another based on similar grounds.²⁷⁰

In the *Volks* case, the majority judgment by Skweyiya J adopted the equality test formulated in the *Harksen* case²⁷¹ and found that the *MSSA* differentiated between married spouses and life partners on the listed ground of marital status, constituting unfair discrimination.²⁷² It held that there were no justificatory grounds for the unfair

²⁶¹ Dlamini 2002 *Journal for Juridical Science* 16. These laws include legislation such as the *MSSA* and *ISA* for example.

²⁶² Dlamini 2002 *Journal for Juridical Science* 16.

²⁶³ Dlamini 2002 *Journal for Juridical Science* 16.

²⁶⁴ Govender 1998 *Indicator SA* 81.

²⁶⁵ Govender 1998 *Indicator SA* 81.

²⁶⁶ Dlamini 2002 *Journal for Juridical Science* 16.

²⁶⁷ Dlamini 2002 *Journal for Juridical Science* 16.

²⁶⁸ Govender 1998 *Indicator SA* 81. *Constitution of the Republic of South Africa*, 1996. *Prinsloo v van der Linde* 1997 (6) BCLR 759 (CC) para 32 (hereafter *Prinsloo* case) states that in South Africa, discrimination is defined as treating people differently, impairing their fundamental dignity as human beings.

²⁶⁹ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC) (hereafter *Harksen* case).

²⁷⁰ Govender 1998 *Indicator SA* 81. Govender goes on to state that an analogous basis is described as "attributes or characteristics that have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparable manner."

²⁷¹ *Harksen* case para 54.

²⁷² *Volks* case para 22.

discrimination and concluded that Robinson's right to equality had been unfairly eroded.²⁷³

In the same case, Mokgoro J and O'Regan J also found that the provisions of the *MSSA* constitute unfair discrimination based on marital status.²⁷⁴ This is because it did not afford equal protection of the law to individuals who are in a permanent heterosexual life partnership, while legislation is supposed to provide benefits and prohibit people from being subordinated or disadvantaged.²⁷⁵

Substantive equality should be employed to address this issue. Substantive equality aims to address formal inequality; therefore, the courts must acknowledge the power dynamics in society and family relations, and the role of the law in addressing social inequalities.²⁷⁶

3.3.2 *The right to human dignity*

The right to dignity,²⁷⁷ which is one of the *Constitution's* founding values aim to prevent unfair discrimination and ensure equal dignity for all members of society.²⁷⁸ This right is central to the interpretation of other fundamental rights like equality and life.²⁷⁹ In South Africa, the past involved oppressive laws eroding human dignity, including the human dignity of heterosexual partners.²⁸⁰ The right to dignity entails

²⁷³ *Volks* case para 22. Para 54 and 55 outlines the examples of justifiable grounds.

²⁷⁴ Madzika 2020 *De Jure* 402. *Volks* case para 144. In the *Bwanyana* case, Madlanga J determined that the act's exclusion of permanent heterosexual life partners from its safeguards constituted unjust discrimination based on marital status, which in turn violated the *Constitution's* section 9 right to equality, see *Bwanyana* case para 37, 39 and 49.

²⁷⁵ *Volks* case para 144. The court in the *Bwanyana* case held that same-sex partners have legal protection, while women in heterosexual life partnerships tend to suffer the detriment of a break-up after years of investing in a relationship. The court therefore held that this violates the heterosexual life partnership's right to equality. See *Bwanyana* case para 171 and 181.

²⁷⁶ Manthwa *Recognition of domestic partnerships in South African law* 19. Manthwa also states that substantive equality focuses on addressing societal inequalities, particularly in favour of domestic partnerships, to support the marginalised groups within these partnerships, aiming to provide a future-oriented solution to societal inequalities. See also Govender 1998 *Indicator SA* 84.

²⁷⁷ Section 10 of the *Constitution of the Republic of South Africa*, 1996.

²⁷⁸ Manthwa *Recognition of domestic partnerships in South African law* 21.

²⁷⁹ Manthwa *Recognition of domestic partnerships in South African law* 21.

²⁸⁰ Manthwa *Recognition of domestic partnerships in South African law* 21.

treating all people with respect and protection, as well as acknowledging their essential worth.²⁸¹

There have been contrasting views on life partners' right to human dignity. The court ruled in the *Volks* case that the human dignity of life partners is as equally valuable as that of married couples, notwithstanding their uneven treatment.²⁸² The court distinguished between a life partner relationship and marriage with respect to maintenance.²⁸³ As a result, the court will not impose a maintenance requirement on a life partner if the obligation was not formed during the course of the domestic relationship.²⁸⁴ It is obvious that the right to human dignity is an essential right under the *Constitution*; yet it appears that domestic partners cannot claim a breach of their right to human dignity when they are treated differently from civil or customary married couples.²⁸⁵

On the other hand, the court in the *Bwanya* case held that traditionally, it is women who tend to suffer after years of dedication and support for the livelihood of a permanent life partnership as they end up with nothing, which consequently strips them of their dignity.²⁸⁶ Same-sex life partners in similar situations tend to benefit instead of suffering a similar detriment.²⁸⁷ The discrimination was found to be based on marital status, sexual orientation, sex, and gender.²⁸⁸ In addition to this finding, the court held that although heterosexual life partners may not have suffered in the past from patterns of disadvantage similar to those suffered by their same-sex counterparts, "the impact of the end of the relationship is severe, affecting the dignity, personhood, and identity of heterosexual permanent life partners deeply."²⁸⁹

²⁸¹ Manthwa *Recognition of domestic partnerships in South African law* 21.

²⁸² *Volks* case para 62.

²⁸³ *Volks* case para 62.

²⁸⁴ *Volks* case para 62.

²⁸⁵ Manthwa *Recognition of domestic partnerships in South African law* 22.

²⁸⁶ *Bwanya* case para 171.

²⁸⁷ *Bwanya* case para 171. Furthermore, it was discovered that there was a violation of the Applicant's right to equality and dignity since there was unequal treatment compared to their same sex living partnership peers who do inherit even if they are not married. In *EB v ER* the court held that historically, women faced disadvantageous situations and that their dignity is violated when their contributions to their partner's estate are not recognised, see *EB v ER* para 130.

²⁸⁸ Madzika 2020 *De Jure* 403. See *Volks* case para 181.

²⁸⁹ Madzika 2020 *De Jure* 403. See *Volks* case para 181.

The court concluded that the failure to include heterosexual life partnerships in section 1(1) of the *ISA* violates the applicant's rights and the rights of all parties in similar circumstances, particularly their rights to equality and dignity under sections 9 and 10 of the *Constitution*.²⁹⁰

Therefore, heterosexual life partners' right to human dignity should be respected as enshrined in the *Constitution*, especially given South Africa's history of harsh legislation that undermined human dignity.

3.4 The duty to support

3.4.1 The right to duty of support – the Volks case

The extension of the right of duty to support to unmarried heterosexual life partners was hampered by the two majority judgments in the *Volks* case. In this case, Robinson and the deceased had been in a heterosexual, monogamous permanent life relationship for 16 years until the deceased's death in 2001.²⁹¹ Robinson and the deceased had never married and had no children together.²⁹² However, there were no legal barriers to the partners concluding a civil marriage. They lived together on a continuous basis and shared household costs; therefore, Robinson was accepted as a dependent on the deceased's medical aid scheme. The deceased bequeathed certain assets to Robinson in his will, with the residue devolving upon his three adult children from his previous marriage.²⁹³

It is important to note that the facts of this case were not at issue, the issue arose when Robinson sought to institute an action for maintenance against the estate of

²⁹⁰ *Volks* case para 191. *EB v ER* case held that distinction made based on qualities and traits that could potentially undermine an individual's basic human dignity or have a similarly severe negative impact, see *EB v ER* para 57.

²⁹¹ Wildenboer 2005 *SA Public Law* 459. Also see Bonthuys 2018 *PER* 15.

²⁹² Wildenboer 2005 *SA Public Law* 459. Lind 2005 *Acta Juridica* 110.

²⁹³ Wildenboer 2005 *SA Public Law* 459. Lind 2005 *Acta Juridica* 110. Lind further states that the deceased paid for most of their living expenses and gave Robinson an allowance to enable her to manage the household. She was also his dependent for the purposes of his medical aid scheme. He saw to it that her motor vehicle was maintained and that its running expenses were met. When she needed it, Mr Shandling also deposited additional funds into her bank account; he maintained her liquidity. In essence the evidence was, in effect, incontrovertible that everyone – friends, family and business associates alike – recognised their status as a committed couple living a common family life.

her deceased partner in terms of the *MSSA*.²⁹⁴ The maintenance sought was in terms of section 2(1) of the Act.²⁹⁵ This act defines "Survivor" in section 1 as "the surviving spouse in a marriage dissolved by death".²⁹⁶ As a result, Volks, the estate's executor, refused Robinson's claim, stating that she was not a surviving spouse as defined by the *MSSA*.²⁹⁷ Robinson then proceeded to the High Court to challenge the exclusion of permanent life partners from the *MSSA*, arguing that it violated the constitutional rights to equality and dignity.²⁹⁸ She successfully contested the definition of "survivor" under the Act and the high court held that the reason for her success was that she was in a "monogamous permanent life partnership," similar to marriage.²⁹⁹ Furthermore, the high court ruled that the exclusion of permanent life partners from the Act violated their constitutional rights to equality and dignity and read in the words to remedy such exclusion from the act.³⁰⁰ Subsequently, Volks appealed the decision, while Robinson sought confirmation of the judgment.³⁰¹

Considering the spirit of the new constitutional dispensation, one would expect the Constitutional Court to confirm the High Court's decision as a matter of course. After all, this case focused on one of the specific grounds protected from unfair discrimination under the *Constitution's* equality clause. Unfortunately, the

²⁹⁴ The claim was lodged in terms of section 2(1) of the *Maintenance of Surviving Spouses Act 27 of 1990*. Bonthuys 2018 *PER* 15. Wildenboer 2005 *SA Public Law* 459.

