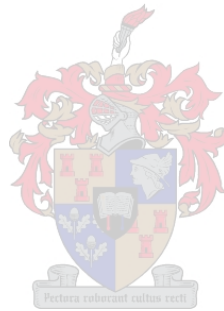


# **The implications of a relational feminist interpretation of socio-economic rights for cohabiting partners**

Tarryn Bannister



*Dissertation presented in fulfilment of the requirements for the degree of Doctor of  
Laws in the Faculty of Law at Stellenbosch University*

Promoter: Prof Sandra Liebenberg

Co-Promoter: Prof Sonia Human

2016

## **Declaration**

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof (save to the extent explicitly otherwise stated), and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Tarryn Bannister

December 2016, Stellenbosch

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## Summary

Within South Africa, it is disproportionately women and children who bear the socio-economic burdens of divorce and family dissolution. While all family relationships need to be effectively regulated so as to protect the socio-economic needs of its members, women who are cohabiting remain particularly vulnerable. This is due to the fact that their status is governed by a patchwork of laws that do not express a coherent set of family law rules. Upon the termination of these relationships, whether initiated by one of the partners or upon a partner's death, these women tend to fall between the cracks of the legal system. As a result of this, they often face eviction and destitution. This stands in sharp contrast to South Africa's progressive constitutional framework which appears highly conducive to combating gender inequality and poverty. For example, the Constitution protects the right to equality (section 9), human dignity (section 10), the right to have access to adequate housing (section 26) and the right to have access to health care services, food, water and social security (section 27). The Constitution also provides for the horizontal application of the Bill of Rights through sections 8 and 39 of the Constitution. The Constitution's commitment to founding a society based on human dignity, equality and human rights and freedoms, therefore extends to private relations. In spite of these provisions, the family law regime is primarily perceived through a private law lens informed by liberal conceptions of choice, contractual autonomy and marriage fundamentalism. This dissertation examines the potential of a relational feminist framework to guide the horizontal application of socio-economic rights between cohabitants so as to guide both common law and legislative reform in this area. This horizontal application is primarily through the vehicles of sections 8 and 39 of the Constitution. Progressive foreign law developments pertaining to the protection of unmarried cohabitants are then analysed to determine whether they can inform the development of the South African family law regime. This dissertation thus analyses how existing family law rules and doctrines can be transformed so as to be more responsive to the lived realities and needs of female cohabitants.

## Opsomming

In Suid-Afrika is dit vrouens en kinders wat buite verhouding die gevolge dra van egskeiding en die beëindiging van gesinsverhoudings. Terwyl alle gesinsverhoudings effektief gereguleer moet word om sodoende die sosio-ekonomiese behoeftes van gesinslede te beskerm, bly veral vrouens in saamwoonverhoudings besonder kwesbaar. Dit kan toegeskryf word daaraan dat hul status nie deur 'n samehangende stel familiereg reëls gereguleer word nie, maar eerder op 'n lukrake wyse deur wetgewing. By die beëindiging van hierdie verhoudings, hetsy geïnisieer deur een van die partye of deur die dood van 'n party, is dit veral vrouens wat geneig is om tussen die krake in die regstelsel te val. As gevolg hiervan word hulle dikwels deur uitsetting en ontbering gekonfronteer. Dit is 'n teenstelling met Suid-Afrika se progressiewe grondwetlike raamwerk wat meewerk tot die bekamping van geslagsongelykheid en armoede. Die Grondwet verskans byvoorbeeld die reg op gelykheid (artikel 9), die reg op menswaardigheid (artikel 10), die reg op toegang tot geskikte behuising (artikel 26) en die reg op toegang tot gesondheidsorg, voedsel, water en maatskaplike sekerheid (artikel 27). Die Grondwet maak ook voorsiening vir die horisontale toepassing van die Handves van Regte op grond van artikels 8 en 39 van die Grondwet. Die Grondwet se verbintenis tot die daarstel van 'n samelewing wat op menswaardigheid, gelykheid, menseregte en vryhede gegrond is, strek dus tot privaat verhoudings. Ten spyte van hierdie bepalings, word die familieregstelsel hoofsaaklik deur 'n privaatreglens waargeneem, wat deur liberale opvattinge van keuse, kontraktuele outonomie en huweliksfundamentalisme informeer word. Hierdie proefskrif ondersoek dus die potensiaal van 'n sogenaamde "relational feminist" om die weg te baan vir die horisontale toepassing van sosio-ekonomiese regte tussen persone in saamwoonverhoudings. Die horisontale toepassing vind hoofsaaklik in gevolg artikel 8 en 39 van die Grondwet plaas. Progressiewe ontwikkelings in ander jurisdiksie ten opsigte van die beskerming van ongetroude persone in saamwoonverhoudings word ontleed ten einde te bepaal in watter mate dit kan bydrae tot die ontwikkeling van 'n Suid-Afrikaanse familiereg regime. Die proefskrif ontleed dus die wyse waarop bestaande familiereg reëls en doktrines getransformeer kan word ten einde meer ontvanklik en sensitief te wees vir die leefwêreld en behoeftes van vrouens in saamwoonverhoudings.

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## Table of contents

<b>Table of abbreviations</b>	<b>x</b>
<b>Chapter 1: Introduction</b>	
<b>1 1 Introduction</b>	<b>1</b>
1 1 1 Background to the research problem	1
1 1 2 Socio-economic implications of terminated domestic partnerships	4
1 1 3 Rationale and motivation for the study: A transformative Constitution	8
1 1 4 A relational feminist framework	13
<b>1 2 Research question, research aims, hypotheses and methodology</b>	<b>15</b>
1 2 1 Primary research question	15
1 2 2 Supplementary research aims and hypotheses	15
1 2 3 Methodology	16
1 2 4 Scope of the study	18
<b>1 3 Overview of chapters</b>	<b>19</b>
<b>1 4 Conclusion</b>	<b>21</b>
<b>Chapter 2: Developing a relational feminist framework for interpreting the socio-economic rights of female cohabitants</b>	
<b>2 1 Introduction</b>	<b>22</b>
<b>2 2 Justification for a relational feminist framework</b>	<b>23</b>
<b>2 3 Four-step analysis of relational feminism</b>	<b>29</b>
<b>2 4 A context sensitive approach</b>	<b>32</b>
2 4 1 Introduction	32
2 4 2 Deconstructing the public/private law divide	33
2 4 3 Conclusion	41
<b>2 5 A value-sensitive approach: Countering an abstract conception of rights</b>	<b>42</b>
2 5 1 Introduction	42
2 5 2 Developing a substantive conception of autonomy	44
2 5 3 Developing a relational conception of human dignity	50
2 5 4 The values of non-sexism and equality	52
2 5 5 Conclusion	54
<b>2 6 Structuring relations that give effect to constitutional values</b>	<b>55</b>
<b>2 7 Interpreting socio-economic rights to structure socio-economic equality between cohabitants</b>	<b>61</b>

2 7 1	Introduction	61
2 7 2	Developing a framework for the horizontal application of socio-economic rights between cohabitants	62
2 7 2 1	<i>Introduction</i>	62
2 7 2 2	<i>Section 8 of the South African Constitution</i>	62
2 7 2 3	<i>Section 39 of the South African Constitution</i>	70
2 7 2 4	<i>The transformative potential of sections 8 and 39</i>	73
2 7 3	Reflections on the need to develop private socio-economic responsibility	73
<b>2 8</b>	<b>Conclusion: Key concepts underlying a relational feminist interpretation of socio-economic rights</b>	<b>74</b>
<b>Chapter 3: The South African legal framework through a relational Feminist lens</b>		
<b>3 1</b>	<b>Introduction</b>	<b>77</b>
<b>3 2</b>	<b>The South African family law regime before the advent of democracy</b>	<b>78</b>
<b>3 3</b>	<b>Jurisprudence on the interaction between the Bill of Rights and unrecognised relationships</b>	<b>81</b>
3 3 1	Introduction	81
3 3 2	Constitutional jurisprudence on same-sex relationships	84
3 3 3	Jurisprudence on customary marriages	87
3 3 4	Jurisprudence on religious marriages	91
3 3 5	Cohabitation: <i>Volks NO v Robinson</i>	94
3 3 6	Jurisprudential analysis	101
<b>3 4</b>	<b>Legislative interventions following the advent of democracy</b>	<b>104</b>
3 4 1	Introduction	104
3 4 2	Incremental legislative recognition to cohabitants	105
3 4 3	Protection provided by the Domestic Violence Act 116 of 1998	107
3 4 4	Potential relief under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000	109
3 4 5	Inadvertent forms of cohabitation due to legislative gaps	115
3 4 6	Civil Union Act 17 of 2006	118
3 4 7	Domestic Partnerships Bill of 2008	119
3 4 8	Conclusion: A separate and unequal family law system	123
<b>3 5</b>	<b>Common law framework governing cohabitation</b>	<b>125</b>
3 5 1	Introduction	125

3 5 2	Contracts	126
3 5 3	Universal partnerships	128
3 5 4	Unjustified enrichment	135
3 5 5	Proprietary estoppel and the constructive trust	136
3 5 6	Extension of the common law duty of support	136
3 5 7	A summary of the applicable common law developments	139
<b>3 6</b>	<b>Conclusion: An evaluation of the family law regime through a relational feminist lens</b>	<b>139</b>
<b>Chapter 4: An examination of Canadian and Dutch family law through a relational feminist lens</b>		
<b>4 1</b>	<b>Introduction</b>	<b>142</b>
<b>4 2</b>	<b>Justification for a comparative study of Canadian family law</b>	<b>143</b>
<b>4 3</b>	<b>The Canadian Charter</b>	<b>146</b>
4 3 1	Introduction	146
4 3 2	Social rights under the Canadian Charter	148
4 3 3	Application of the Canadian Charter to family law	151
4 3 4	Conclusion	153
<b>4 4</b>	<b>Canadian legislation</b>	<b>154</b>
4 4 1	Introduction	154
4 4 2	Provincial legislation: Ascription (status) versus contract	155
4 4 3	Conclusion: The debate between status and contract	159
<b>4 5</b>	<b>Canadian jurisprudence</b>	<b>160</b>
4 5 1	Introduction	160
4 5 2	Gender-sensitive Canadian jurisprudence from the 1980s to the early 1990s	161
4 5 3	Feminists trends in Canadian family law in the 1990s	166
4 5 4	Innovative judicial developments in Québec in the 1990s	170
4 5 5	The dangers of neoliberalism and the liberal choice argument: <i>Nova Scotia v Walsh</i>	171
4 5 6	The retrogressive trend continues: <i>Kerr v Baranow</i> and <i>Eric v Lola</i>	175
4 5 7	Conclusion: An overview of the trends in Canadian jurisprudence	181
4 5 8	Lessons from a comparative analysis of Canadian family law	182
<b>4 6</b>	<b>The Dutch family law system</b>	<b>184</b>
4 6 1	Introduction	184
4 6 2	The Dutch Constitution	187



4 6 3	The Dutch family law regime	192
4 6 3 1	<i>Introduction</i>	192
4 6 3 2	<i>The recognition of same-sex marriages and domestic partnerships</i>	192
4 6 3 3	<i>Unregistered partnerships: Legislative developments</i>	195
4 6 3 4	<i>Unregistered partnerships: Judicial developments</i>	197
4 6 4	Conclusion: Lessons from a comparative analysis of Dutch family law	202
<b>4 7</b>	<b>Concluding remarks: Lessons from Canadian and Dutch family law</b>	<b>203</b>

## **Chapter 5: The implications of a relational feminist interpretation of socio-economic rights for South African cohabitants**

<b>5 1</b>	<b>Introduction</b>	<b>204</b>
<b>5 2</b>	<b>Shifting the theoretical lens informing the regulation of cohabitation</b>	<b>205</b>
<b>5 3</b>	<b>Improved public provisioning of socio-economic rights</b>	<b>207</b>
<b>5 4</b>	<b>Towards a transformed legislative framework for cohabitation</b>	<b>209</b>
5 4 1	Introduction	209
5 4 2	Utilising a relational feminist lens to develop the legislative framework	209
5 4 3	Conclusion	219
<b>5 5</b>	<b>Jurisprudential developments</b>	<b>220</b>
5 5 1	Introduction	220
5 5 2	Utilising a relational feminist lens to foster gender-sensitive family law jurisprudence	221
5 5 2 1	<i>Utilising a relational feminist framework to inform the horizontal application of socio-economic rights</i>	223
5 5 2 2	<i>Interpreting legislation</i>	226
5 5 2 3	<i>Developing the common law</i>	229
5 5 2 4	<i>Developing a new constitutional remedy</i>	234
5 5 3	Summary of the judicial interventions required	236
<b>5 6</b>	<b>Implications of a relational feminist framework for transforming the socio-economic consequences of cohabitation</b>	<b>237</b>

## **Chapter 6: Conclusion**

<b>6 1</b>	<b>Introduction</b>	<b>240</b>
<b>6 2</b>	<b>Synthesis of study's recommendations</b>	<b>241</b>
6 2 1	Value of a relational feminist framework	241
6 2 2	Need to transform the South African legal framework	243
6 2 3	Value of a comparative study	244

6 2 4	Positive developments required	246
<b>6 3</b>	<b>Concluding remarks</b>	<b>247</b>
	<b>Bibliography</b>	<b>249</b>
	Books	249
	Chapters in books	250
	Journal articles	253
	Research reports	263
	Theses and dissertations	267
	Table of cases	267
	Table of Constitutions, legislation and bills	271
	International law instruments	273

## Table of abbreviations

<b>ALRDP</b>	Alliance for the Legal Recognition of Domestic Partnerships
<b>CALS</b>	Centre for Applied Legal Studies
<b>CUA</b>	Civil Union Act 17 of 2006
<b>CHRA</b>	Canadian Human Rights Act 1985
<b>DCC</b>	Dutch Civil Code
<b>DVA</b>	Domestic Violence Act 116 of 1998
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IFHR</b>	International Federation of Human rights
<b>ISA</b>	Intestate Succession Act 81 of 1987
<b>JFV</b>	Joint family venture
<b>MPL</b>	Muslim Personal Law
<b>MSSA</b>	Maintenance of Surviving Spouses Act 27 of 1990
<b>NSMPA</b>	Nova Scotia Matrimonial Property Act of 1980
<b>OHCHR</b>	Office of the High Commissioner of Human Rights
<b>PEPUDA</b>	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
<b>PFVA</b>	Prevention of Family Violence Act 133 of 1993
<b>QCHRF</b>	Québec Charter of Human Rights and Freedoms 1976
<b>RCMA</b>	Recognition of Customary Marriages Act 120 of 1998
<b>SALRC</b>	South African Law Reform Commission
<b>SERI</b>	Socio-Economic Rights Institute of South Africa
<b>STATSSA</b>	Statistics South Africa
<b>TLAC</b>	Tshwaranang Legal Advocacy Centre

## Chapter 1: Introduction

### 1 1 Introduction

#### 1 1 1 Background to the research problem

Gender inequality has been described as one of the leading moral and human rights issues of this century.<sup>1</sup> While this inequality is rooted in various causes, discrimination in the private sphere continues to serve as a central foundation of women's social and economic disadvantage.<sup>2</sup> This imbalance is evinced by the fact that women continue to bear the socio-economic burdens of divorce and family dissolution disproportionately.<sup>3</sup> Women as a group are also more vulnerable to destitution,<sup>4</sup> homelessness,<sup>5</sup> and violence.<sup>6</sup> Developing a theoretical paradigm that enforces, enables and realises socio-economic rights within the private sphere is thus interconnected to combating systemic patterns of gender inequality in South Africa.<sup>7</sup>

Historically, the legal system played a key role in entrenching existing patterns of inequality in our society. Discriminatory laws and policies that were enacted under the apartheid regime entrenched racially-based disadvantages in our society.<sup>8</sup> While not

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<sup>1</sup> N Kristof & S Wudunn *Half the Sky: How to Change the World* (2010) xviii.

<sup>2</sup> D Nath (One in Nine Campaign) *We were Never meant to Survive: Violence in the Lives of HIV Positive Women in South Africa* (2012) 23 <<http://www.oneinnine.org.za/58.page>> (accessed 04-06-2012); and R Kaddaria & MA Freeman "Economic Consequences of Marriage and its Dissolution: Applying a Universal Equality Norm in a Fragmented Universe" (2012) 13 *Theoretical Inquiries in Law* 323 323.

<sup>3</sup> B Goldblatt "Regulating Domestic Partnerships: A Necessary Step in the Development of South African Family Law" (2003) 120 *SALJ* 610 611.

<sup>4</sup> See D Budlender "Women and Poverty" (2005) 64 *Agenda* 30 35, where she points out that: "While there are many different ways of measuring poverty, all suggest that women are more likely than men to live in poverty."

<sup>5</sup> L Chenwi & K McLean "A Woman's Home is her Castle? Poor Women and Housing Inadequacy in South Africa" (2009) 25 *SAJHR* 517 518.

<sup>6</sup> B Meyersfeld *Domestic Violence and International Law* (2010) xxxv; and N Abrahams, S Mathews, R Jewkes, LJ Martin & C Lombard "Every Eight Hours: Intimate Femicide in South Africa 10 years later" (2012) *Medical Research Council Policy Brief* 4.

<sup>7</sup> This was recognised by the Constitutional Court in the case of *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC) ("*Grootboom*"), para 23:

"There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter ... The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential."

<sup>8</sup> Preamble to the Constitution of the Republic of South Africa, 1996 (the "Constitution").

as publicised, the legal system also established deep patterns of gender inequality in South Africa.<sup>9</sup> Courts regularly interpreted family law rules in a formalistic manner, regardless of the material consequences for vulnerable family members.<sup>10</sup> The judiciary also frequently resorted to the strict enforcement of family contracts in the name of *pacta sunt servanda*.<sup>11</sup> This anachronistic approach remains rife, notwithstanding the frequent inclusion of terms that predominantly cause women socio-economic disadvantage.<sup>12</sup> In relation to access to adequate housing,<sup>13</sup> the precarious position of a non-owning spouse arises during the subsistence of the marriage once the parties are heading towards the divorce courts.<sup>14</sup> Intersecting with these jurisprudential trends is South Africa's incoherent and hierarchical statutory framework. While the South African family law system recognises a variety of relationship forms, religious marriages and domestic partnerships remain

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<sup>9</sup> See *Brink v Kitshoff NO* 1996 4 SA 197 (CC); 1996 6 BCLR 752 (CC) ("*Brink*"), para 44, where Justice O'Regan J states:

"Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage."

<sup>10</sup> For example, in *MM v MN* 2010 4 SA 286 (GNP), the court had to consider the validity of a second customary marriage where the husband had failed to comply with the formalities set out in the Recognition of Customary Marriages Act 120 of 1998 for the registration of a second marriage. Ultimately the court decided to declare the second marriage void. This declaration of voidness usually occurs after the death of the husband, and has devastating legal and emotional consequences for the discarded wife.

<sup>11</sup> J Heaton "Striving for Substantive Gender Equality in Family Law: Selected Issues" (2005) 21 *SAJHR* 547 555.

<sup>12</sup> This is illustrated in the case of *Barnard v Barnard* 2000 3 SA 741 (C) ("*Barnard*"). In this case the wife attempted to attack the validity of a clause in the spouses' ante-nuptial contract through which the parties had agreed to the complete separation of property upon their divorce. The applicant argued that at the time of signing the contract the respondent had been in a position of substantial influence and advantage over her, which resulted in her signing the ante-nuptial contract. In this case the applicant was in her twenties, while her partner was in his sixties and experienced in business matters. Upon their divorce, she alleged that, if she had been free to exercise normal free will, she would not have agreed to the exclusion of the accrual system. She sought an order declaring the marriage to be in community of property. In para 39, the court held that an ante-nuptial contract providing for the complete separation of family property "can never be contrary to public policy." See Heaton (2005) *SAJHR* 555, where she discusses this case.

<sup>13</sup> S 26(1) of the Constitution states that "[e]veryone has the right to have access to adequate housing."

<sup>14</sup> JC Sonnekus "The Personal Consequences of Divorce" in J Heaton (ed) *The Law of Divorce and Dissolution of Life of Partnerships in South Africa* (2015) 33 50.

unrecognised.<sup>15</sup> As a result of these interconnecting factors, the South African family law regime currently exacerbates gender inequality.<sup>16</sup>

While all family relationships need to be regulated to protect the socio-economic needs of its members, research has revealed that cohabiting women remain particularly vulnerable. A major factor underlying cohabitants' socio-economic disadvantage is the fact that these relationships have traditionally been perceived and regulated through a discriminatory lens. During the 1970s, for example, the occurrence of an unmarried man and woman living together was referred to as "concubinage".<sup>17</sup> Nowadays, reference is instead made to "cohabitation", "domestic partnerships" and "life partnerships".<sup>18</sup>

The primary reason for the vulnerability of cohabitants is, however, the fact that their status is currently governed by a "patchwork of laws that [do] not express a coherent set of family law rules".<sup>19</sup> These rules are also predominantly based on liberal conceptions of choice and individualism, which have the propensity to entrench patterns of inequality and disadvantage.<sup>20</sup> While the liberal conception of choice is deeply embedded in our law,<sup>21</sup> recent trends indicate the need to question and transform this underlying paradigm.<sup>22</sup>

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<sup>15</sup> P Bakker "Chaos in Family Law: A Model for the Recognition of Intimate Relationships in South Africa" (2013) 16 *PELJ* 116 118.

<sup>16</sup> Heaton (2005) *SAJHR* 555.

<sup>17</sup> HR Hahlo "The Law of Concubinage" (1972) 89 *SALJ* 321 321.

<sup>18</sup> B Smith "The Dissolution of a Life or Domestic Partnership" in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 387 390-391.

<sup>19</sup> *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC); 2006 3 BCLR 355 (CC) ("*Fourie*"), para 125.

<sup>20</sup> D Bhana "The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract" (2015) 26 *Stell LR* 1 3.

<sup>21</sup> This can be seen from an analysis of the rhetoric underlying much of the family law jurisprudence, including cases such as: *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) ("*National Coalition v Minister of Home Affairs*"); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) ("*Satchwell*"); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) ("*Du Toit*"); *J v Director-General: Department of Home Affairs* 2003 5 SA 621 (CC) ("*J v Director-General*"); *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) ("*Du Plessis*"); and *Gory v Kolver* 2007 4 SA 97 (CC) ("*Gory*"). See in particular, *Volks NO v Robinson* 2005 5 BCLR 446 (CC) ("*Volks*"), which is discussed in detail in part 3 3 2 of chapter three of this study.

<sup>22</sup> B Coetzee Bester & A Lou "Domestic Partners and "the Choice Argument: *Quo Vadis?*" (2014) 17 *PELJ* 2951 2955; and E Bonthuys "Developing the Common Law of Breach of Promise and Universal Partnerships: Rights to Property Sharing for all Cohabitants?" (2015) 13 *SALJ* 76 78.

## 1 1 2 Socio-economic implications of terminated domestic partnerships

As a result of the patchwork of rules regulating cohabitation, upon the termination of a domestic partnership, cohabiting women tend to fall between the cracks of the legal system.<sup>23</sup> These gaps in the legal regime often result in socio-economic disadvantage for women. Their precarious position is evinced by the fact that upon the termination of a partnership, it is disproportionately women and children who have to leave the family home.<sup>24</sup> Forced removals and evictions implicate female cohabitant's constitutionally protected right of access to adequate housing.<sup>25</sup> One reason for these evictions is that the family property is usually registered in the name of the man in the relationship, regardless of whether his partner contributed to the family home through value-added services.<sup>26</sup> As non-owning cohabitants do not have the right to occupy the family home, women's vulnerability to homelessness and eviction is exacerbated.<sup>27</sup> The failure to regulate domestic partnerships also prevents cohabiting women from claiming a duty of support from their partner.<sup>28</sup> Cohabitants are further excluded from inheriting from their partner's estate, unless their partner specifically nominates them as a beneficiary.<sup>29</sup> For many cohabitants who are at an advanced age, the inability to claim maintenance from their deceased partner's estate implicates their constitutionally protected right of access to social security.<sup>30</sup> Their vulnerability is

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<sup>23</sup> B Clark & B Goldblatt "Gender and Family Law" in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 195 205; and South African Law Reform Commission (SALRC) *Project 118: Report on Domestic Partnerships* (2006) 7 <[http://www.justice.gov.za/salrc/reports/r\\_prj118\\_2006march.pdf](http://www.justice.gov.za/salrc/reports/r_prj118_2006march.pdf)> (accessed 20-10-2012).

<sup>24</sup> Alliance for the Legal Recognition of Domestic Partnerships (ALRDP) *Submission to the Department of Home Affairs on the Draft Partnerships Bill, 2008* (2008) 3 <<http://www.tlac.org.za/wp-content/uploads/2012/01/domestic-partnership-alliance-submission-on-the-draft-domestic-partnerships-bill.pdf>> (accessed 26-02-2013).

<sup>25</sup> S 26(1) of the Constitution provides that everyone has the right to have access to adequate housing. This right is discussed in further detail below in part 1 1 3 of this study.