²⁹⁵ the Maintenance of Surviving Spouses Act 27 of 1990.

²⁹⁶ Wildenboer 2005 *SA Public Law* 459.

²⁹⁷ Madzika 2020 *De Jure* 401.

²⁹⁸ Madzika 2020 *De Jure* 401. See also *Volks* case paras 3-10.

²⁹⁹ *Volks* case para 24.

³⁰⁰ Madzika 2020 *De Jure* 401. See also *Volks* case para 24. Wildenboer states that "the Cape High Court held that section 2(1) of the Act, read together with the definition of 'survivor' in section 1, is unconstitutional in that it violates the right to equality in terms of section 9 of the 1996 Constitution and specifically discriminates unfairly on the basis of marital status"; see Wildenboer 2005 *SA Public Law* 460.

³⁰¹ Madzika 2020 *De Jure* 401. See Wildenboer 2005 *SA Public Law* 460, In reaching this decision, Davis J referred to the fact that our courts have recently indicated that the privileging of marriage is unfair and contrary to section 9 of the Constitution. He specifically referred to the decision of the Constitutional Court regarding the legal recognition of permanent life relationships of same-sex partners (*Satchwell v President of the Republic of South Africa* 2002 9 BCLR 986 (CC)) and to the decision of the Cape High Court regarding marriages according to Muslim rites (*Daniels v Campbell* 2003 9 BCLR 969 (C)). Davis J then formulated the essential question in the present case as to whether there is any justification to distinguish permanent life relationships of same-sex partners and marriages by Muslim rites from domestic partnerships (294B-G).

Constitutional Court saw the matter differently.³⁰² The judges' decision on the matter was divided into four different rulings, indicating its complexity.³⁰³

In the majority judgement, Skweyiya J ruled that the Act did not violate the equality clause³⁰⁴ and the right to dignity³⁰⁵ in the *Constitution*.³⁰⁶ The court held that:³⁰⁷

"I do not agree that the right to dignity has been infringed. Mrs Robinson is not being told that her dignity is worth less than that of someone who is married. She is simply told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance. It is that people in a marriage are obliged to maintain each other by operation of law and without further agreement or formalities. People in the class of relationships to which she belongs are not in that position."

The court further found that section 2(1) of the Act was an extension of the reciprocal duty of support between living married persons to the estate of a deceased spouse, but it would be unfair to impose such a duty on the deceased's estate in this case as there is no reciprocal duty that exists between living, unmarried persons.³⁰⁸ He considered that marriage is an essential social institution, and the law necessitates that married and unmarried people be distinguished.³⁰⁹ As a result, he concluded that the *MSSA* could not be interpreted to include permanent life partners in the definition of a "spouse."³¹⁰ The court expressed sympathy for vulnerable women who cannot marry and have become victims of cohabitation relationships but declined to assist them³¹¹ because the remedy could only be evaluated once legislation regulates domestic partnerships while both partners are

³⁰² Wildenboer 2005 *SA Public Law* 460 – 461.

³⁰³ Madzika 2020 *De Jure* 401.

³⁰⁴ Section 9(3) of the *Constitution of the Republic of South Africa*, 1996.

³⁰⁵ Section 10 of the *Constitution of the Republic of South Africa*, 1996.

³⁰⁶ *Volks* case paras 46 – 62. Wildenboer 2005 *SA Public Law* 460 – 461.

³⁰⁷ *Volks* case para 62.

³⁰⁸ Wildenboer 2005 *SA Public Law* 460 – 461. See Madzika 2020 *De Jure* 401, states that the *Volks* case held that reciprocal duties of support do not exist during the existence of heterosexual partnership and can consequently not start existing after the dissolution of that relationship.

³⁰⁹ Madzika 2020 *De Jure* 401 – 402. See *Volks* case para 68.

³¹⁰ Madzika 2020 *De Jure* 401 – 402. See *Volks* case para 68.

³¹¹ *Volks* case para 68. Wildenboer 2005 *SA Public Law* 460 – 461. Skweyiya J acknowledged the severe economic and social conditions faced by some female cohabitants but ruled that this inequality was not caused by the *Maintenance of Surviving Spouses Act* and that it was not the court's responsibility to address their issues, see Bonthuys 2018 *PER* 15.

alive.³¹² They held that the *MSSA* was incapable of an interpretation that would include permanent life partners in the definition of a “spouse.”

Ngcobo J, just like Skweyiya J, applied the Harksen test to argue that the *Constitution* recognises marriage,³¹³ aligning with international human rights instruments like the African Charter on Human and Peoples’ Rights, the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights.³¹⁴ He further argued that the law can distinguish between married and unmarried persons and provide married persons with protection that it does not provide to unmarried persons, so that discrimination in such cases is just, I disagree with this view.³¹⁵ He held that the *MSSA*’s purpose is to protect the right of married persons to receive maintenance and support from their deceased spouse.³¹⁶ He also argued that heterosexual couples who desire the consequences of marriage must accept them by entering into a marriage relationship.³¹⁷ He stated that all couples are equal, but married couples are more equal.³¹⁸ However, if someone cannot get married, is already married, or it is against their belief system, this requirement violates their right not to be unfairly discriminated against based on marital status, as well as their right to freedom of religion, conscience, belief, and culture.³¹⁹ To justify his finding, Ngcobo J said:³²⁰

People involved in a relationship may choose not to marry for a whole variety of reasons, including the fact that they do not wish the legal consequences of a marriage to follow from their relationship. It is also true that they may not marry because one of the parties does not want to get married. Should the law then step in and impose the legal consequences of marriage in these circumstances? To do so in my view would undermine the right freely to marry and the nature of the agreement inherent in a marriage. Indeed it would amount to the imposition of the will of one party upon the other. This is equally unacceptable.

³¹² Wildenboer 2005 *SA Public Law* 460 – 461.

³¹³ Section 15(3)(a)(i) of the *Constitution of the Republic of South Africa*, 1996.

³¹⁴ *Volks* case paras 80 – 85.

³¹⁵ Wildenboer 2005 *SA Public Law* 462. See also Madzika 2020 *De Jure* 402, states that Ngcobo J held that the provisions of the *MSSA* were not inconsistent with sections 9 and 10 of the *Constitution*.

³¹⁶ *Volks* case paras 88–90.

³¹⁷ *Volks* case para 92.

³¹⁸ *Volks* case para 92.

³¹⁹ Wildenboer 2005 *SA Public Law* 462.

³²⁰ *Volks* case para 93.

In conclusion, the judgments of Justices Skweyia and Ncgobo, which the majority judges agreed with, were based on the "choice argument."³²¹ They both agreed that the exclusion of unmarried life partners from the Act should not be considered unfair because even if it is acknowledged that the exclusion of unmarried cohabitants from the *MSSA* discriminates on the basis of marital status, it should be noted that the primacy of marriage is recognised in our *Constitution* and international law.³²² Therefore, the state can legitimately differentiate between married and unmarried couples by granting rights and benefits to married couples, as recognised in the *Constitution* and international law.³²³

In their joint dissenting judgments, both Mokgoro and O'Regan JJ did not agree with the majority judgment, stating that such an approach undermines the constitutional prohibition against discrimination based on marital status, as marriage would still be considered privileged.³²⁴ The justices further examined how the law has historically favoured civil law marriages and detailed the typical legal privileges and obligations that result from such marriages.³²⁵ They also noted that several recent changes in marriage law demonstrate that marriage is a legally changing institution.³²⁶ Therefore, many legal enactments in this regard were aimed at, for example, combating gender discrimination inside marriage.³²⁷

The justices also held that the relationship between Robinson and the deceased was deemed socially and functionally similar to marriage, as it was a permanent life partnership.³²⁸ However, the law regulated its consequences differently from marriage, making it *prima facie* discriminatory.³²⁹ However, the question arises whether this discrimination is unfair.³³⁰ A careful contextual analysis is necessary to determine whether the discrimination is indeed unfair in each case where a

³²¹ Smith 2010 *PER* 243.

³²² Bonthuys 2018 *PER* 15.

³²³ Bonthuys 2018 *PER* 15.

³²⁴ Wildenboer 2005 *SA Public Law* 463.

³²⁵ Wildenboer 2005 *SA Public Law* 463.