<sup>26</sup> Chenwi & McLean (2009) *SAJHR* 532; and Tshwaranang Legal Advocacy Centre (TLAC) *Submission to the Portfolio Committee on Housing* (2007) 1.

<sup>27</sup> United Nations Office of the High Commissioner of Human Rights (OHCHR) *Women and the Right to Adequate Housing* (2012) 6 <[http://www.ohchr.org/Documents/Publications/WomenHousing\\_HR.PUB.11.2.pdf](http://www.ohchr.org/Documents/Publications/WomenHousing_HR.PUB.11.2.pdf)> (accessed 12-09-2012).

<sup>28</sup> L Gertholtz & N Nsibandey (Centre for the Study of Violence and Reconciliation) *Using the Law to Secure Women's Rights to Housing and Security of Tenure: A Brief Examination of Some Key Aspects of Family and Customary Law and Domestic Violence Legislation* (2006) 4.

<sup>29</sup> 4.

<sup>30</sup> S 27(1) (c) of the Constitution provides that everyone has the right to have access to: "Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance".

further perpetuated if they do not have access to a pension fund. Given that many poor women do not have the power to insist that their partner marry them, or appoint them as a beneficiary, this places them at the mercy of their partner's goodwill.<sup>31</sup> If a cohabitant relies on their partner to assist them in accessing health care, their constitutionally protected right of access to health care services is also implicated.<sup>32</sup> This is evinced by the reality that cohabitants are often removed from their partner's medical aid scheme upon the termination of their relationship.<sup>33</sup> Cohabitants, who require their partner to assist them in supporting children, face additional obstacles, as it is still predominantly women who remain responsible for child care once a relationship breaks down.<sup>34</sup>

Maintenance orders are also notoriously difficult to enforce in South Africa, let alone to obtain. As emphasised by the Constitutional Court in *Bannatyne v Bannatyne* ("*Bannatyne*"),<sup>35</sup> upon the breakdown of a marriage, women experience the dual disadvantage of being "overburdened in terms of responsibilities and under-resourced in terms of means".<sup>36</sup> In contrast, fathers, tend to remain employed and generally become wealthier following the breakdown of a relationship. Maintenance payments are consequently essential to relieve this gendered "financial burden".<sup>37</sup> The potential of socio-economic rights to highlight the socio-economic implications of family dissolution for women has not yet been fully explored. Socio-economic rights have also not been systematically raised as potential tools to alleviate the socio-economic consequences of family dissolution. The reality remains however, that women who cohabit with men are often left with nothing once their relationship ends.<sup>38</sup>

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This right is discussed further below in part 1 1 3 of this study.

<sup>31</sup> M Pieterse "Relational Socio-Economic Rights" (2009) 25 *SAJHR* 198 203. See also P de Vos "Same-sex Sexual Desire and the Re-imagining of the South African Family" (2004) 20 *SAJHR* 179 182-183; and Goldblatt (2003) *SALJ* 614.

<sup>32</sup> S 27(1) (a) of the Constitution provides that everyone has the right to have access to health care services, including reproductive health care.

<sup>33</sup> An example of this is provided by the case of *Volks*, which is discussed in detail in part 3 3 5 of this study. In this case Mrs Robinson was at an advanced age when her long-term partner passed away, implicating her need to access a pension fund and ultimately her right to have access to social security. Following her partner's death she would have also been removed from his medical aid, with implications for her right of access to health care services.

<sup>34</sup> Bonthuys (2015) *SALJ* 76.

<sup>35</sup> *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 2 SA 363 (CC) ("*Bannatyne*").

<sup>36</sup> Para 29.

<sup>37</sup> Para 29.

<sup>38</sup> Clark & Goldblatt "Gender and Family Law" in *Gender, Law and Justice* 242.



Interpersonal power dynamics intersect with communal relations, while a lack of knowledge of the law and insufficient access to legal services compounds vulnerability. Consequently, a significant number of women living in domestic partnerships often mistakenly believe that their relationship is regulated by law.<sup>39</sup> In addition, women who are married under customary law, but who fail to fulfil certain prescribed formalities mistakenly believe they are officially married. Many of these women only find out their true legal position once it is too late.<sup>40</sup> The legal gaps confronting cohabitants are patently unjust when compared to how civil marriage offers socio-economic benefits, such as the right to inherit, spousal benefits and tax advantages.<sup>41</sup>

The failure to recognise domestic partnerships entrenches the subordination and material insecurity experienced by a significant number of South African women.<sup>42</sup> Statistics illustrate that these relationships have almost doubled between the Census periods of 1996 and 2001.<sup>43</sup> The number of cohabitants has also continued to increase over the years with reports indicating that over three million South Africans were living together “like husband and wife” in 2011.<sup>44</sup> Statistics from 2012 and 2013 reveal that marriage rates continue to decline, while the number of cohabitants steadily rises,<sup>45</sup> and that marriage rates are substantially lower among African women.<sup>46</sup>

Against this backdrop of gendered inequality, centuries of colonialism and decades of apartheid rule have perpetuated the disadvantaged position of African women. For instance, the combination of apartheid spatial planning laws and the migrant labour

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<sup>39</sup> B Meyersfeld “If You can See, Look: Domestic Partnerships and the Law” (2010) 3 *CCR* 271 310.

<sup>40</sup> 275.

<sup>41</sup> SALRC *Report on Domestic Partnerships* (2006) 39; and E Bonthuys “Race and Gender in the Civil Union Act” (2007) 23 *SAJHR* 526 527.

<sup>42</sup> Goldblatt (2003) *SALJ* 615.

<sup>43</sup> *Volks* para 119.

<sup>44</sup> Smith “The Dissolution of a Life or Domestic Partnership” in *Law of Divorce* 392, citing the *General Household Survey*, which reports that 3,165,497 South Africans were living together in 2011 without being married to one another. See Statistics South Africa (STATSSA) *General Household Survey* (2011) 2 <<http://www.statssa.gov.za/publications/P0318/P0318April2012.pdf>> (accessed 07-08-2015).

<sup>45</sup> STATSSA *Marriage and Divorce 2013 Statistical Release* (2013) 2-3 <<http://www.statssa.gov.za/publications/P0307/P03072013.pdf>> (accessed 09-08-2015).

<sup>46</sup> D Posel & S Rudwick “Changing Patterns of Marriage and Cohabitation in South Africa” (2013) 13 *Acta Juridica* 169 170.

system resulted in the breakdown of African families.<sup>47</sup> The migrant labour system forced many young African men to leave the rural areas to search for work on the mines and in urban areas. Many of these men formed a second household in the urban area, while previous female partners were left to look after the rural homestead.<sup>48</sup> An appropriate human rights-based response to this phenomenon would entail protecting the fundamental rights of both the rural partner and the urban partner when the man dies or the relationship ends.<sup>49</sup> This approach of protecting both partners has, however, not been adopted.<sup>50</sup> Given South Africa's history of inequality and the reality that cohabiting relationships are predominant within poorer segments of our society, there is a clear need for positive socio-economic intervention by the state.

It is evident that the apartheid regime contributed to entrenching the systemic patterns of inequality currently pervading our society, as well as the rise in cohabitation. The legal system did not, however, respond to this phenomenon by providing cohabitants with any additional form of protection. This gendered disadvantage is evinced by the fact that the male primogeniture rule under customary law restricted the capacity of African women to inherit property. While this rule was declared unconstitutional in 2005,<sup>51</sup> it is clear that African women have experienced intersecting forms of socio-economic disadvantage within South Africa.<sup>52</sup>

It needs to be emphasised that not all cohabiting women are powerless and that not all unmarried women wish to be married. Moreover, there are a number of complex

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<sup>47</sup> D Budlender & F Lund "South Africa: A Legacy of Family Disruption" (2011) 42 *Development and Change* 925 927-932; B Goldblatt "Citizenship and the Right to Child Care" in A Gouws (ed) *(Un)thinking Citizenship: Feminist Debates in Contemporary South Africa* (2005) 117 131.

<sup>48</sup> Budlender & Lund (2011) 927-932; and C Albertyn "Contesting Democracy: HIV/AIDS and the Achievement of Gender Equality in South Africa" (2003) 29 *Feminist Studies* 595 598.

<sup>49</sup> Centre for Applied Legal Studies (CALs) *Submission to the Parliamentary Portfolio Committee on Home Affairs: The Civil Unions Bill* (2006) 1 <<http://pmg-assets.s3-website-eu-west-1.amazonaws.com>> (accessed 12-10-2013.)

<sup>50</sup> This is discussed in detail in chapter three of this study.

<sup>51</sup> See *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC); 2005 1 BCLR 1 (CC) ("*Bhe*"), para 91, where Chief Justice Pius Langa (as he was then) stated:

"The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination."

<sup>52</sup> S Liebenberg & M O'Sullivan "South Africa's New Equality Legislation: A Tool for Advancing Women's Socio-Economic Equality?" (2001) 21 *Acta Juridica* 70 71. See also *Brink* para 44.

intersecting factors that have contributed to the decline in marriage in South Africa.<sup>53</sup> Women are occasionally criticised for “choosing” to stay in unregulated domestic partnerships. Remaining in a domestic partnership may however, represent the most feasible option amongst a limited range of choices. A significant number of cohabiting women may furthermore, prefer to be married, but lack the power to determine the official form of their relationship. The social realities of poverty, unemployment and gender inequality play a significant role in shaping these relationship choices.<sup>54</sup> The South African Law Reform Commission (“SALRC”) has emphasised this point, stating that while cohabitation may be a matter of choice for the middle class, it is a serious problem for the majority of poor women who have little or no control over it.<sup>55</sup>

The point of departure of this study is that the legal approach of focusing on the form of a relationship, as opposed to a relational feminist interpretation of the socio-economic rights of the partners, upon its termination, undermines the constitutional commitment to establish a society based on non-sexism<sup>56</sup> and fundamental human rights.<sup>57</sup> In order to protect and fulfil the socio-economic rights of women, the underlying gendered dynamics shaping women’s choices and their access to resources must be more effectively recognised and addressed.

### 1 1 3 Rationale and motivation for the study: A transformative Constitution

The neglect of the socio-economic rights of women within South African family law is somewhat surprising, given the progressive framework of rights protected within the 1996 Constitution. The founding constitutional provisions describe South Africa as a democratic state founded on human dignity, the achievement of equality, the advancement of human rights and freedoms and non-racialism and non-sexism.<sup>58</sup> The Constitution is also committed to healing the divisions of the past,<sup>59</sup> while establishing a society based on social justice.

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<sup>53</sup> D Cooper, E Moore & JE Mantell “Renegotiating Intimate Relationships with Men: How HIV Shapes Attitudes and Experiences of Marriage for South African Women Living with HIV: ‘Now in my life, everything I do, looking at my health’” (2013) 13 *Acta Juridica* 218 218.

<sup>54</sup> SALRC *Report on Domestic Partnerships* (2006) 24.

<sup>55</sup> 87.

<sup>56</sup> S 1(b) of the Constitution.

<sup>57</sup> Preamble.

<sup>58</sup> Preamble.

<sup>59</sup> Preamble.

Unlike many international instruments,<sup>60</sup> and foreign Constitutions,<sup>61</sup> the South African Constitution does not expressly protect the right to family life or the right to marry. During the certification process, the Constitutional Court (the “Court”) pointed out that owing to the fact that families are constituted, function and dissolved in a variety of ways, the possible outcomes of constitutionalising family rights remains uncertain.<sup>62</sup> By not constitutionalising these rights, the Court argued that the constitution-makers would avoid disagreements over the kinds of families in need of protection or over which ceremonies, rites or practices would constitute a marriage under our Constitution.<sup>63</sup> Notwithstanding this positive intention, the South African family law regime has established various legislative structures that have resulted in a separate and unequal family law system.<sup>64</sup>

In the certification judgment, the Court stated that there is no universal acceptance of the need to constitutionalise family rights.<sup>65</sup> It explained that numerous provisions in the 1996 Constitution clearly prohibit any arbitrary state interference with the right to marry or to establish and raise a family.<sup>66</sup> This statement appears to be justified. For example, section 2 of the Constitution states that it is the supreme law of the Republic, while section 7(1) describes the Bill of Rights as a cornerstone of democracy in South Africa. Section 7(2) goes on to state that the “state must respect, protect, promote and fulfil the rights in the Bill of Rights”. The state is therefore under a positive

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<sup>60</sup> For example, art 12 of the Universal Declaration of Human Rights (1948) UN doc A/810 and art 17 of the International Covenant on Civil and Political Rights (1966) 999 UNTS 171 protect one’s family from arbitrary interference. Art 8 of the European Convention on Human Rights (1950) 213 UNTS 222 also protects the right to respect for one’s family life. This article is discussed in more detail in part 4 6 2 of this study. The African Charter on Human and Peoples’ Rights (1981) OAU Doc CAB/LEG/67/rev5 also expressly protects the right to family life in article 18. For example, article 18(1) states that: “The family shall be the natural unit and basis of society. It shall be protected by the State...” Article 18 does not however expressly refer to marriage or spouses. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women (1977) UN Doc A/34/46 departs from many other international documents by emphasising rights of free choice, equality and dignity in all matters relating to marriage and family relations (art 16), without referring to the family as the basic unit of society.

<sup>61</sup> Examples include s 37 of the Constitution of the Federal Republic of Nigeria, 1999, which protects the right to private and family life. Art 6 of the Basic Law for the Federal Republic of Germany, also expressly protects marriage and family life, while s 35 of the Constitution of Pakistan, 1973, expressly protects marriage and family life.

<sup>62</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* (1996) 4 SA 744 (CC) (“*Ex parte Chairperson of the Constitutional Assembly*”), paras 98-102.

<sup>63</sup> Paras 98-102.

<sup>64</sup> Bakker (2013) *PELJ* 118.

<sup>65</sup> *Ex parte Chairperson of the Constitutional Assembly* 98-102.

<sup>66</sup> Paras 98-102.

duty to promote a family law regime based on the fundamental rights protected in the Bill of Rights. Moreover, arbitrary interference in the family law regime, which undermines the rights protected in the Bill of Rights, contravenes sections 2 and 7 of the Constitution.

The Constitution specifically provides that the rights in the Bill of Rights apply to all law and that they bind the “legislature, the executive, the judiciary and all organs of state”.<sup>67</sup> Section 8(2) of the Constitution further states that a provision in the Bill of Rights binds both natural and juristic persons.<sup>68</sup> The Constitution’s commitment to founding a society based on “human dignity, equality and human rights and freedoms”,<sup>69</sup> therefore extends to private relations.<sup>70</sup>

Interconnected to the horizontal commitments in section 8 is section 39 of the Constitution. Section 39(1) states that when interpreting the Bill of Rights, courts must promote the values underlying an open, democratic society based on human dignity, equality and freedom. The courts may also consider foreign law.<sup>71</sup> Section 39(2) goes on to state that when interpreting legislation or developing the common law or customary law, courts must “promote the spirit, purport and objects of the Bill of Rights”. This progressive instruction reveals that all law, including the common law, is subject to the Constitution.<sup>72</sup> Moreover, under our Constitution no exercise of power – whether public or private – is immune from constitutional scrutiny, in light of the progressive rights and values protected within our Constitution.<sup>73</sup>

The provisions of sections 8 and 39(2) of the Constitution justify transcending the public/private law divide and analysing the potential implications of socio-economic rights within the area of family law.<sup>74</sup> While sections 8 and 39 of the Constitution clearly mandate a methodology for the horizontal application of the rights within the Bill of

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<sup>67</sup> S 8(1) to the Constitution.

<sup>68</sup> S 8(2) of the Constitution provides that the rights in the Bill of Rights apply to natural persons while s 9(4) of the Constitution provides that private individuals are prohibited from discriminating against one another.

<sup>69</sup> Preamble.

<sup>70</sup> S Liebenberg *Socio-Economic Rights: Adjudication through a Transformative Constitution* (2010) 319.

<sup>71</sup> S 39(1)(c) of the Constitution.

<sup>72</sup> *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674; 2000 3 BCLR 241 (CC) (“*Pharmaceutical Manufacturers*”), para 44.

<sup>73</sup> Liebenberg *Socio-Economic Rights* 319.

<sup>74</sup> Liebenberg *Socio-Economic Rights* 319; Abrahams, Mathews, Jewkes, Martin, & Lombard “Every Eight Hours” *Medical Research Council Policy Brief* 4.

Rights, the courts have not been consistent in their application of these provisions.<sup>75</sup> A need for further development is thus clear, particularly to give substantive content to the socio-economic rights of cohabiting women.

Section 9(1) of the Constitution provides that everyone is equal before the law and that everyone has the right to enjoy the equal protection and benefit of the law. Section 9(2) elucidates that equality includes the full and equal enjoyment of all the rights in the Bill of Rights, demonstrating its interconnection to other fundamental rights, including socio-economic rights. It has been argued that this right should be interpreted in ways that promote greater equality in people's access to resources and services, as protected by the socio-economic provisions.<sup>76</sup> Section 9(3) specifically prohibits discrimination on the grounds of race, gender, sex, marital status and social origin, while section 9(5) states that discrimination on any of these grounds is presumed to be unfair. Section 9(4) specifically prohibits discrimination between private individuals.

The right to human dignity is protected under section 10, while section 12(1)(c) states that everyone has the right to freedom and security of the person, including freedom from private violence. Section 14 of the Constitution provides that everyone has the right to privacy. The rights to human dignity, freedom,<sup>77</sup> and privacy<sup>78</sup> have been utilised by the judiciary to develop family law rules. The majority of family law developments have, however, been based upon the right to equality. While section 9

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<sup>75</sup> Liebenberg *Socio-Economic Rights* 321.

<sup>76</sup> Liebenberg *Socio-Economic Rights* 53; S Liebenberg & B Goldblatt "The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution" (2007) 23 *SAJHR* 335 33; P de Vos "*Grootboom*, the Right of Access to Housing and Substantive Equality as Contextual Fairness" (2001) 17 *SAJHR* 258 259; and S Fredman "Engendering Socio-Economic Rights" (2009) 25 *SAJHR* 410 411.

<sup>77</sup> S 12(1)(c) of the Constitution is of vital importance in a country like South Africa, which experiences extreme levels of domestic violence. In accordance with the Domestic Violence Act 116 of 1998, freedom from violence includes freedom from socio-economic abuse in interpersonal relationships.

<sup>78</sup> In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6; 1998 12 BCLR 1517 ("*National Coalition v Minister of Justice*"), the Court recognised that this right extends beyond the right to be left alone. This right was held to encompass the right to establish and live in supportive personal and public contexts and relationships. This necessarily entails a duty upon the state to establish the conditions necessary for the fulfilment of this right. The majority judgment defined privacy as "entailing the opportunity to establish relationships without interference from the outside community." (Para 32). The concurring judgment, by Sachs J, linked the right to privacy to the right to identity and emphasised the fact that rights are not exercised in isolation, but by people as members of communities. See Justice Sachs' judgment in paras 116-119.

is relied upon in a number of cases,<sup>79</sup> the socio-economic equality of women remains neglected within South African family law.

Of particular importance for the development of our family law regime, is the express constitutional protection of justiciable socio-economic rights. The Constitution specifically mandates, for example, that everyone has the right to have access to adequate housing in section 26(1). Section 26(2) elaborates that “reasonable measures” must be taken, within the state’s “available resources”, to achieve the “progressive realisation” of this right. Section 26(3) further stipulates that no one may be evicted from their home, or have their home demolished, without an order of court. The Constitution also protects the right to have access to health care services, food, water and social security.<sup>80</sup> It is thus praised for its “transformative”<sup>81</sup> potential to facilitate a socio-economic shift towards a more egalitarian society, where all are able to access vital resources to achieve their full human potential.<sup>82</sup> In stark contrast to the Constitution’s transformative goals, South Africa is currently facing extreme levels of poverty<sup>83</sup> and high levels of gender inequality.

From the progressive framework of rights outlined above, it is clear that the South African Constitution encompasses a human rights-based ethos that should necessarily infuse all areas of our legal system.<sup>84</sup> In this regard, significant attention has been paid towards addressing and transforming public law aspects of poverty and

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<sup>79</sup> Examples include: *Bhe* para 91, *Volks* para 46- 48; *Bannatyne* para 30; *Brink* para 44 and *Daniels v Campbell* 2004 5 SA 331 (CC); 2004 7 BCLR 735 (CC) (“*Daniels*”) para 34.

<sup>80</sup> S 27 of the Constitution.

<sup>81</sup> The phrase “transformative constitutionalism” was first used and developed in a seminal article published by Karl Klare in 1998. In his article, Klare specifically described this project as entailing constitutional interpretation and enactment aimed at transforming South Africa’s “political and social institutions and power relationships in a democratic, participatory and egalitarian direction”. He went on to state that this project necessarily entails “large-scale social changes through non-violent political changes”. See K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 150.

<sup>82</sup> De Vos (2001) *SAJHR* 259; P Langa “Transformative Constitutionalism” (2006) 3 *Stell LR* 351 352; C Albertyn & B Goldblatt “Equality in the Final Constitution” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (Original Service, June 2008) 35-1 35-5.

<sup>83</sup> Stats SA *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011* (2014) 12; see also JP Landman, H Bhorat, C van Aardt & S van der Berg *Breaking the Grip of Poverty and Inequality in South Africa 2004 – 2014* (2003) 1 <<http://www.sarpn.org.za/documents/d0000649/index.php>> (accessed 20-04-2012); S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 26

<sup>84</sup> *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 4 SA 222 (CC); 2009 2 SACR 130 (CC) (“*Director of Public Prosecutions*”), para 2.

inequality. Less attention has, however, been paid to utilising socio-economic rights as vehicles for addressing private causes of women's poverty.<sup>85</sup> In particular, very little consideration has been given to socio-economic rights as potential tools for addressing the gendered inequalities found within the family law regime. This dissertation consequently investigates the potential of developing a theoretical framework that recognises and addresses the socio-economic impact of relational dynamics between cohabitants upon the termination of their partnership. In this manner, a relational feminist framework is examined in terms of its potential to transform the socio-economic consequences of terminated domestic partnerships in a manner that fosters substantive gender equality.

#### 1 1 4 A relational feminist framework

The need for a transformative approach to family law is emphasised by the fact that the family unit plays an integral psychological role in shaping peoples' identities, values and decisions.<sup>86</sup> The importance of the family unit is emphasised by the fact that many people gain access to the objects of socio-economic rights privately, "within and by way of relationships".<sup>87</sup> Family law scholars have accordingly recognised the constitutive power of the family, accentuating how family law rules play a political role in entrenching inequalities on numerous grounds.<sup>88</sup> Significant scholarship therefore exists on the manner in which the family law regime perpetuates discrimination on the grounds of gender, race, sexual orientation, class, religion and culture.<sup>89</sup>

While it may be easy to recognise the constitutive nature of the family for young children, Jennifer Nedelsky highlights that in reality relational interdependence

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<sup>85</sup> Pieterse (2009) *SAJHR* 203; and B Goldblatt & L Lamarche "Background Document for the Workshop: Interpreting and Advancing Women's Rights to Social Security and Social Protection" (2013) *International Institute for the Sociology of Law* 2; S Liebenberg "Socio-Economic Rights Beyond the Public-Private Law Divide" in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2015) 63 63.

<sup>86</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011) 208.

<sup>87</sup> Pieterse (2009) *SAJHR* 198.

<sup>88</sup> F Kaganas & C Murray "Law and Women's Rights in South Africa: An Overview" (1994) *Acta Juridica* 1 1; Clark & Goldblatt "Gender and Family Law" in *Gender, Law and Justice* 205; and Nedelsky *Law's Relations* 20.

<sup>89</sup> Clark & Goldblatt "Gender and Family Law" in *Gender, Law and Justice* 205; Heaton (2005) *SAJHR* 555; E Bonthuys "*RH v DE: A Feminist Minority Judgment on Adultery*" (2015) 31 *SAJHR* 379 381; and Nedelsky *Law's Relations* 20.



extends throughout our entire lives.<sup>90</sup> A relational feminist perspective accordingly recognises the significance of relations that shape our capacity for love, creativity and independence, as well as our choices and our capacity to access resources.<sup>91</sup> These private dynamics inevitably intersect with broader social patterns, resulting in constructs of rights offering varying privileges to differently situated groups.<sup>92</sup> This relational reality reveals that rights are not stable givens, but that they shift as relationships change.<sup>93</sup> As a result, private and public relationships give rise to intersecting forms of vulnerability and disadvantage. In order to protect the fundamental human rights of each person, the regulation of both public and private power needs to be sensitive to existing relational inequality and disadvantage.

The family law regime should be developed to serve as a tool for transforming the lives of female cohabitants. While the legal system alone cannot foster all of the necessary social change, it should play an integral part in responding to the experiences of cohabiting women and in contributing to the change that needs to occur.<sup>94</sup> Given that the law can be a powerful tool in effecting social change, it is necessary to examine how the law can be developed to promote constructive relations that improve access to socio-economic resources for female cohabitants. The South African Constitution's progressive framework of rights supports the notion that, regardless of the official form of a relationship, there ought to be a more humane and equitable division of socio-economic resources upon its dissolution. A human-rights based approach is in accordance with the Constitutional Court's statement that the Bill of Rights requires that everyone be treated "with care and concern".<sup>95</sup> This study examines the need to develop the relevant private law rules governing the termination of a domestic partnership so as to address women's poverty and infuse private relations with constitutional values and norms.<sup>96</sup>

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<sup>90</sup> Nedelsky *Law's Relations* 20.