³²⁶ Wildenboer 2005 *SA Public Law* 463.

³²⁷ Wildenboer 2005 *SA Public Law* 463.

³²⁸ *Volks* case para 107.

³²⁹ *Volks* case para 107.

³³⁰ *Volks* case para 107.

relationship that is socially and functionally similar to marriage is treated differently from marriage.³³¹ This case highlights the importance of considering the legal framework when regulating relationships like marriage.³³² To answer the question of unfairness, Mokgoro and O'Regan JJ agreed that the discrimination is indeed unfair.³³³ They supported their view by stating that the unfairness of discrimination lies not in the fact that section 2(1) of the *MSSA* regulates the rights of spouses in the event of marriage termination by death, but in the lack of similar remedies for surviving partners of life partnerships that were socially and functionally similar to marriage.³³⁴ They used the same reasoning when answering the question of whether unfair discrimination in this regard is acceptable and permissible under the limitation clause.³³⁵

The justices' proposal was to amend the Act's definition of "spouse" to include surviving partners of life partnerships, but only if they can prove the need for financial relief. After considering the case, they concluded that Robinson was not entitled to any further relief since she had already benefitted in terms of the deceased's will.³³⁶

Sachs J in his dissenting judgment agreed with Mokgoro and O'Regan JJ that the provisions of the *MSSA* section 2(1) are unconstitutional and invalid.³³⁷ He then proceeded to criticise the majority judgment for its narrowness and circular arguments.³³⁸ Based on the principle of "choice argument,"³³⁹ Sachs J further stated that the fact that an option to marry was never exercised is not necessarily sufficient to conclude that a surviving life partner in the situation of Robinson should not be entitled to support³⁴⁰ because the option to marry only exists in theory most of the time.³⁴¹ He unpacked his argument by stating that the answer to the issue in this

³³¹ *Volks* case para 107.

³³² *Volks* case para 107.

³³³ Wildenboer 2005 *SA Public Law* 464.

³³⁴ Wildenboer 2005 *SA Public Law* 464.

³³⁵ Section 36 of the *Constitution of the Republic of South Africa*, 1996.

³³⁶ *Volks* case para 144. See also Wildenboer 2005 *SA Public Law* 464.

³³⁷ Wildenboer 2005 *SA Public Law* 464.

³³⁸ Bonthuys 2018 *PER* 16.

³³⁹ Smith 2010 *PER* 243.

³⁴⁰ Smith 2010 *PER* 244.

³⁴¹ *Volks* case paras 155–162. Also see Schäfer 2006 *SALJ* 626, 641

case rests not in matrimonial law rules, but in the larger framework of family law principles, which aims to foster stability, accountability, and equality in personal relationships.³⁴² Therefore, the unconventional lifestyles should not be penalised by the law, although only relationships that demonstrate mutual support and promote stable family life should be recognised as such.³⁴³ This means that instead of categorising relationships based on marital status, it is important to focus on the function they serve in society, such as protecting vulnerable family members and promoting fairness during family disputes.³⁴⁴ Sachs J concurred with the SALRC that a way forward is the functional approach instead of the definitional approach to relationship rights and obligations.³⁴⁵

He concluded that according to the functional approach, it would be unfair to exclude permanent, non-married life partners from the *MSSA* benefits if both parties committed to financial and emotional support,³⁴⁶ or if the nature of the life partnership requires maintenance.³⁴⁷ On this basis, he decided that the provisions of the Act constitute unfair discrimination under section 9(3) of the *Constitution*.³⁴⁸ In terms of justifiability, Sachs J then evaluated the arguments in favour of the retention of these provisions and decided that the blanket exclusion of domestic partnerships from the remedies afforded by the Act cannot be justified.³⁴⁹

In conclusion, the majority judgment was regarded as law.³⁵⁰ This stance is controversial because the Constitutional Court ruled that the *MSSA* did not unfairly discriminate against survivors of permanent life partnerships, despite the legislation

³⁴² *Volks* case para 212. Also see Wildenboer 2005 *SA Public Law* 464.

³⁴³ *Volks* case para 156. Also see Wildenboer 2005 *SA Public Law* 464.

³⁴⁴ Wildenboer 2005 *SA Public Law* 464 – 465.

³⁴⁵ *Volks* case paras 172–174. See Wildenboer 2005 *SA Public Law* 465, according to the definitional approach, only couples who meet the present definition of marriage are eligible for its benefits and can form a legally protected family. The functional approach suggests that cultural developments have led to a redefining of 'marriage', with legal ramifications based on the relationship's purpose.

³⁴⁶ *Volks* case para 214. See also Wildenboer 2005 *SA Public Law* 464.

³⁴⁷ *Volks* case para 218. See also Wildenboer 2005 *SA Public Law* 464.

³⁴⁸ *Constitution of the Republic of South Africa*, 1996.

³⁴⁹ *Volks* case paras 228 – 236. Wildenboer 2005 *SA Public Law* 464.

³⁵⁰ Barratt 2022 *PER* 4–5.

providing protection to surviving spouses of marriages but not to permanent life partners.³⁵¹

3.4.2 Maintenance after dissolution: the VH v EW case

In this case, the applicant and the respondent were in a romantic relationship for eight to nine years until April 2022 when the respondent vacated their common home.³⁵² The couple also had three children from their relationship.³⁵³ The applicant had not yet terminated her relationship with her former partner, and the respondent had remained married to his previous wife until 2019.³⁵⁴ The applicant filed an action in the Western Cape High Court asking the court to declare that partners in life partnerships in which the partners had undertaken reciprocal duties of support during the existence of the life partnership, in other words factually reciprocally supporting each other, are entitled to claim maintenance from one another on termination of the life partnership.³⁵⁵

The applicant supported her action by claiming that the lack of legal recourse for life partners to seek maintenance from one another following the termination of their partnership is constitutionally unacceptable because it discriminates on the basis of marital status and gender, resulting in unequal protection before the law.³⁵⁶ The applicant further pointed out that the common law duty of support between spouses ends on divorce, but such a spouse has legislative relief under section 7 of the *Divorce Act*,³⁵⁷ which applies to all civil marriages and civil unions concluded under the *Civil Union Act*,³⁵⁸ and recognised customary marriages under the *Recognition of Customary Marriages Act*.³⁵⁹

³⁵¹ Barratt 2022 *PER* 4.

³⁵² *VH v EW* case para 1.

³⁵³ *VH v EW* case para 1.

³⁵⁴ *VH v EW* case para 1.

³⁵⁵ *VH v EW* case para 10. This paragraph lists the circumstances of the life partnership that the court must consider before making the declaration. One of them being to develop the common law to claim maintenance from one another after their relationship has been terminated.

³⁵⁶ *VH v EW* case para 20. The court then turned to consider whether the development of the common law was required and appropriate.

³⁵⁷ 70 of 1979.

³⁵⁸ 17 of 2006.

³⁵⁹ 120 of 1998. *VH v EW* case para 21.

Additionally, the applicant argued that the *MSSA* provides legislative relief for couples whose relationships are terminated by the death of a spouse. The Act includes spouses in certain customary marriages and widows from monogamous Muslim marriages. The Constitutional Court has confirmed that the term "spouse" in the Act includes widows from monogamous Muslim marriages. In *Bwanyana*, the court ruled that the exclusion of life partners from the Act was unconstitutional and invalid. The definition of "survivor" should now include the surviving partner of a permanent life partnership that has been terminated by the death of one partner and where they undertook reciprocal duties of support. The applicant claimed that those engaged in life partnerships are "left out in the cold" when it comes to maintenance following the breakdown and termination of their relationships.³⁶⁰

In the majority judgment, the court ruled that the case law provided the applicant with legal recourse. However, she needed to prove that the duty of support existed as a result of their relationship and in a familial setting. The court also determined that the pending action (to claim maintenance following the termination of the partnership) was the appropriate forum for resolving the issue, rather than developing common law as proposed.³⁶¹

In his dissenting judgment, Wille J held that that when considering the development of the common law in a constitutional framework, it is important to consider all relevant provisions of the *Constitution* and to approach the inquiry holistically.³⁶² The question was whether the applicant's reading of the legislation would further the integrated and inclusive character of equality contemplated by the *Constitution*, which he believed it would.³⁶³ To support his stance, he relied on Mogoeng CJ's words and findings in the minority judgment in the *Bwanyana* case, which stated that the exclusion of permanent life partnerships may be addressed progressively by expanding the common law to satisfy the identified needs.³⁶⁴

³⁶⁰ *VH v EW* case para 22.

³⁶¹ *VH v EW* case paras 23–42.

³⁶² *VH v EW* case para 79.

³⁶³ *VH v EW* case para 79.

³⁶⁴ *VH v EW* case para 80.