<sup>91</sup> 20.

<sup>92</sup> S Joseph "Problematizing Gender and Relational Rights: Experiences from Lebanon" (1994) 1 *Social Politics* 271 274; and Pieterse (2009) *SAJHR* 199.

<sup>93</sup> S Joseph "Teaching Rights and Responsibilities: Paradoxes of Globalization and Children's Citizenship in Lebanon" (2005) 38 *Journal of Social History* 1007 1008; and Pieterse (2009) *SAJHR* 199.

<sup>94</sup> L Artz & D Smyth "Introduction: Should We Consent?" in L Artz & D Smyth (eds) *Should We Consent? Rape Law Reform in South Africa* (2008) 1 15.

<sup>95</sup> *Grootboom* para 44.

<sup>96</sup> B Goldblatt "Poverty and the Development of the Right to Social Security" (2014) 10 *IJLC* 460 460. In this article she refers to the right to social security under international law, pointing out that the public law right to social security has been given "limited attention as a vehicle for

## 1 2 Research question, research aims, hypotheses and methodology

### 1 2 1 Primary research question

The primary research question this study seeks to answer is what a relational feminist interpretation of socio-economic rights can contribute to the development of a family law system that is more responsive to women's socio-economic disadvantage following the termination of a domestic partnership. In order to answer this research question, a number of ancillary research aims need to be addressed.

### 1 2 2 Supplementary research aims and hypotheses

In order to achieve the primary research question, four subsidiary research aims are pursued in this dissertation. The first research aim is to examine how a relational feminist lens resonates with the project of transformative constitutionalism and how it can overcome the constraining influence of classic liberalism. The central hypothesis informing this research aim is that a relational feminist approach to cohabitation can be utilised to ensure that the law is more responsive to the socio-economic needs of female cohabitants. In this regard, a relational feminist framework can be employed to develop guidelines informing the application of socio-economic rights between cohabitants upon the termination of their relationship.

The second research aim of this study is to analyse the South African legal framework governing cohabitation through a relational feminist lens. Relevant jurisprudence, legislation and common law rules are examined in terms of their capacity to promote constructive relations that empower cohabitants to access socio-economic resources. The hypothesis is that the current legal framework governing cohabitation is fragmented, while informed by formal notions of equality, patriarchal norms, marriage fundamentalism, contractual principles and a liberal conception of choice. This fragmented framework ultimately exacerbates existing patterns of gender inequality and disadvantage.

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addressing women's poverty". Under South African law, the socio-economic rights have also been given insufficient attention as potential vehicles for addressing women's poverty, particularly in the private sphere.

The third research aim of this study is to analyse relevant comparative law, focusing on developments in Canadian family law and Dutch family law, pertaining to the protection of cohabiting women. The strengths and weaknesses underlying these foreign legal approaches are examined against the standards developed under the relational feminist theoretical framework. The hypothesis guiding this research aim is that a comparative analysis of Canadian family law and Dutch family law, can aid in identifying normatively attractive approaches for protecting the needs of cohabiting women. A normative approach can also utilise both Dutch and Canadian family case law to illustrate approaches that are antithetical to a relational feminist approach. These antithetical approaches can emphasise developments that the South African legal system, based on a Constitution dedicated to non-sexism and justiciable socio-economic rights, should avoid.<sup>97</sup>

The final research aim is to examine the implications of a relational feminist interpretation of socio-economic rights, in conjunction with lessons gained from the Canadian and the Dutch context, for the development of the South African legal framework governing cohabitation. This dissertation aims to develop recommendations for the legal regulation of domestic partnerships to improve the socio-economic outcomes for female cohabitants upon the termination of their relationship.

### 1 2 3 Methodology

This dissertation primarily relies on South African jurisprudence, relevant feminist critiques on family law and academic literature pertaining to socio-economic rights, to address the research aims conveyed above. Through an overview of the literature, as well as the legislative and common law framework, this study analyses the intersecting elements of family dissolution, high levels of poverty and gender inequality. This analysis is followed by an examination of the literature and debates on the transformative potential of sections 8 and 39 of the Constitution as the primary vehicles for raising and protecting socio-economic rights in family law jurisprudence and legislation. Following from this, is a comparative study of Canadian family law and

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<sup>97</sup> KL Scheppele “Aspirational and Aversive Constitutionalism: The Case for Studying Cross Constitutional Influence through Negative Models” (2003) 1 *IJCL* 296 296.

Dutch family law. The methodology to be followed in the comparative chapter is elaborated on next.

Section 39 of the Constitution expressly permits the judiciary to consider foreign law when interpreting the Bill of Rights.<sup>98</sup> In accordance with this provision, this dissertation provides a comparative perspective by critically evaluating relevant jurisprudence and legislative developments under Canadian family law. The study undertakes a normative and functional comparative analysis of Canadian legal developments, particularly those pertaining to the protection of female cohabitants' socio-economic needs. While the justification for examining Canadian family law is set out in detail in part 4.2 of this dissertation, one reason for focusing on the Canadian jurisdiction is that it has gone further than most jurisdictions in protecting the socio-economic well-being of unmarried cohabitants.<sup>99</sup> Dutch family law has also been noteworthy for significantly developing the family law regime in previous decades, in accordance with human rights norms.<sup>100</sup> Relevant Dutch developments will also be critically examined through a relational feminist lens.

Methodologies underlying constitutional comparison vary in a number of ways. One example of this is in terms of what they aim to do and who is engaged in the comparison.<sup>101</sup> Vicki Jackson has broadly defined the different methodologies as classificatory, historical, normative, functional and contextual.<sup>102</sup> While all of these methodologies interact and overlap to varying degrees, for the purposes of this study, the focus is primarily on the normative and functional comparative approaches. In accordance with the normative approach, the aim is to search for universally applicable, just or "good" principles.<sup>103</sup> An example of this is the search for essential jurisprudential characteristics underlying the horizontal application of a Bill of Rights to private law.<sup>104</sup> In this regard, comparative study can focus on reform by identifying

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<sup>98</sup> S 39(1)(c) of the Constitution.

<sup>99</sup> C Rogerson "Canada: A Bold and Progressive Past but an Unclear Future" in E Sutherland (ed) *The Future of Child and Family Law: International Predictions* (2012) 77 77.

<sup>100</sup> P Vlaardingerbroek "The Netherlands: The Growing Role of the Judge in Child and Family Law" in E Sutherland (ed) *The Future of Child and Family Law: International Predictions* (2012) 235 235.

<sup>101</sup> V Jackson "Comparative Constitutional Law: Methodologies" in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 54 54; and M Tushnet *Advanced Introduction to Comparative Constitutional Law* (2014) 1 6.

<sup>102</sup> Jackson "Comparative Constitutional Law" in *The Oxford Handbook* 54.

<sup>103</sup> 60.

<sup>104</sup> M Tushnet "The Issue of State Action/Horizontal Effect in Comparative Constitutional Law" (2003) 1 *IJCL* 79 90.

normatively more attractive and justice-seeking approaches. This research can also, however, identify “averse precedent”.<sup>105</sup> In accordance with this approach, the study explores Canadian and Dutch family law developments as providing potentially attractive approaches to achieving substantive justice for female cohabitants. Foreign law developments will also be analysed to determine whether they offer examples of approaches that are inconsistent with a constitutional order committed to justiciable socio-economic rights.<sup>106</sup>

The functional approach to comparative constitutional law focuses on functional comparisons and questions of causation.<sup>107</sup> This approach attempts, for instance, to identify one or more functions performed by constitutional institutions or doctrines in one jurisdiction, while comparing how this function is achieved elsewhere through a different method. A functional approach is more focused on specific functional comparisons, as opposed to moral and principled searches for universally applicable principles. Accordingly, the comparative law chapter in this study aims to examine how the Canadian and Dutch family law systems have extended certain forms of protection to cohabitants and whether these developments can serve as positive lessons, or potential warnings, for South African lawmakers.

#### 1 2 4 Scope of the study

This dissertation investigates the potential of adopting a relational feminist approach to regulating the socio-economic consequences of terminated domestic partnerships. While a relational feminist approach to family law adjudication and legislation may render our family law regime more responsive to women’s specific needs in general, that is not where the focus of this dissertation lies. For the purposes of this study, the focus is on the vulnerability of women in unregulated relationships and, particularly, on the socio-economic needs of female cohabitants. In this study, I refer to domestic partners, domestic partnerships and cohabitants interchangeably.

This dissertation briefly examines legal developments pertaining to customary marriages and religious marriages, to the extent that they emphasise the need for a relational feminist response to women’s socio-economic disadvantage upon family

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<sup>105</sup> Scheppele (2003) *IJCL* 296.

<sup>106</sup> 296.

<sup>107</sup> Jackson “Comparative Constitutional Law” in *The Oxford Handbook* 60.

dissolution. The focus of this study remains however, on unregulated domestic partnerships.

While both heterosexual and same-sex cohabitants require protection, the focus of this study is on heterosexual cohabitants due to the legal regime currently providing greater protection to same-sex cohabiting relationships than heterosexual cohabitants. The focus is also on examining the need to foster substantive gender equality, as opposed to sex equality. The emphasis is on legislative provisions and jurisprudential modes of reasoning affecting care-giving partners who are usually left socio-economically vulnerable upon the termination of their domestic partnership. Male cohabitants who fulfil this role and who are left vulnerable also require protection. The reality is, however, that women remain disproportionately responsible for this care-giving role.<sup>108</sup> Women also experience socio-economic deprivation in unique ways due to gendered social norms.<sup>109</sup> Given the interconnection between gendered family roles and socio-economic disadvantage, the focus of this study is on the need for a relational feminist response to the socio-economic consequences of terminated domestic partnerships.

### 1 3 Overview of chapters

Chapter two commences by setting out the justification for adopting a relational feminist framework for the interpretation of socio-economic rights. It focuses on the elements underlying classic legal liberalism that constrain the transformative potential of socio-economic rights. This is followed by an examination of the underlying theoretical basis of relational feminism and how it deconstructs elements of classic liberalism, such as the traditional public/private law divide and the liberal conception

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<sup>108</sup> See the discussion by Mokgoro and O'Regan JJ in *Volks*, para 110. The secondary literature on this issue is also extensive, with empirical evidence confirming that women continue to perform most of the household and caregiving labour within the family. For example, see the international survey by I Ellman "Marital Roles and Declining Marriage Rates" (2008) 41 *Family LQ* 455 478. In relation to the South African context, see: E Bonthuys "Gender and Work" in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 244 244-247; Clark & Goldblatt "Gender and Family Law" in *Gender, Law and Justice* 205; and D Budlender, D Chobokoane & Y Mpetsheni *A Survey of Time Use: How South African Women and Men Spend Their Time* (2001) 49 79; STATSSA *Income and Expenditure of Households 2010/2011* (2011) 216.

<sup>109</sup> DM Chirwa & S Khoza "Towards Enhanced Citizenship and Poverty Eradication: A Critique of *Grootboom* from a Gender Perspective" in A Gouws (ed) *(Un)thinking Citizenship: Feminist Debates in Contemporary South Africa* (2005) 137 210.

of choice. It also examines how this theoretical framework facilitates the interrogation of the socio-economic implications of private law rules governing cohabitation. Chapter two concludes by setting out key concepts underlying a relational feminist interpretation of socio-economic rights to reconceptualise relevant family law rules. This is in order to render the law more responsive to women's ability to gain and retain access to socio-economic resources on an equitable basis in the context of cohabitation.

Chapter three provides a detailed analysis of the current legal framework governing cohabitation in South Africa, through a relational feminist lens. It commences with an overview of the South African family law regime before the advent of democracy. It then examines the jurisprudence on the interaction between the Bill of Rights and family law, focusing on how the Bill of Rights has been utilised to develop certain aspects of the family law system. Following from this, it sets out the applicable legislative and common law framework. The chapter concludes by highlighting that, despite certain progressive developments, the socio-economic rights of women have been neglected within the context of family law. There is, therefore, a need for further transformation in accordance with a relational feminist interpretation of the socio-economic rights of cohabiting women.

Chapter four examines promising Canadian and Dutch family law developments pertaining to the protection of unmarried cohabitants through a relational feminist lens. It commences with a brief background to the Canadian family law regime and the historical advances relating to the protection of social rights in Canadian law. The focus of this chapter is on a functional and normative comparative approach to Canadian family law, concentrating on leading legislative and jurisprudential developments concerning female cohabitants. This is followed by an analysis of the Dutch family law regime through a relational feminist lens. Relevant Dutch legislation is first examined. This is followed by an examination of Dutch jurisprudential developments pertaining to unregistered cohabitants. This chapter concludes by emphasising the potential lessons and warnings that can be gained from a comparative analysis of Canadian and Dutch family law.