Willie J further emphasised that there is progress in recognising a legal duty of support between life partners during the subsistence of a life partnership, particularly in the majority judgment in *Bwanya* case. He argued that people have social, moral, and religious obligations towards each other in the familial context, and a contract to support cannot be the only reasonable explanation for supporting a partner if there is also affection and altruistic motives. The court must consider various factors when determining whether a tacit contractual undertaking to support exists, some of which overlap with other factors used to determine whether a qualifying life partnership exists.³⁶⁵ Consequently, it is no longer necessary to distinguish between reciprocal support requirements arising as an unavoidable result of marriage and support duties arising in the context of permanent life partners. Therefore, permanent life partnerships must be protected constitutionally and legally.³⁶⁶ Wille J held that the failure to recognise a legal responsibility of support between life partners in common law was unconstitutional, since it constituted discrimination based on marital status. He argued that common law should be created to recognise a legal responsibility of assistance between life partners during the partnership's existence. This invention would enable life partners to enforce maintenance duties during the partnership's existence. If this responsibility was recognised, there is no reason why life partners should not be able to seek maintenance from each other after the partnership ends.³⁶⁷

Willie J emphasised the need for common law to be developed to address maintenance after a life partnership breakdown. In the absence of agreement, the court should consider factors like means, financial needs, age, duration, and standard of living. The court should then make a just order for payment until the partner's death or remarriage, whichever occurs first. This would ensure a fair and equitable solution to maintenance issues.³⁶⁸ In order to support this view, he

³⁶⁵ *VH v EW* case para 86.

³⁶⁶ *VH v EW* case para 88.

³⁶⁷ *VH v EW* case para 89.

³⁶⁸ *VH v EW* case para 92. In other words, the lack of protection for life partners is unquestionably discriminatory against a historically disadvantaged and oppressed population. Marital status and gender are recognised as grounds for discrimination, therefore discrimination against unmarried, cohabiting women is assumed to be unjust. Our courts have the authority to create a completely new remedy and process in cases when the legislature has failed to do so.

explored whether the concept of maintenance for a spouse upon divorce had a basis in our common law, noting that historically, it was widely believed that the courts had no authority to award maintenance on divorce unless there was an agreement between the parties. This uncertainty was subsequently settled by legislative action.³⁶⁹

South African courts have been entrusted with bringing common law in line with the Bill of Rights, but also acknowledging the complexities of varied partnerships. The *EW v VH* case examined the legal implications of life partnerships and whether there is a responsibility of assistance after termination. The majority judgment determined that common law does not acknowledge a responsibility of support in life partnerships. On the other hand, the minority judgment advocated for the development of common law to redress the discrimination suffered by Ms Bwanya and to promote equality.

3.4.3 The right to inherit: the Bwanya case

The facts of the case were that the applicant, Bwanya, had been living with the deceased in a heterosexual life partnership situation for two years, from 2014 until the deceased's death in 2016.³⁷⁰ Their family and friends were aware of their relationship and the couple had planned to get married and have children together in the future.³⁷¹ The deceased died intestate and the applicant submitted a claim against the deceased's estate, but the executor refused it.³⁷² She then proceeded to lodge an application in the High Court in terms of the *ISA* and the *MSSA*.³⁷³ Both claims involved a challenge to the constitutional validity of the Acts concerned in that they failed to acknowledge her rights to a portion of the deceased's inheritance and maintenance.³⁷⁴ The applications were ultimately considered by the Constitutional Court even though a settlement had been reached with *Bwanya*

³⁶⁹ *VH v EW* case para 97. It is an issue that bears scrutiny in our law, whether maintenance for spouses upon divorce has any foundation in our common law.

³⁷⁰ *Bwanya* case paras 3–7. See also Barratt 2022 *PER* 2 and Madzika 2020 *De Jure* 402.

³⁷¹ Barratt 2022 *PER* 2.

³⁷² Madzika 2020 *De Jure* 402 – 403.

³⁷³ *Bwanya* case para 10.

³⁷⁴ Barratt 2022 *PER* 2. *Bwanya* case para 10.

before litigation commenced.³⁷⁵ *Bwanya* further requested an order to include the phrase "partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support and are contemplating marriage" wherever the word "spouse" appeared in the Acts.³⁷⁶ Additionally, *Bwanya* challenged the *MSSA*, claiming that the definition of "marriage" was unconstitutional and invalid since it excluded the words "permanent opposite-sex life partnership in which the partners have undertaken reciprocal duties of support."³⁷⁷

The court ruled that while same-sex partners in similar situations benefit from their partnership, women traditionally suffer when they are destitute after years of dedication and support, robbing them of their dignity.³⁷⁸ The court further determined that this violates the right to equality in heterosexual life partnerships.³⁷⁹ Therefore, *Bwanya's* right to equality and dignity was violated, since the couple was treated differently from their same sex living partnership peers who inherit even without marriage.³⁸⁰ This discrimination was found to be based on marital status, sexual orientation, sex, and gender. In addition to this finding, the court held that although the group in question may not have previously suffered from patterns of disadvantage like those suffered by their same-sex counterparts, "the impact of the end of the relationship is severe, affecting the dignity, personhood, and identity of heterosexual permanent life partners deeply,³⁸¹ it happens at several levels and in a variety of manners, making it difficult to remove."³⁸² Regarding the *MSSA* provisions, the court found that they were restricted by the *stare decisis* rule and could not

³⁷⁵ Barratt 2022 *PER* 2. *Bwanya* case para 10. See also Madzika 2020 *De Jure* 402–403 states that as a result of the rejection, the applicant filed a suit with the High Court. She contended that some portions of the *ISA* and *MSSA* failed to recognise her rights to a portion of the deceased's estate and maintenance. On that assumption, she claimed that the regulations were illegal because they discriminated against her based on her marital status.

³⁷⁶ Madzika 2020 *De Jure* 403. See also *Bwanya* case para 53 & Barratt 2022 *PER* 2. Barratt states that *Bwanya's* claims were worded quite specifically, and she used similar wording in her constitutional arguments to the *ISA* and *MSSA*. *Bwanya* argued that the definition of "spouse" in section 1 of the *ISA* and *MSSA* was unconstitutional and invalid as it did not include the words "or partner in a permanent opposite-sex life partnership in which the partners have undertaken reciprocal duties of support."

³⁷⁷ Barratt 2022 *PER* 3.

³⁷⁸ *Bwanya* case paras 171, 181.

³⁷⁹ *Bwanya* case paras 171, 181.

³⁸⁰ Madzika 2020 *De Jure* 403. See also *Bwanya* case paras 171, 181.

³⁸¹ *Bwanya* case paras 181, 191, 225. See also Madzika 2020 *De Jure* 403.

³⁸² Madzika 2020 *De Jure* 403. See also *Bwanya* case paras 181, 191, 225.

deviate from the judgment in the *Volks* case.³⁸³ The *Volks* case applies fully to maintenance difficulties between heterosexual domestic partners.³⁸⁴

In conclusion, the court held that the issue of women in permanent life partnerships who cannot support themselves is a broader issue that Parliament must address, and the rights of these women must be clearly defined in law and enforceable in courts.³⁸⁵ It further noted that indeed, in the *Volks* case the minority acknowledged that Parliament is best placed to provide the remedy.³⁸⁶ It is appropriate to refer the matter to Parliament for legislation to address the affairs of permanent life partnerships, which involve over 3,2 million South Africans. However, Parliament is not required to give these partnerships the recognition and status of a marriage.³⁸⁷

3.5 Conclusion

The *Volks* case and *Bwanya* case have similarities considering that they both deal with issues of heterosexual life partnership rights. In the *Volks* case the court decided that the discrimination against heterosexual life partners when it comes to being afforded protection in terms of the *MSSA*, is not an unfair discrimination. The court further held that the primacy of marriage is protected by the *Constitution* and the differentiation between the married and unmarried is warranted by the *Constitution* and international law. The rationale of the court in this case was that unmarried heterosexual life partners intentionally opt not to marry, so they deliberately place themselves outside of legal protection.³⁸⁸ It is important to note that this case law sets precedent. However, the constitutional principles of equality and rectifying past injustices do not allow Western traditions of marriage to provide legal solutions for marginalised groups in South Africa.³⁸⁹ The decision in *Volks* unfairly discriminates against domestic partners, setting an unfair precedent that the law may fairly discriminate between married and unmarried partners.³⁹⁰

³⁸³ *Bwanya* case para 56.

³⁸⁴ Madzika 2020 *De Jure* 403–405.

³⁸⁵ *Bwanya* case para 202.

³⁸⁶ *Bwanya* case para 203.

³⁸⁷ *Bwanya* case para 203.

³⁸⁸ *Volks* case paras 58, 91–93.

³⁸⁹ Manthwa *Recognition of domestic partnerships in South African law* 20 – 21.

³⁹⁰ Manthwa *Recognition of domestic partnerships in South African law* 20 – 21.

Therefore, the decision should not be accepted, as it undermines the principle of present neutrality and perpetuates past injustices.³⁹¹

In the *Bwanya* case, the court emphasised the significance of precedent in determining legal issues, stating that it is a crucial aspect of the rule of law.³⁹² Since the court was dealing with the issue of both the *ISA* and *MSSA*, it recognised that the precedent established in the *Volks* case applied directly to the *MSSA* case at hand.³⁹³ The court in the *Bwanya* case overruled the *Volks* case judgment on the *MSSA*, acknowledging that the reciprocal responsibility of support might be founded on an agreement rather than an invariable result of marriage.³⁹⁴ It is indeed a breakthrough for vulnerable life partners that the outcome of the *Bwanya* case recognises permanent life partners for intestate succession and post-death maintenance.³⁹⁵

However, there is still a gap in the legal protection afforded to heterosexual life partners because they are not afforded the right to claim maintenance from each other after dissolution as was the case in *VH v EW*. Therefore, common law should be developed to redress this issue since the legislature cannot disregard the rising number of heterosexual life partnerships without violating the constitutional ban of unfair discrimination based on marital status.

This chapter discussed the fact that indeed the Constitutional Court cases have provided opposite-sex permanent life partners with some legal protection, but this legal protection is not adequate as heterosexual life partners still do not enjoy the same benefits that other intimate partners enjoy, despite the increase in life partnerships as shown in the statistics. Chapter 4 focuses on legislative development and the SALRC's effort to remedy the situation by drafting the Single

³⁹¹ Manthwa *Recognition of domestic partnerships in South African law* 20 – 21.

³⁹² *Bwanya* case para 46. See also Barratt 2022 *PER* 4.

³⁹³ Barratt 2022 *PER* 4. Barratt states that the court's decision on the *ISA* was likely influenced by the *Volks* precedent. Extending the *ISA* to encompass heterosexual life partners necessitated overturning the precedent.

³⁹⁴ *Bwanya* case para 71. See also Barratt 2022 *PER* 8.

³⁹⁵ Sloth Nielsen 2023 *Acta Juridica* 149.

Marriage Statute. The chapter also examines whether or not the bill makes provision for heterosexual life partnerships such as cohabitation.

CHAPTER 4: LEGISLATIVE DEVELOPMENT: NEW PROPOSALS

4.1 Introduction

Chapter 3 delved into the fact that case law has provided opposite-sex permanent life partners some legal protection. However, this legal protection is not adequate as heterosexual life partners still do not enjoy the same benefits that other intimate partners enjoy, despite the ever-increasing number of heterosexual partners cohabiting.

As discussed in Chapter 1, the *Marriage Act*, *Civil Union Act*, and *Recognition of Customary Marriages Act* are among the several pieces of law that govern marriage in South Africa.³⁹⁶ Parliament has also considered adding the Domestic Partnership Bill to the list.³⁹⁷ It aims to regulate unmarried partnerships.³⁹⁸ These laws have led in a hierarchy and unfairness in South African marriage law, especially when it comes to civil marriages.³⁹⁹ This hierarchy refers to the belief that certain intimate relationships are better protected in society and/or by law than others.⁴⁰⁰ The unequal treatment marriages and intimate relationships prompted the development of a single marriage law that would uniformly govern all marriages and life partnerships.⁴⁰¹ In its pursuit to remedy the current position and to regulate all marriages under a single piece of legislation, the SALRC released an Issue Paper and a Discussion Paper in 2019 and 2020, proposing two possible bills for a single marriage statute: the Protected Relationships Bill and the Recognition and Registration of Marriages and Life Partnerships Bill.⁴⁰²

³⁹⁶ Osman 2021 *PELJ* 3. The new Bill will consolidate all marriage statutes and fill any gaps in the present statute.

³⁹⁷ Osman 2021 *PELJ* 3.

³⁹⁸ Osman 2021 *PELJ* 3.

³⁹⁹ Osman 2021 *PELJ* 3. See Bakker 2013 *PER* 124, states that the broad set of acts governing intimate partnerships in South Africa complicates matters, such as the average person being unaware of the legal implications of their relationship due to the complex system of laws. This has resulted in a hierarchy of intimate relationships, which was not intended by the legislation but is a practical outcome of many acts governing intimate partnerships.

⁴⁰⁰ Bakker 2013 *PER* 124–125.

⁴⁰¹ Osman 2021 *PELJ* 3. For convenience's sake, this paper will not get into full details of all these other types of marriages but will focus more on the position of heterosexual life partnerships.

⁴⁰² Osman 2021 *PELJ* 3. The two bills regulate relationships similarly, but the terminology for referring to a marriage as a "protected relationship" or a "marriage / life partnership" differs.

This chapter focuses on legislative development and the SALRC's effort to remedy the situation by drafting the Domestic Partnerships Bill and the Single Marriage Statute. The chapter also examines whether these bills make provision for heterosexual life partnerships such as cohabitation.

4.2 Draft Domestic Partnerships Bill 2006 and spousal duty to support

The SALRC's 2006 report on domestic partnerships highlighted the lack of legal protection for life partners who are economically vulnerable due to their roles during the relationship.⁴⁰³ The Commission proposed that the courts should have discretion to redistribute property or order maintenance in accordance with the merits of each case.⁴⁰⁴ It was as a result of the abovementioned report that in 2008, the South African legislature introduced a Draft Domestic Partnerships Bill⁴⁰⁵ to regulate life partnerships. In doing so it adopted a comprehensive and adaptable approach to domestic partnerships⁴⁰⁶ by providing for two forms of domestic partnerships: registered and unregistered.⁴⁰⁷ Registered partnerships require a public commitment, regardless of gender, and are subject to legal consequences similar to valid marriages.⁴⁰⁸ It gives rise to automatic (*ex lege*) duties of support between partners, they cannot dispose of joint property without written consent, and they are entitled to occupy the family home.⁴⁰⁹ Additionally, registered partners qualify as "spouse" for the *ISA*⁴¹⁰ and the *MSSA*⁴¹¹ purposes, and as a "dependant" in terms of the *Compensation for Occupational Injuries and Diseases Act*.⁴¹² On the other

⁴⁰³ Barratt 2015 *STELL LR* 110.

⁴⁰⁴ Barratt 2015 *STELL LR* 110. Barratt also states that the primary focus of the report was on achieving fair outcomes at the termination of long-term life partnerships.

⁴⁰⁵ Domestic Partnerships Bill (draft) GN 36 in GG 30663 of 14 January 2008. The commission's proposal that the courts should have the discretion to redistribute property or order maintenance in appropriate circumstances was included in the bill, see Barratt 2015 *STELL LR* 110. (Hereafter "the Bill").

⁴⁰⁶ Barratt 2015 *STELL LR* 119.

⁴⁰⁷ Smith and Robinson 2010 *PER* 31. If enacted, this Bill would eliminate the dilemma caused by the ongoing exclusion of heterosexual life partners from the ISA.

⁴⁰⁸ Smith and Robinson 2010 *PER* 31. Bonthuys 2018 *PER* 13.

⁴⁰⁹ Smith and Robinson 2010 *PER* 31. Bonthuys 2018 *PER* 13.

⁴¹⁰ 81 of 1987.

⁴¹¹ 27 of 1990.

⁴¹² 130 of 1993. Smith and Robinson 2010 *PER* 31. Partners are afforded duty to support and can be extended post-dissolution support if agreed upon or through court order. Consequently, the *MSSA* would apply to survivors of such partnerships.

hand, unregistered partnerships would not adhere to the requirements mentioned above and ultimately do not give rise to a duty of support, but after death or separation, partners can apply for maintenance in court.⁴¹³ Bonthuys maintained that registered partnerships would offer the strongest rights of support.⁴¹⁴

The Bill integrates elements of both contract-based and status-based approaches to life partnership regulation.⁴¹⁵ In the contract-based approach, life partners can establish economic arrangements through contracts, such as formal agreements governing property ownership and division upon the end of their relationship.⁴¹⁶ Although the Bill gave the courts discretion to redistribute property or order maintenance in accordance with the merits of each case at the dissolution of life partnership, the Bill upholds the autonomy of life partners who manage their property through contracts, ensuring the court does not interfere with their decisions.⁴¹⁷ When it comes to the status-based model of domestic partnerships, the SALRC adopted a "judicial discretion model" in the Bill, which means that life partnership status does not automatically result in financial consequences, but it does give the court the authority to make financial orders that are deemed just and equitable.⁴¹⁸ These orders are status-based rather than contract-based, and they can be issued even if the parties do not agree.⁴¹⁹ Critics contend that this paradigm violates the autonomy rights of couples who choose not to have their relationship legally regulated.⁴²⁰ Couples who agree on financial repercussions, on the other

⁴¹³ Bonthuys 2018 *PER* 13. See also Coetzee Bester and Louw 2015 *PER* 2964.

⁴¹⁴ Bonthuys 2018 *PER* 13. Coetzee Bester and Louw also contend that registered domestic partners should have access to matrimonial property law if domestic partnership legislation does not offer a clear alternative. This protection should be available only if needed and can cover needs-based claims and property division claims, which are generally outside the context of the chosen model, see Coetzee Bester and Louw 2015 *PER* 2964.

⁴¹⁵ Barratt 2015 *STELL LR* 119.

⁴¹⁶ Barratt 2015 *STELL LR* 117. Barratt also asserts that previously, such contracts were regarded as contra *bonis mores* within South African law. However, this is no longer the position because the law now allows cohabitation contracts as legally enforceable.

⁴¹⁷ Barratt 2015 *STELL LR* 117.

⁴¹⁸ Barratt 2015 *STELL LR* 117–119.