Chapter five utilises the normative guidelines underlying a relational feminist framework set out in chapter two, in addition to the lessons provided by Canadian and Dutch family law in chapter four, to outline recommendations for the development of South African family law. The emphasis is on developing rules to fulfil the socio-

economic rights of women in the context of terminated domestic partnerships. Chapter five provides recommendations on how to transform the rules governing terminated domestic partnerships to protect and fulfil the socio-economic rights of cohabiting women.

The purpose of the concluding chapter is to highlight important recommendations and reflections relating to specific gaps within the South African family law regime. The final chapter also summarises the nature of the positive steps required by the South African state to protect and promote the socio-economic rights of women upon the termination of their domestic partnership.

## 1 4 Conclusion

Inequality in the family continues to serve as a central cause of women's poverty.<sup>110</sup> While all intimate relationships need to be regulated to protect the rights of its members, cohabiting women are particularly vulnerable to destitution and homelessness upon the dissolution of their relationship. Given the constitutional commitment to non-sexism<sup>111</sup> and justiciable socio-economic rights, the state is constitutionally required to examine how the family law regime can be transformed to structure more equitable socio-economic relations between cohabiting men and women. This obligation is emphasised by the fact that all areas of law are subject to the Bill of Rights,<sup>112</sup> as well as the constitutional duty on the state to "respect, protect and promote"<sup>113</sup> the rights in the Bill of Rights. This dissertation examines the potential of a relational feminist interpretation of the socio-economic rights of female cohabitants to transform the socio-economic consequences of terminated domestic partnerships for women in accordance with the transformative aspirations of our Constitution.<sup>114</sup>

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<sup>110</sup> Nath *We were Never meant to Survive* (2012) 25.

<sup>111</sup> S 1(b) of the Constitution.

<sup>112</sup> S 8(1).

<sup>113</sup> S 7(2).

<sup>114</sup> S 39(2).



## Chapter 2: Developing a relational feminist framework for interpreting the socio-economic rights of female cohabitants

### 2 1 Introduction

This chapter examines the transformative potential of developing a relational feminist framework for interpreting the socio-economic rights of female cohabitants. The paradigmatic shift is necessitated by the reality that cohabitants often access the objects of socio-economic rights through private relationships.<sup>1</sup> Relational feminism is scrutinised in terms of its potential to develop a framework for recognising and regulating the socio-economic consequences of terminated domestic partnerships.<sup>2</sup> In particular, this framework is examined for its capacity to render the application of socio-economic rights more responsive to the needs of female cohabitants upon the termination of their relationships.

The justification for adopting a relational feminist framework is set out first. Relational feminist theory is examined in terms of how it resonates with the project of transformative constitutionalism,<sup>3</sup> particularly in relation to the horizontal application of the Bill of Rights. Following this, the main elements of relational feminism as a theory are set out in detail, focusing on the four-step approach informing a relational feminist framework. In accordance with this approach, legal rules are examined to determine whether they are structuring relations consonant with constitutional values. Relevant South African constitutional provisions pertaining to the socio-economic consequences of terminated domestic partnerships are examined through this four-step approach. Relational feminism is also employed as a basis for critiquing the constraining elements underlying South Africa's traditional legal culture.<sup>4</sup> In particular,

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<sup>1</sup> M Pieterse "Relational Socio-Economic Rights" (2009) 25 *SAJHR* 198 203.

<sup>2</sup> There are a number of theories on relational feminism. For the purposes of this study, the focus is on the theory as developed by Jennifer Nedelsky. The underlying tenets of this theory and the manner in which it resonates with the ethos underlying transformative constitutionalism, are discussed under part 2 2 of this chapter. See J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011).

<sup>3</sup> KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150.

<sup>4</sup> Karl Klare defines liberal legalism as:

"Closely related to the classical liberal political tradition, exemplified in the work of Hobbes, Locke and Hume. The metaphysical underpinnings of liberal legalism are supplied by the central themes of that tradition: the notion that values are subjective and derive from personal desire, and that therefore ethical discourse is conducted profitably only in instrumental terms; the view that society is an artificial aggregation of autonomous

a relational feminist lens is utilised to explore the extent to which the “choice argument”,<sup>5</sup> informing South Africa’s legal response to cohabitation, structures socio-economic inequality between cohabitants. This chapter concludes by setting out key concepts underlying a relational feminist approach to socio-economic rights. The potential of relational feminism to catalyse a significant shift in terms of the current paradigms informing the regulation of cohabitation is also explored.

## 2.2 Justification for a relational feminist framework

There are various theories of relational feminism,<sup>6</sup> many of which have made significant contributions to developing the law to be more responsive to women’s lived realities.<sup>7</sup> For purposes of this study, the focus is on the theory as developed by

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individuals, the separation in political philosophy between public and private interest, between state and civil society; and a commitment to a formal or procedural rather than a substantive conception of justice.”

See K Klare “Law-making as Praxis” (1979) 40 *Telos* 123 123.

<sup>5</sup> Referring to the decision in *Volks NO v Robinson* (2005) 5 BCLR 446 (CC) (“*Volks*”), Bradley Smith describes the Court’s line of reasoning as embodying the “choice argument”. This argument is that unmarried partners cannot claim spousal benefits, because they have chosen not to marry. See BS Smith “Rethinking *Volks v Robinson*: The Implications of Applying a ‘Contextualised Choice Model’ to Prospective South African Domestic Partnerships Legislation” (2010) *PELJ* 238 238. See also B Coetzee Bester & A Lou “Domestic Partners and the ‘Choice Argument’: Quo Vadis?” (2014) 17 *PELJ* 2951 2952.

<sup>6</sup> N Noddings *Women and Evil* (1989); M Minow *Making All the Difference: Exclusion, Inclusion and American Law* (1990); C Gilligan *In a Different Voice* (1992); and CM Kogge *Perspectives on Equality: Constructing a Relational Theory* (1998).

<sup>7</sup> While there have been a number of relational feminist theories, one particularly important strand of work in this field constitutes the research undertaken by Carol Gilligan. In accordance with her research, she essentially identifies two distinctive methods of analysis in moral reasoning. The first is what she refers to as an “ethic of rights”. This approach is very much in accordance with traditional South African legal culture, in that it approaches problems through ranking priorities, the formation of rules and the abstract application of rules to facts. In sharp contrast to the ethic of rights approach, is the approach defined as an “ethic of care”, which analyses moral problems contextually, focusing on the particular rather than the abstract. This approach also recognises the importance and reality of social relationships involved in a legal dispute. Gilligan’s controversial claim was that these two ethics are gendered, in the sense that girls and women tend to adopt the ethic of care, while boys and men are more likely to reason in terms of rights. Her research is regarded as ground-breaking and controversial in that it specifically highlights the one-sided and gendered nature of traditional psychological research. The lived experiences and psychological reasoning adopted by women has therefore, been predominantly ignored within the field of psychology. The neglect of the specific experiences and perspectives of women has also been a characteristic of traditional legal systems. For example, through predominantly reflecting the ethic of rights approach, the liberal legal tradition has essentially ignored certain truths about the human condition and about social life in general, which has been to the detriment of modern societies. See C Gilligan *In a Different Voice* (1992) 5-23.

Jennifer Nedelsky. The primary reason for adopting her theory is that it recognises the role of relationships, both personal and institutional, in enabling cohabitants to exercise their rights in a manner that gives effect to constitutional values.<sup>8</sup> In this regard, relational feminism focuses on how private law rules intersect with gendered dynamics to structure relations that either hinder or facilitate access to resources.<sup>9</sup> Nedelsky's theory is transformative, as it examines how alternative interpretations of rights can structure more equitable relations. Given the reciprocal connection between constructive relationships and the capacity to exercise rights, these dynamics should inform interpretations of family law rules. Relational dynamics should, similarly, inform the formulation of state legislation and policy aimed at giving effect to the socio-economic rights of cohabitants.

While substantive equality, which is aimed at achieving equality of outcome, has certain similarities with a relational feminist approach, there are important distinctions that need to be illuminated. Under South African law, Cathi Albertyn has identified the elements of the judicial approach to substantive equality as requiring recognition of the social context, the impact of the discrimination on the complainant, a positive recognition of difference and the need to give effect to transformative constitutional values.<sup>10</sup> The ultimate goal of substantive equality is to respond to discrimination in a manner that achieves equality of outcome.

While substantive equality recognises the social context and the impact of discrimination in considering the choice argument, liberal individualism remains a dominant mode of thought within our equality jurisprudence. Calls for substantive equality have not therefore, shifted the liberal choice argument within South African jurisprudence, particularly in family law cases.

Relational feminism however, calls for a paradigmatic shift whereby a relational analysis is more deeply integrated into everyday legal analysis and interpretation. For example, when examining the social context and impact in an equality case, a relational feminist analysis requires a relational lens to become central. A relational feminist lens shifts the focus towards how cohabiting men and women relate to one

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<sup>8</sup> Nedelsky *Law's Relations* 87.

<sup>9</sup> S Chant "Re-thinking the Feminisation of Poverty in Regard to Aggregate Gender Indices (2006) 7 *Journal of Human Development* 201 205; and D Budlender "Women and Poverty" (2005) 64 *Agenda* 30 35.

<sup>10</sup> C Albertyn "Substantive Equality and Transformation in South Africa" (2007) 23 *SAJHR* 253 253.

another and the socio-economic consequences of these patterns of relating. In doing so, a relational feminist approach fosters an expanded view of harm. For example, a relational feminist lens reveals how relations based on dominance and exploitation are intrinsically harmful to both cohabiting men and women and to society in general.<sup>11</sup>

A relational feminist lens emphasises how relational dynamics either constrict or improve access to socio-economic resources between cohabiting men and women. If we are to take the socio-economic rights of cohabiting women seriously, we therefore need to undertake a more robust examination of gendered relations in family law. An expanded view of harm further recognises how gender and socio-economic well-being are deeply interconnected, particularly within family law. As gendered relations have socio-economic consequences, socio-economic rights need to be interpreted in a manner that addresses and transforms these relations. A relational feminist lens further enriches the examination of dignity in discrimination cases. For instance, without a relational understanding of dignity, the courts tend to adopt an individualistic approach to dignity and difference, which perpetuates a formalistic approach to equality.<sup>12</sup>

Given the dominance of the choice argument and its negative impact, the constitutional values and rights implicated in cohabitation disputes are best analysed through a relational feminist lens. Relational feminism can thus be described as an institutional and transformative project aimed at finding a new language and new concepts to address relational dynamics in family law. From a relational feminist perspective, legal rules can either support or challenge exploitative patterns of relating within the family law sphere.

With regard to relational feminism as applied to law, Nedelsky distinguishes between values and rights. In terms of her theory, rights are the rhetorical and institutional means to give effect to core values. Rights are best analysed in terms of whether they structure relations that give effect to values, such as equality, dignity and autonomy. With regard to our family law jurisprudence, the issue concerning the regulation of cohabitation is primarily constructed as equality versus autonomy.

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<sup>11</sup> Nedelsky *Law's Relations* 26.

<sup>12</sup> C Barclay "Substantive Equality: A Feminist Critique of the notion of Difference in the Canadian and the South African Equality Test" (2001) 5 *IJDL* 167 188.

While the socio-economic rights have not been analysed in cases concerning cohabitation,<sup>13</sup> they are frequently implicated. An example of this is provided when a female cohabitant is evicted by her partner when their relationship ends. A strictly private law lens, allows one to ignore her socio-economic rights, focusing on property law and autonomy. In this case, interpretations of her right of access to adequate housing should however, be examined. Her right of access to adequate housing should also be informed by an intention to structure constructive relations between cohabitants that foster autonomy and equality. A relational feminist lens emphasises the notion that socio-economic rights do not simply entail access to commodities. These rights play an important role in structuring more just and equitable inter-personal and social relationships in our society. A relational feminist lens thus clarifies the debate and reveals the relational nature of access to adequate housing, health care services and social security, particularly in domestic partnerships. In this manner a relational feminist approach exposes a potential avenue for expanding relational access to socio-economic resources so as to give effect to constitutional values. In terms of this framework, Nedelsky sets out a four-step analysis, which is expanded upon below.