⁴¹⁹ Barratt 2015 *STELL LR* 117–119.

⁴²⁰ Barratt 2015 *STELL LR* 117–119.

hand, maintain the ability to regulate them. Judicial powers are only effective when both partners approach the court.⁴²¹

The Draft Domestic Partnerships Bill gives couples autonomy to govern their affairs.⁴²² It also affords them the freedom to choose not to approach the courts to seek legal redress.⁴²³ However, if the parties cannot agree on the financial implications on terminating their relationship, they may seek a resolution from the courts.⁴²⁴ For that reason, the courts have jurisdiction to hear cases from anyone who has been in any kind of domestic partnership, registered or unregistered⁴²⁵ and to also make orders regarding maintenance, intestate succession and division of the property.⁴²⁶ Although there are no formal requirements when such a matter is heard in court, clause 26 of the Bill provides a comprehensive list of factors for the court to consider when making orders, assessing whether a relationship is casual or marriage-like, whether it has caused any significant emotional distress, and whether it has caused dependence in one partner.⁴²⁷ These factors include the duration of the relationship, common residence, financial dependence, property ownership, mutual commitment, care of children, household duties, reputation, and relationship status with third parties.⁴²⁸ Further factors are included in clause 28, which allows the court to order ongoing maintenance after the termination of the relationship, ensuring equitable and just treatment.⁴²⁹ It is important to note that clause 28 factors are similar to those listed in section 7(2) of the *Divorce Act*,⁴³⁰ which provides for maintenance after divorce.⁴³¹ The bill's clause 32 also regulates property division at termination of the domestic partnership, allowing the court to divide joint property or reallocate separate property as deemed equitable and just. In case of

⁴²¹ Barratt 2015 *STELL LR* 119.

⁴²² Barratt 2015 *STELL LR* 119.

⁴²³ Barratt 2015 *STELL LR* 119.

⁴²⁴ Barratt 2015 *STELL LR* 119.

⁴²⁵ Bonthuys 2018 *PER* 13.

⁴²⁶ Barratt 2015 *STELL LR* 119. Clause 36 of the Bill.

⁴²⁷ Barratt 2015 *STELL LR* 119.

⁴²⁸ Barratt 2015 *STELL LR* 119.

⁴²⁹ 70 of 1979.

⁴³⁰ 70 of 1979.

⁴³¹ Barratt 2015 *STELL LR* 119–120. According to Barratt, the SALRC elected to use similar wording, presumably because the courts are already familiar with this wording.

transfer orders, the court must be satisfied that the unregistered partner contributed to the maintenance or increase of the other partner's property.⁴³²

The Bill's objective is to redress relationship-induced dependence and help economically vulnerable spouses.⁴³³ It also brings hope that in future life partners' intimate relationships will be regulated by legislation in the same way as civil marriages, customary marriages and civil unions.⁴³⁴ Furthermore, the Bill also aims to achieve equity between partners even if they did not agree to share property or support each other upon termination of their life partnership.⁴³⁵ However, the enactment of the Domestic Partnerships Act was delayed due to the *Civil Union Act*⁴³⁶ and a separate Draft Domestic Partnerships Bill in 2008.⁴³⁷ Consequently economically vulnerable spouses who wish to claim maintenance at the end of their partnership cannot use these provisions until Parliament passes the legislation.

It is alarming that the SALRC is seeking to afford legal protection to permanent life partners, yet it still discriminates between registered and unregistered life partnerships.⁴³⁸ Registered partners would have to undergo a ceremony of public commitment in order for their partnership to be fully protected, and the unregistered partnership would not enjoy the same benefits.⁴³⁹ I concur with Coetzee et al.'s⁴⁴⁰ argument that the Bill should consider whether to include registered domestic partnerships, as they require a formal registration process to be recognised. If not, they would become an alternative to a formalised union similar to a marriage or a civil union with similar consequences.⁴⁴¹ The Bill should only apply to *ex post facto*

⁴³² Barratt 2015 *STELL LR* 119–120.

⁴³³ Manthwa *Recognition of domestic partnerships in South African law* 60. See also Barratt 2015 *STELL LR* 121.

⁴³⁴ Manthwa *Recognition of domestic partnerships in South African law* 60. See also Barratt 2015 *STELL LR* 121.

⁴³⁵ Barratt 2015 *STELL LR* 121.

⁴³⁶ 17 of 2006.

⁴³⁷ Bonthuys 2018 *PER* 13.

⁴³⁸ Coetzee Bester and Louw 2015 *PER* 2971.

⁴³⁹ Coetzee Bester and Louw 2015 *PER* 2971.

⁴⁴⁰ Coetzee Bester and Louw 2015 *PER* 2971.

⁴⁴¹ Coetzee Bester and Louw 2015 *PER* 2971.

recognition of unregistered domestic partnerships without formal legal recognition, as they are devoid of any formal recognition for their existence.⁴⁴²

4.3 SALRC 2019 and 2020 issue paper 35

In April 2019, the SALRC released Issue Paper 35, the first document created to deal with the possible adoption of a single marriage statute.⁴⁴³ The recommendation from Issue Paper 35 was considered when drafting Discussion Paper 152 – the single marriage statute.⁴⁴⁴ Two draft bills were created as alternate choices.⁴⁴⁵ The first alternative is the Protected Relationships Bill, which proposed unified requirements for all protected relationships, marriages, and life partnerships.⁴⁴⁶ The second choice is the Recognition and Registration of Marriages and Life Partnerships Bill, which also sought to unify the requirements for all protected relationships, marriages, and life partnerships.⁴⁴⁷

The proposed bills aimed to recognise protected relationships, marriages, and life partnerships, regardless of religious, cultural, or other beliefs. They outlined the requirements for entering into such relationships, registration, legal consequences, and incidental matters. These two bills also aimed to address the registration of these relationships, regardless of whether they had been registered under the proposed legislation or the *Marriage Act*,⁴⁴⁸ the *Civil Union Act*,⁴⁴⁹ or the *RCMA*.⁴⁵⁰ In addition, the bills addressed matters incidental to these relationships, ensuring that they are referred to in the appropriate legislation.⁴⁵¹

One noteworthy point is that the failure to register a protected relationship, marriage, or life partnership does not render the relationship invalid.⁴⁵² In addition,

⁴⁴² Coetzee Bester and Louw 2015 *PER* 2971.

⁴⁴³ SALRC Project 144 1.

⁴⁴⁴ Discussion paper 152 on a single marriage statute (project 144) 1.

⁴⁴⁵ Discussion paper 152 on a single marriage statute (project 144) 1.

⁴⁴⁶ Discussion paper 152 on a single marriage statute (project 144) 1.

⁴⁴⁷ Discussion paper 152 on a single marriage statute (project 144) 1.

⁴⁴⁸ 25 of 1961.

⁴⁴⁹ 17 of 2006.

⁴⁵⁰ 120 of 1998. Discussion paper 152 on a single marriage statute (project 144) 1–2.

⁴⁵¹ Discussion paper 152 on a single marriage statute (project 144) 2.

⁴⁵² Discussion paper 152 on a single marriage statute (project 144) 5. Meaning that it will be possible to prove the existence of a life partnership other than by proof of registration.

when legislation or common law has consequences for protected relationships, marriages, or life partnerships, it refers to the relationships defined in the proposed legislation, regardless of whether they have been registered under the proposed legislation, the *Marriage Act*,⁴⁵³ the *Civil Union Act*,⁴⁵⁴ or *RCMA*.⁴⁵⁵

The Bill proposes that parties in marriages or life partnerships may file dependents' actions for loss of support, but they will not be regarded as having a marriage/life partnership.⁴⁵⁶ This denial of a person's status affects their rights since it affects the recognition of the relationship as a survivor under the *MSSA*.⁴⁵⁷ The definition of a "survivor" in the Recognition and Registration of Marriages and Life Partnership Act has been amended to include the person's partner in a relationship.⁴⁵⁸ This means that the party is not deemed a survivor under the Maintenance Act and cannot seek maintenance from the deceased partner's estate.⁴⁵⁹

The SALRC believes that the legal implications of protected relationships should be determined by other investigations, such as the review of maintenance and matrimonial property law, and legislation such as the *Divorce Act* and *MSSA* rather than the Bill.⁴⁶⁰

4.4 Provisions of the single marriage statute

The Draft Marriage Bill of 2022 illustrates the South African legislature's willingness to alter its marriage legislation to accommodate all types of intimate partnerships, regardless of gender, sexual orientation, religious, cultural, or other convictions.⁴⁶¹

⁴⁵³ 25 of 1961.

⁴⁵⁴ 17 of 2006.

⁴⁵⁵ 120 of 1998. Discussion paper 152 on a single marriage statute (project 144) 6.

⁴⁵⁶ Osman 2021 *PELJ* 3.

⁴⁵⁷ Osman 2021 *PELJ* 3.

⁴⁵⁸ Osman 2021 *PELJ* 3.

⁴⁵⁹ Osman 2021 *PELJ* 3. Discussion paper 152 on a single marriage statute (project 144) 5. The advisory committee suggested that the Issue Paper examine the impact of marriages on maintenance and property distribution in light of the SALRC's current inquiries into these topics.

⁴⁶⁰ Osman 2021 *PELJ* 3. Discussion paper 152 on a single marriage statute (project 144) 5.

⁴⁶¹ Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>.

This aligns with South Africa's greater goal of achieving genuine equality on all fronts and bringing marriage policy in accordance with the *Constitution* as stated above.⁴⁶²

The new Bill aims to eradicate child and forced arranged marriages in line with international standards by criminalising marriages to persons under 18 and prioritising the interests of the child over religious or cultural considerations in South Africa.⁴⁶³ This change is in line with the constitutional principle that the interests of the child are paramount. The Bill also recognises polygamous marriages and did not leave them out. All spouses are considered equal under the new legal framework, despite the current limitations on the capacity to acquire and dispose of assets, enter contracts, and litigate.⁴⁶⁴

There are significant enhancements to the Act to achieve the goals of genuine equality on all fronts and bringing marriage policy in accordance with the *Constitution*.⁴⁶⁵ However there are several omissions from the Bill that cause concern.⁴⁶⁶

The first notable problem is that although the Bill recognises polygamous marriages as stated above, it prescribes the requirements for a valid polygamous marriage by promoting patriarchal ideologies and limiting women to one partner.⁴⁶⁷ This suggestion is ignorant and undermines the goal of recognising the diversity of genders in society.⁴⁶⁸ The state and stakeholders should move away from presuming

⁴⁶² Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>.

⁴⁶³ Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>.

⁴⁶⁴ Osman 2021 *PELJ* 6 – 8. Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>.

⁴⁶⁵ Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>.

⁴⁶⁶ Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>.

⁴⁶⁷ Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>.

⁴⁶⁸ Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>.

that gender gaps and diversity are enough to achieve the women's peace and security agenda.⁴⁶⁹

Certain requirements of the new Bill may be overly restrictive and result in discrimination because it requires all customary marriages to be registered, with failure to do so resulting in the marriage being null and void. This is concerning, as South African women in customary marriages have faced difficulties in registering their marriages after their spouse's death. Its concerning that the lack of registration in this Bill could invalidate the marriage, considering the difficulties women face in customary marriages, especially those who live in the rural areas, as they may be unable to access a home affairs office to register their customary marriages.⁴⁷⁰

4.5 The position on heterosexual life partnerships

Osman⁴⁷¹ states that "the Bill defines a life partnership as one where the parties cohabit and have assumed a permanent responsibility of support for each other." Although it is encouraging to see unmarried partners recognised, the definition of a life partnership requires further consideration.⁴⁷² This shallow definition excludes some life partnerships, and as a result, it contradicts the South African courts' advancements in women's rights in these relationships.⁴⁷³

The Bill requires cohabitation between parties for the recognition of a life partnership.⁴⁷⁴ This is problematic for many South Africans as intimate relationships often do not coincide with sharing a household or the behavioural and spatial patterns found in monogamous Western marriages.⁴⁷⁵ The continuing migrant labour system allows many people to be members of multiple households, sharing long-term sexual, emotional, and economic relationships while not necessarily living

⁴⁶⁹ Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>.

⁴⁷⁰ Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>.

⁴⁷¹ Osman 2021 *PELJ* 9.

⁴⁷² Osman 2021 *PELJ* 9.

⁴⁷³ Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>.

⁴⁷⁴ Bonthuys 2018 *PELJ* 3.

⁴⁷⁵ Bonthuys 2018 *PELJ* 3.

together permanently or for a prolonged period.⁴⁷⁶ For example, a man may leave a rural area for work and enter into a relationship with a woman where he works, commuting between the rural and urban areas, or he may leave an unmarried partner in the rural area, supporting them but not cohabiting for prolonged periods.⁴⁷⁷ Without cohabitation, women's relationships would not be recognised as life partnerships in terms of the Bill.⁴⁷⁸

The Bill overlooks the vulnerability of life partners who do not cohabit in shared households, ignoring the importance of non-cohabiting shared households in African societies. There is no acknowledgement that a shared home may be less significant in African communities than it is in Western countries,⁴⁷⁹ and that requiring cohabitation for the recognition of a life partnership may exclude many families, therefore ignoring the lived realities of the people of South Africa. It is recommended that cohabitation should be a factor used by courts to determine mutual support, but not a requirement for life partnership recognition as it is contained the current version of the Bill.⁴⁸⁰

4.6 The Department of Home Affairs proposal

In 2013, the Department of Home Affairs (DHA) suggested a Single Marriage Act that would allow South Africans to marry legally while promoting equality.⁴⁸¹ The DHA and the SALRC both worked separately on marriage policies.⁴⁸² In June 2019, the DHA informed the SALRC that it was developing a policy to detect outdated and non-compliant aspects in the statute.⁴⁸³ The DHA is now conducting detailed research to inform the policy's development. However, the differences between the two reform organisations indicate a lack of communication.⁴⁸⁴

⁴⁷⁶ Bonthuys 2018 *PELJ* 3.

⁴⁷⁷ Osman 2021 *PELJ* 9.

⁴⁷⁸ Osman 2021 *PELJ* 9.

⁴⁷⁹ Bonthuys 2018 *PELJ* 6.

⁴⁸⁰ Osman 2021 *PELJ* 9.

⁴⁸¹ Clark and van Heerden 2024 *SALJ* 475. In June 2023, the Cabinet approved the DHA's Draft Marriage Bill of 2022.

⁴⁸² Clark and van Heerden 2024 *SALJ* 475.

⁴⁸³ Clark and van Heerden 2024 *SALJ* 475.

⁴⁸⁴ Clark and van Heerden 2024 *SALJ* 475.

The goal of the DHA's White Paper⁴⁸⁵ is to allow South Africans of all sexual orientations, religious and cultural backgrounds to legally marry and form permanent life partnerships, promoting equality, non-discrimination, human dignity, and unity in diversity.⁴⁸⁶ However, permanent life partnerships were left out of the Draft Marriage Bill, contradicting both the White Paper and the SALRC's recommended bills.⁴⁸⁷

South Africa's Draft Marriage Bill claims to be based on sections 9(1) and (3) of the *Constitution*, which prohibit unjust discrimination based on marital status.⁴⁸⁸ However, it provides no legal protection for life relationships, particularly for the women, and fails to recognise South Africa's international duties to eliminate gender discrimination in marriage.⁴⁸⁹ The Bill's preamble also emphasises that it aims equity and inclusiveness, but it does not recognise intimate partnerships, such as permanent life partnerships.⁴⁹⁰ The Bill is silent on issues of maintenance and asset division on separation.⁴⁹¹

4.7 Conclusion

The Draft Domestic Partnership Bill is part of the efforts of the legislature to remedy the legal uncertainty when it comes to the legal protection of life partners. Although the SALRC report makes provision for life partners, the Department of Justice's Bill in draft form, promises to have substantial potential influence.⁴⁹² The approach taken in the Bill creates a further problem of distinguishing between registered and unregistered life partners as stated above. This differentiation is unfair on two grounds: Firstly, registered domestic partners would become an alternative to formalised unions like a marriage or a civil union with similar consequences. Secondly, it creates a further discrimination between registered and unregistered

⁴⁸⁵ White Paper (Vision Statement at 23).

⁴⁸⁶ Clark and van Heerden 2024 *SALJ* 477.

⁴⁸⁷ Clark and van Heerden 2024 *SALJ* 477.

⁴⁸⁸ Clark and van Heerden 2024 *SALJ* 481.

⁴⁸⁹ Clark and van Heerden 2024 *SALJ* 481.

⁴⁹⁰ Clark and van Heerden 2024 *SALJ* 481.

⁴⁹¹ Clark and van Heerden 2024 *SALJ* 473 and 481.

⁴⁹² Burnett Attorneys & Notaries 2024 <https://www.burnett-law.co.za/the-new-marriage-law-in-south-africa>.

domestic partnerships, because unregistered domestic partners would not enjoy the same benefits as the registered partners.

As stated above, the proposed Single Marriage Statute's treatment of life partnerships is troubling since it ignores the rights and legal protection of many south Africans, therefore undermining their lived realities. It's noteworthy to reiterate that heterosexual life partners frequently confront issues with property rights, succession, and access to certain benefits.⁴⁹³ Therefore, without legal recognition, these couples may have difficulty expressing their rights and defending their interests, especially if they separate or a partner dies. By ignoring the reality of life partners, the Bill passes up an opportunity to offer clarity and safeguards for those in non-marital partnerships, creating confusion and possible injustices, and women in these relationships will continue to lack bargaining power and rely on their partners' financial support.⁴⁹⁴ Therefore, excluding domestic partnerships from the Bill is irrational and in contravention of the Constitutional Court's ruling. The issue of property division for life partners remains a thorny issue since both the SALRC and DHA proposals have left it hanging.

The next chapter contains concluding remarks and recommendations as to whether the common law should be further developed in order to include an automatic duty of support for heterosexual life partners after termination of the life partnership to promote the spirit, purport, and objectives of the *Constitution* or not.

⁴⁹³ Life partnerships have serious implications for finances, human dignity, property ownership, and child custody.