A relational feminist framework allows for a wider range of relevant social, material and inter-personal issues to be considered when determining how to regulate domestic partnerships. It emphasises, for instance, the influence of gendered family roles in shaping both men and women's choices.<sup>14</sup> Relational feminism's sensitivity to gendered relations also has the potential to shift private dynamics in a manner that empowers women to access the resources necessary to free their potential.<sup>15</sup>

Various provisions in the South African Constitution are particularly compatible with a relational feminist approach to gender inequality and poverty,<sup>16</sup> such as the

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<sup>13</sup> Examples of these cases include *Volks and Butters v Mncora* 2012 4 SA 1 (SCA); 2012 2 All SA 485 (SCA) ("*Butters*"), which are discussed in detail in part 3 3 5 and part 3 5 3 of this study respectively.

<sup>14</sup> Nedelsky *Law's Relations* 19.

<sup>15</sup> Preamble to the Constitution of the Republic of South Africa, 1996 (the "Constitution").

<sup>16</sup> For example, in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC) ("*PE Municipality*"), para 37, Justice Sachs (as he then was) specifically stated that:

"The spirit of *Ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structural, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

mechanism for the horizontal application of the Bill of Rights,<sup>17</sup> the commitment to fostering substantive equality,<sup>18</sup> and the inclusion of justiciable socio-economic rights.<sup>19</sup> The Constitution is also committed to healing the divisions of the past and establishing a society based on non-sexism and fundamental human rights.<sup>20</sup> Collectively, these provisions justify examining whether the law structures relations that reflect the rights and values protected in the Bill of Rights.

As a result of these progressive provisions, the transformative potential of the South African Constitution has been widely discussed and celebrated.<sup>21</sup> While the exact meaning of transformation is contested, this study proceeds from the understanding that transformation entails a significant shift (both in terms of public and private relations) towards an egalitarian society premised on a more equitable division of resources.<sup>22</sup> Given the constitutive power of the family, the constitutional goal to construct a “society based on democratic values, social justice and fundamental human rights”<sup>23</sup> should extend to the family law regime. In order to give effect to this social vision, greater attention needs to be paid to the current regulation of socio-economic rights within the private sphere. In particular, the manner in which the family law regime structures socio-economic responsibility between cohabitants requires a relational feminist analysis.

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<sup>17</sup> S 8(1) of the Constitution states that the Bill of Rights applies to “all law”, while s 8(2) states that a provision in the Bill of Rights binds a natural or juristic person to the extent that it is applicable.

<sup>18</sup> S 9(2) of the Constitution provides that in order to “promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.” This provision has been held to entail a commitment to substantive equality and not formal equality. This was emphasised by Justice Sachs in the case of *Volks* with the statement that:

“This Court has on numerous occasions stressed the importance of recognising patterns of systematic disadvantage in our society when endeavouring to achieve substantive and not just formal equality.” (Para 163).

<sup>19</sup> Socio-economic rights are specifically protected under ss 26, 27 and 28 of the Constitution.

<sup>20</sup> Preamble to the Constitution.

<sup>21</sup> P de Vos “*Grootboom*, the Right of Access to Housing and Substantive Equality as Contextual Fairness” (2001) 17 *SAJHR* 258 259; P Langa “Transformative Constitutionalism” (2006) 3 *Stell LR* 351 352; and C Albertyn & B Goldblatt “Equality in the Final Constitution” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (Original Service, June 2008) 35-1 35-5.

<sup>22</sup> Langa (2006) *Stell LR* 352; and Albertyn & Goldblatt “Equality” in *Constitutional Law of South Africa* 35-5.

<sup>23</sup> Preamble to the Constitution.

An innovative approach to interpreting the Constitution is further necessitated as South Africa is considered one of the most unequal countries in the world.<sup>24</sup> The feminisation of socio-economic burdens has also deepened since democracy.<sup>25</sup> In addition, the courts have not yet fully utilised the Constitution's transformative potential, including its textual openness to a relational feminist approach, when deciding on family law issues. Following from this, it becomes necessary to analyse the possibility of developing a relational feminist framework to achieve the Constitution's transformative vision, particularly in relation to domestic partnerships.

This imperative is underscored by Karl Klare, who notes that the Constitution clearly intends to infuse the private sphere, particularly the market, the workplace and the family, with constitutional norms and values.<sup>26</sup> This project of "constitutionalising"<sup>27</sup> the family law regime is primarily meant to be achieved through the vehicles of sections 8 and 39 of the Constitution.<sup>28</sup> Given that relational feminism is consonant with the transformative aspirations of the South African Constitution, this chapter commences with a description of Nedelsky's four-step analysis. Her four-step approach examines whether relevant legal rules structure relations based on constitutional values. The four-step process is utilised to scrutinise how rules interpreted through a liberal lens structure inequitable relations between cohabiting men and women.

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<sup>24</sup> South Africa has been described as one of the most unequal countries in the world. See F Wilson & V Cornell "Investing in People: Nurture, Education and Training" in F Wilson & V Cornell (eds) *Guide to Carnegie 3: Strategies to Overcome Poverty and Inequality, Conference Report* (2014) 68 <[http://www.carnegie3.org.za/docs/Carnegie3\\_April13\\_WEB.pdf](http://www.carnegie3.org.za/docs/Carnegie3_April13_WEB.pdf)> (accessed 15-08-2015); and National Planning Commission (NPC) *Diagnostic Overview* (2010) 8. Statistics South Africa (STATSSA) *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2011* (2014) 12. For earlier data, see: The Presidency *Towards a Fifteen Year Review* (2008) 18 <[www.info.gov.za/view/DownloadFileAction?id=89475](http://www.info.gov.za/view/DownloadFileAction?id=89475)> (accessed 02-07-2015), which estimates that 47.99% of South Africa's population lived below a poverty line of R 322,00 per month in 2005.

<sup>25</sup> Chant (2006) *Journal of Human Development* 206; and M Rogan *Poverty and Headship in Post-apartheid South Africa 1997-2008* (2012) 2 *ERSA* <[http://www.econrsa.org/system/files/publications/working\\_papers/wp288.pdf](http://www.econrsa.org/system/files/publications/working_papers/wp288.pdf)> (accessed 05-06-2015). See also National Development Agency (NDA) *State of Poverty and its Manifestation in the Nine Provinces of South Africa* (2014) <<http://www.nda.org.za/docs/Research%20Report%20State%20of%20poverty%20in%209%20provinces%20of%20SA.PDF>> (accessed 05-06-2015).

<sup>26</sup> Klare (1998) *SAJHR* 150.

<sup>27</sup> D Bhana "The Development of a Basic Approach for the Constitutionalisation of our Common Law of Contract" (2015) 26 *Stell LR* 1 3.

<sup>28</sup> See part 2 7 of this chapter for a discussion of ss 8 and 39 of the Constitution.

## 2 3 Four-step analysis of relational feminism

In accordance with Nedelsky's relational feminist approach, the human subjects of law and politics are not best thought of as independent, freestanding individuals who simply require protection from one another.<sup>29</sup> She accordingly rejects the formalistic "rights as boundaries"<sup>30</sup> approach. Rather, interdependence and interaction are valued not only because people's interests may collide, but because each individual is in basic ways constituted by a network of relationships.<sup>31</sup> In terms of Nedelsky's theory, legal rights such as socio-economic rights should be interpreted and implemented with this relational reality in mind. The application of Nedelsky's relational feminist approach focuses on recognising the existing social and relational context. A value-sensitive approach to rights is also adopted, while sections 8 and 39 of the Constitution are employed to develop a relational conception of socio-economic responsibility between cohabitants. A relational feminist approach comprises four steps that are utilised to determine whether the legal regime structures equitable socio-economic relations between cohabitants in a manner that is consonant with constitutional values.

The first step entails a context-sensitive examination of the rights dispute to determine how the law currently structures the relations that engender the specific problem.<sup>32</sup> This first step is used in this chapter to analyse how the theoretical framework governing cohabitation exacerbates socio-economic vulnerability for female cohabitants. This aspect of Nedelsky's approach resonates with the constitutional sections providing for the horizontal application of the Constitution. For example, section 8 of the Constitution, states that the rights in the Bill of Rights – which includes the socio-economic rights – now apply to all areas of law.<sup>33</sup> Adopting a relational feminist lens emphasises the socio-economic consequences of terminated domestic partnerships. This first step is utilised to examine how certain aspects underlying traditional South African legal culture constrain the transformative potential of the Constitution. One example of this is the traditional public/private law divide, which obscures the importance of private dynamics in shaping women's access to

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<sup>29</sup> Nedelsky *Law's Relations* 19.

<sup>30</sup> 19.

<sup>31</sup> Nedelsky *Law's Relations* 19; and Pieterse (2009) *SAJHR* 198.

<sup>32</sup> Nedelsky *Law's Relations* 19.

<sup>33</sup> S 8(1) of the Constitution.



resources. Liberal conceptions of this divide need to be transcended and the socio-economic implications of terminated domestic partnerships need to be recognised. Recognising relational socio-economic vulnerability is also necessary in order to foster context-sensitive interpretations of socio-economic rights that respond to private gendered dynamics.<sup>34</sup> Moreover, failing to scrutinise this underlying normative concept runs the risk of leaving private gendered abuses of power intact.<sup>35</sup> Revealing how family law rules engender detrimental socio-economic consequences emphasises the need to fundamentally shift our mode of thinking about private socio-economic responsibilities.<sup>36</sup>

The second aspect of Nedelsky's approach entails establishing the particular competing values that are at stake in determining how to regulate cohabitation.<sup>37</sup> This aspect also resonates with the horizontal commitments in the Constitution. For example, section 39 of the Constitution, provides that the courts must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>38</sup> This step is value-sensitive and counters the traditional formalistic conception of rights prevalent under a classic liberal lens.<sup>39</sup> It recognises the potential of the values underlying socio-economic rights to inform the legal response to cohabitation to be more reflective of the specific needs of female cohabitants. This is necessary, as one of the policy arguments against regulating cohabitation is the protection of autonomy, but without taking into account the socio-economic conditions that ensure the meaningful exercise of choice in the circumstances of autonomy. Through setting out the specific values at stake, this element elucidates the norms that should guide the state's regulation of cohabitation, in order to be more responsive to women's specific needs.

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<sup>34</sup> Pieterse (2009) *SAJHR* 198.

<sup>35</sup> S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 34.

<sup>36</sup> D Bhana "The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution" (2013) 29 *SAJHR* 351; and E Bonthuys "*RH v DE: A Feminist Minority Judgment on Adultery*" (2015) 31 *SAJHR* 379 381.

<sup>37</sup> Nedelsky *Law's Relations* 74.

<sup>38</sup> S 39(1)(a) of the Constitution.

<sup>39</sup> S Liebenberg "Socio-Economic Rights Beyond the Public-Private Law Divide" in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2015) 63 64.

The third step of a relational feminist analysis considers the kinds of relationships that truly foster the constitutional values enumerated above.<sup>40</sup> It entails interpersonal relations, as well as the broader social and legal relations existing between the state and cohabitants. This third step is utilised to emphasise the need to recognise and regulate private socio-economic responsibility between cohabitants. If gendered patterns of relating are learned within the family, it is necessary to examine the relational patterns that are being structured by family law rules. Enforcing private socio-economic responsibilities includes developing a legislative framework that regulates the socio-economic consequences of terminated domestic partnerships. A proactive response includes interpreting existing common law rules in a manner that protects the socio-economic rights of female cohabitants. Actively protecting the socio-economic rights of cohabitant's, stands in sharp contrast to the state's current passive response.<sup>41</sup> This third element of relational feminism calls for a shift from a liberal conception of individualism towards greater state responsibility for regulating the relational aspects of socio-economic rights between cohabitants.

The fourth step is transformative in that it examines how sections 8 and 39 of the Constitution can be utilised in accordance with a relational feminist interpretation of socio-economic rights. This step focuses on applying a relational feminist interpretation of socio-economic rights to transform the socio-economic consequences of terminated domestic partnerships for vulnerable cohabitants. In doing so, relational feminism is responsive to the gendered patterns of disadvantage currently exacerbated by our family law regime. Relational feminism also focuses on how to utilise the law to transform gendered relations in accordance with the Bill of Rights. The emphasis of a relational feminist approach is on fostering socio-economic transformation through structuring constructive relations between cohabitants.

After examining these four steps, this chapter concludes by highlighting key concepts that should inform the state's development of accountability structures for regulating the socio-economic consequences of terminated domestic partnerships. Through an examination of this four-step approach, the constraining aspects underlying our traditional legal culture are explored.

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<sup>40</sup> Nedelsky *Law's Relations* 74.

<sup>41</sup> E Bonthuys "Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court" (2008) 20 *CJWL/RFD* 1 13-14.