⁴⁹⁴ Centre for the Study of Violence and Reconciliation 2023 <https://www.csvr.org.za/the-new-marriage-bill-and-its-implications-in-south-africa/>. A 2022 study by the Centre for the Study of Violence and Reconciliation highlights the difficulties women in domestic partnerships face.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The previous chapter delved into the new proposals of the SALRC. The proposed legislative developments include the Draft Domestic Partnerships Bill and the Single Marriage Statute.

Life partnerships have always been excluded from the ordinary legal protection afforded to couples who are married. However, they can make use of contracts to protect their interest in the partnership. This exclusion constitutes discrimination in a democratic country like South Africa. The laws related to intimate relationships developed from a Calvinist beliefs and were enforced through a legal system where the Parliament held ultimate authority. In the current South Africa, Parliament has to uphold the *Constitution*.

The development of laws relating to intimate relationships is evident from the enactment of the *RCMA* and the *Civil Union Act*, the former affording protection to previously disadvantaged black women in customary marriages and the latter enabling same sex partners to enter a legal marriage. The *VH v EW* case, *Volks* case and *Bwanya* case are among the few cases that show that heterosexual life partnerships are still lagging when it comes to legal protection.

The applicant in the *VH v EW* case argued that the lack of legal recourse for life partners to seek maintenance from one another following the termination of their partnership is legally objectionable since it discriminates based on marriage status and gender, resulting in unequal protection under the law.⁴⁹⁵

The aim of this chapter is to analyse the study's findings in response to the question of whether common law should be developed to include an automatic duty of support for heterosexual life partners after termination of the life partnership to promote the spirit, purport, and objectives of the *Constitution*.

⁴⁹⁵ *VH v EW* case para 20.

Furthermore, this chapter looks at how the legislature can afford heterosexual life partners the same legal protection as other forms of intimate relationship to cure the issue of discrimination on the grounds of marital status. The chapter concludes with recommendations.

5.2 Findings of the study

5.2.1 The choice argument

The extension of the maintenance rights of life partnerships has been hampered by two majority judgments in the *Volks* case. It is important to note that this is a Constitutional Court case, therefore setting precedent on the issue of life partners not being able to claim maintenance from a deceased partner's estate in terms of the *MSSA*.

The court relied on the choice argument to exclude life partnerships from this claim. This argument assumes that a person's marital status, whether married or single, is the consequence of a deliberate or positive decision.

5.2.2 Marriage as a legally changing institution

The choice argument undermines the constitutional prohibition against discrimination based on marital status by privileging marriage. The law has historically favoured civil law marriages, so it has immense legal privileges and obligations. However, recent changes in marriage law show that marriage is a legally changing institution, with many enactments aimed at combating gender discrimination within marriage. Public policy does change over time, thus both the law and society should acknowledge the reality of life partnership.

5.2.3 Duty to support and division of property

An option to marry should not be sufficient to conclude that surviving life partners are not entitled to support, because an option to marry often only exists in theory. The answer to the issue in this case rests not in matrimonial law rules, but in the

larger framework of family law principles, which aim to foster stability, accountability, and equality in personal relationships.

People have social, moral, and religious obligations in familial settings, and a contract to support cannot be the only legitimate rationale for sustaining a spouse when there are affectionate and altruistic motivations. When assessing whether a tacit contractual obligation to support exists, courts must evaluate a variety of elements, some of which may overlap with those used to define a qualified life partnership. Permanent life partnerships must be safeguarded by the *Constitution* and the law.

After separation, life partners leave the relationship with nothing, meaning they are not entitled to share assets. There is no protection in this regard, except if the parties safeguard their relationship with contracts.

5.2.4 Inheritance claim

Permanent life partners are unable to claim maintenance or inheritance from their deceased partner's estate in terms of the *MSSA* and *ISA*. The *Bwanya* case changed the narrative as a heterosexual permanent life partner was granted the right to inherit from her deceased partner. The *Bwanya* case made an order to include the phrase "partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support" wherever the word "spouse" appeared in section 1 of the *ISA* and *MSSA*. Its exclusion is unconstitutional and invalid. In essence, because of the *Volks* and *Bwanya* cases, the issue of maintenance with regard to life partners has become stronger and as a result of the *EB v ER* case, there is an argument to be made for a division of property when people have been in a cohabitation to protect the rights of women.

5.2.5 The development of common law

The exclusion of permanent life partnerships may be addressed progressively by expanding the common law to satisfy the identified needs. When considering the development of the common law within a constitutional framework, it is important

to consider all relevant provisions of the *Constitution* and to approach the inquiry holistically.

South African courts have been entrusted with bringing common law in line with the Bill of Rights, but also acknowledging the complexities of varied partnerships. The minority judgment in the *VH v EW* case advocated for the development of common law to redress the discrimination suffered by life partners and to promote equality. Common law should be developed to recognise a legal responsibility of assistance between life partners during the partnership's existence. This invention would enable life partners to enforce maintenance duties during the partnership's existence. If this responsibility were recognised, there is no reason why life partners should not be able to seek maintenance from each other after the partnership ends.

5.2.6 Maintenance claim after the dissolution of a life partnership

Willi J in the *VH v EW* case held that a legal duty of support between life partners over the course of a life partnership should be recognised. Therefore, it is no longer necessary to distinguish between reciprocal support requirements arising as an unavoidable result of marriage and support duties arising in the context of permanent life partners. This call for permanent life partnerships must be protected constitutionally and legally. Thus, Wille J held that the failure to recognise a legal responsibility of support between life partners in common law was unconstitutional since it constituted marital status discrimination. He argued that common law should be created to recognise a legal responsibility of assistance between life partners during the partnership's existence. Consequently, this invention would enable life partners to enforce maintenance duties during the partnership's existence. Ultimately, if this responsibility were recognised, there is no reason why life partners should not be able to seek maintenance from each other after the partnership ends.

5.2.7 Lived experiences and gender issues

With the variety of intimate relationships in South Africa, and three million South Africans living in permanent life partnerships, unconventional lifestyles should not be penalised by the law. Recognition should be given to relationships that

demonstrate mutual support and promote stable family life. This means that instead of categorising relationships based on marital status, it is important to focus on the function they serve in society, such as protecting vulnerable family members and promoting fairness during family disputes.

Women in life partnerships bear the brunt of financial loss after the dissolution of life partnership, whether through death or break up. Barrat⁴⁹⁶ has stated that the Constitutional Court has emphasised the importance of establishing a legislative framework to guarantee that economically weak spouses are not "unfairly taken advantage of," referring specifically to women. A family law system that permits one partner to take undue advantage of the other appears to violate the broader objectives of equality and justice that the legal system is intended to foster. The state and family law system have a responsibility "to protect the vulnerable and weak in society."

5.2.8 The conundrum

Even after the enactment of the *Constitution*, which affords everyone the right to inheritance and dignity, life partnerships are still excluded. Homosexual life partners have been afforded the rights of intestate succession; they continue to find themselves in a more favourable legal position than their heterosexual counterparts. Although certain legislation offers life partners legal protection on ad hoc basis, such as the Insolvency Act,⁴⁹⁷ the *Employment Equity Act*,⁴⁹⁸ section 1 of the *Domestic Violence Act*⁴⁹⁹ and sections 231 and 293 of the *Children's Act*,⁵⁰⁰ they still find themselves inadequately protected by the law.

The *Volks* case hinders life partners from benefitting from the *MSSA* and *ISA*, yet the minority judgment in the *Bwanya* case advocates for them to be included.

⁴⁹⁶ Barratt 2015 *STELL LR* 112–113.

⁴⁹⁷ 24 of 1936.

⁴⁹⁸ 55 of 1998.

⁴⁹⁹ 116 of 1998.

⁵⁰⁰ 38 of 2005.

There is a clear conflict between the that are values protected in society: On the one hand, there are the values of equality and equal benefit of the law, and on the other hand, there is the entrenched value of marriage. Thus, Parliament's intervention is required to remove uncertainty about how domestic partnerships ought to be treated in law.

5.3 Recommendations

The SALRC's proposed Single Marriage Statute should be passed into law. However, its current shortcomings require rectification. The first issue to look at is the narrow definition of life partnership that it has adopted. The Bill should not only focus on the spatial patterns typically found in monogamous Western marriages, namely cohabitation. However, it should also consider other types of life partnership where the couple might not be living together but has undertaken a reciprocal duty of support.

Parliament should develop common law in a manner that promotes the spirit, purport, and objects of the Bill of Rights by recognising an *ex lege* duty of support for unmarried opposite-sex permanent life partners.

Heterosexual life partners should be afforded the right to claim maintenance and share assets after a break so that women are not left destitute. They should also be afforded legal right to claim maintenance when the relationship comes to an end through death in terms of the *MSSA* and the *ISA*.

5.4 Conclusion

Indeed, marriage patterns and the structure of family units have changed in South Africa because of the decline in the number of marriages and the increase in instances of cohabitation. Laws related to marriage have been changing since the dawn of democracy. However, the position of life partners has not changed. They remain unprotected by the law. However, the SALRC's new proposal could bring a new era for heterosexual life partners.

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