## 2 4 A context sensitive approach

### 2 4 1 Introduction

The research on cohabitation reveals that there are a number of factors exacerbating the vulnerability of female cohabitants.<sup>42</sup> These factors include extreme levels of poverty, gender inequality, the failure to value caring work, and elements of classic legal liberalism. The liberal conception of the public/private law divide, for instance, often prevents courts from engaging with existing dysfunctional gendered relations in family law cases. This liberal focus also inhibits the examination of the potential implications of socio-economic rights to transform the socio-economic consequences of family dissolution. The first step underlying a relational feminist framework entails a context-sensitive examination of how elements of classic liberalism provide an inadequate framework for responding to the relational socio-economic needs of cohabiting women.<sup>43</sup> As highlighted above, while substantive equality requires recognition of the existing social context, relational feminism, recognises an expanded relational conception of harm. Dysfunctional or exploitative patterns of relating between men and women are often learned in the family and transferred intergenerationally.<sup>44</sup> If we are committed to fostering substantive gender equality and greater socio-economic equality, we need to take a closer look at how family law rules are structuring gendered relations within our society. The integral link between gender equality and socio-economic rights further justifies the need to

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<sup>42</sup> B Goldblatt "Regulating Domestic Partnerships: A Necessary Step in the Development of South African Family Law" (2003) 120 *SALJ* 610 611; B Meyersfeld "If you can See Look: Domestic Partnerships and the Law" (2010) 3 *Constitutional Court Review* 271 310; B Goldblatt, C Yose, & S Mills *Cohabitation and Gender in the South African Context: Implications for Law Reform* (2001) 1 (research report prepared by the Gender Research Project of the Centre for Applied Legal Studies at the University of the Witwatersrand); Bonthuys (2008) 13-14; and B Smith "The Dissolution of a Life or Domestic Partnership" in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 390-391.

<sup>43</sup> C Albertyn "Substantive Equality and Transformation in South Africa" (2007) 23 *SAJHR* 253 253; and Liebenberg *Socio-Economic Rights* 317.

<sup>44</sup> D Nath (One in Nine Campaign) *We were Never meant to Survive: Violence in the Lives of HIV Positive Women in South Africa* (2012) 25 <<http://www.oneinnine.org.za/58.page>> (accessed 04-06-2012).

address the socio-economic implications of how men and women relate to one another.<sup>45</sup>

The following section underscores the need to transcend the public/private law divide through a context-sensitive examination of the relational socio-economic consequences of terminated domestic partnerships.<sup>46</sup> Deconstructing this divide is necessary, as private law rules currently exacerbate the socio-economic vulnerability experienced by female cohabitants.

## 2 4 2 Deconstructing the public/private law divide

Under classic liberalism, there is a tendency to deny the influence of state power in structuring inequitable private relations,<sup>47</sup> resulting in a strict conceptual division between public and private law. When discussing this divide, it needs to be emphasised that this concept is both ambiguous and “socio-historically variable”.<sup>48</sup> This divide is also used to refer to different theoretical and empirical distinctions over time.<sup>49</sup> A single dichotomous definition of the public/private law divide fails to express the full institutional complexity of this term. For purposes of a feminist critique of family

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<sup>45</sup> See para 1 1 1 of chapter 1 of this study, which discusses the interconnection between socio-economic rights and gender inequality. In the case of *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC) (“*Grootboom*”), in para 23, Yacoob J pointed out that:

“The realisation of these rights is also key to the advancement of race and gender equality.”

<sup>46</sup> Liebenberg *Socio-Economic Rights* 317.

<sup>47</sup> Liebenberg “Socio-Economic Rights” in *Symbols or Substance* 62.

<sup>48</sup> J Weintraub & K Kumar (eds) *Public and Private in Thought and Practice* (1997) xiv.

<sup>49</sup> Weintraub and Kumar on page xi specifically highlight how:

“[P]ublic and private have long served as key organising categories in social and political analysis, in legal practice and jurisprudence and in moral and political debates...While the relationship between the ‘public sector’ and ‘privatisation’ has become a prominent issue of economic policy and political debate, there has also been an intensified interest in the history and transformation of ‘private life’”. On page xii Weintraub & Kumar go on to state: “The public/private divide is not unitary but protean. It comprises, not a single paired opposition, but a complex family of them, neither mutually reducible nor wholly unrelated.” Following this, they discuss the four broad fields that have been identified under the public/private divide. The first field comprises the liberal-economic model, the second the civic perspective, the third as conceptualising the public realm as a sphere of fluid and polymorphous sociability. The fourth field comprises those tendencies in feminist scholarship that see the distinction between the family and the larger political order, with the market economy often becoming the paradigmatic public realm. Weintraub & Kumar therefore point out that a single dichotomous definition of the public/private divide fails to capture the institutional and cultural complexities of modern societies. See Weintraub & Kumar *Public and Private* xi & xii.

law, the domestic sphere and the market place are understood to comprise the private domain where theoretically free and autonomous individuals interact with one another.<sup>50</sup> As the private sphere is where sexuality, reproduction and family life reside,<sup>51</sup> women are associated with this sphere. In contrast, the public sphere is associated with activities such as politics and law, which have traditionally been dominated by men.

Private institutions, such as the family, are regarded in liberal theory as the natural institutions for distributing social and economic resources.<sup>52</sup> The generally accepted starting point of rights within the sphere of family law is primarily composed of property law and contract law rules. As a result of this private designation, the detrimental socio-economic consequences of these rules are regarded as natural consequences of autonomy.<sup>53</sup> One result of this liberal approach is that existing gendered imbalances are depoliticised and seen as unimportant peripheral aspects.<sup>54</sup> One of the major paradigms in which human rights law is currently embedded is, therefore, the view that the main purpose of public law is to restrain state institutions from interfering in the private sphere.<sup>55</sup> The human rights implications of this approach can, however, be severe for women.<sup>56</sup>

As a result of the harm caused by this perceived division, there is a need for a shift in terms of how we respond to private socio-economic abuse and neglect. Relational feminism emphasises the need for the state to respond to gendered dynamics within family law. For example, family law rules currently result in women predominantly bearing the risk of life events such as disability, family dissolution and poverty.<sup>57</sup> Given

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<sup>50</sup> SB Boyd "Introduction" in SB Boyd (ed) *Challenging the Public/Private Law Divide: Feminism, Law and Public Policy* (1997) 1 4; and Liebenberg *Socio-Economic Rights* 59.

<sup>51</sup> E Bonthuys "The Personal and the Judicial: Sex, Gender and Impartiality" (2008) 24 *SAJHR* 239 240.

<sup>52</sup> Liebenberg "Socio-Economic Rights" in *Symbols or Substance* 64.

<sup>53</sup> Liebenberg *Socio-Economic Rights* 317; and N Fraser "From Redistribution to Recognition: Dilemmas of Justice in a "Post-socialist" Age?" in N Fraser (ed) *Justice Interruptus: Critical Reflections on the Post-Socialist Condition* (1997) 11 20.

<sup>54</sup> Nedelsky *Law's Relations* 19.

<sup>55</sup> A Cockrell "Can You Paradigm? Another Perspective on the Public/Private Law Divide" (1993) *Acta Juridica* 227 227; Liebenberg "Socio-Economic Rights" in *Symbols or Substance* 64; and C Romany "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law" (1993) 6 *Harvard Human Rights Journal* 87 89.

<sup>56</sup> R Copelon "Recognizing the Egregious in the Everyday: Domestic Violence as Torture" (1994) 25 *Columbia Human Rights Law Review* 291 292; and Liebenberg "Socio-Economic Rights" in *Symbols or Substance* 63.

<sup>57</sup> A Alstott "Private Tragedies? Family Law as Social Insurance" (2009) 64 *Harvard Law and Policy Review* 1 26; E Bonthuys "Gender and Work" in E Bonthuys & C Albertyn (eds) *Gender,*

the particularly gendered nature of traditional family roles and their impact on socio-economic well-being, the rules governing cohabitation often implicate constitutionally protected socio-economic rights.<sup>58</sup>

A context-sensitive recognition of this socio-economic impact from a relational feminist perspective is important, as the infringement of socio-economic rights by family members should not be seen as arbitrary incidents detached from existing systems of gender oppression. Rather, these rights should be seen within the broader social context comprising the feminisation of poverty. Cohabiting women's vulnerability to eviction intersects, for instance, with the broader social factors of familial abandonment and internalised notions of women's traditional gender roles.<sup>59</sup> Recognition of these underlying dynamics is necessary in order to interpret and create laws that are responsive to this reality. The manner in which a relational feminist approach deconstructs the public/private law divide is thus valuable.

A relational feminist approach reveals that it is public power (in the form of legislation or the lack thereof) and judicial interpretations of existing legal rules that creates, exacerbates and legitimates socio-economic responsibility or freedom between cohabitants.<sup>60</sup> Family law rules can also legitimate or challenge gendered ideological paradigms that shape how men and women interact with one another. As an example of how rules can shape relations, Nedelsky explains that when countries provide decent maternity leave to both women and men, or well-funded child-care, they shape the families within them. Well-funded child care can also shape gendered relations between family members. Countries that value caring work also provide constructive models for other countries.<sup>61</sup> It is thus possible to restructure relations that respect and protect nurturing work, while facilitating female caregiver's equal participation within the public sphere.

Nedelsky expands on the relational power of law by stating that the common law has historically been informed by particular conceptions of fairness and freedom. These supposedly "neutral rules of the game" give advantages to some players over

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*Law and Justice* (2007) 244-247; and Clark & Goldblatt "Gender and Family Law" in *Gender, Law and Justice* 205.

<sup>58</sup> See part 1.1.2 of chapter one of this study.

<sup>59</sup> Nath *We Were Never Meant to Survive: Violence in the Lives of HIV Positive Women in South Africa* (2012) 25.

<sup>60</sup> Liebenberg "Socio-Economic Rights" in *Symbols or Substance* 65.

<sup>61</sup> Nedelsky *Law's Relations* 22.

others in systematic ways that are hard to ignore.<sup>62</sup> These patterns of inequality are illustrated through the state's enactment of family law legislation, which shapes and legitimates certain family forms, to the exclusion of others.<sup>63</sup> The power of the state is further evinced by the fact that the failure to regulate cohabitation reinforces the marginalised position of women who are unable to gain access to resources through the usual market mechanisms.<sup>64</sup> Focusing on the relations that are currently being structured by legal rules foregrounds the reality that the state already structures inequitable socio-economic relations between cohabitants.<sup>65</sup> The legal regime also structures inequitable relations between different groups of women. An example of this is state legislation which recognises certain relationships, such as civil marriages, while excluding others, such as Muslim marriages and domestic partnerships. While a woman married according to the Marriage Act 25 of 1961, has certain automatic benefits, regardless of the length of her marriage, a woman who has lived in a long-term domestic partnership has to approach a court to utilise private law mechanisms in an attempt to gain access to these benefits. In this manner the law is structuring hierarchical relations that offer different benefits to different groups. A relational feminist approach reveals, however, how rights "construct, reflect, or express relationships".<sup>66</sup>

In spite of its fallacy, the persistence of the public/private divide is evinced through the courts' general reluctance to engage with the potential implications of the Bill of Rights in family law cases.<sup>67</sup> While there have been judgments that have resulted in discernible positive change,<sup>68</sup> a significant number of family law decisions have maintained a private law perspective, while failing to interrogate the socio-economic

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<sup>62</sup> J Nedelsky "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 *Yale Journal of Law and Feminism* 7 10.

<sup>63</sup> Liebenberg "Socio-Economic Rights" in *Symbols or Substance* 65.

<sup>64</sup> Liebenberg "Socio-Economic Rights" in *Symbols or Substance* 57; Meyersfeld (2010) *Constitutional Court Review* 310; and Alliance for the Legal Recognition of Domestic Partnerships (ALRDP) *Submission to the Department of Home Affairs* (2008) 3.

<sup>65</sup> Nedelsky *Law's Relations* 238.

<sup>66</sup> Nedelsky *Law's Relations* 208.

<sup>67</sup> E Bonthuys "The South African Bill of Rights and the Development of Family Law" (2002) 119 *SALJ* 748 748. For an in-depth discussion of these cases, see part 3 3 of chapter three of this study.

<sup>68</sup> This is evinced by the judgment of *Butters*, where the Supreme Court of Appeal extended the application of the tacit universal partnership to cohabitants. This case is discussed in part 3 3 5 of chapter 3 of this study.

implications of relevant private law rules.<sup>69</sup> This private law lens prevents the judiciary and the legislature from engaging with the potential power of constitutional rights to dislodge many of the underlying causes of gender inequality.<sup>70</sup> It also undermines the constitutional provision that the Bill of Rights applies to all law.<sup>71</sup>

The influence of the public/private law divide is further evident in the development of theories relating to the enforcement of socio-economic rights. For example, the focus has traditionally been on developing “state-centred theories” for measuring compliance with these rights.<sup>72</sup> This is demonstrated through a discussion of the ground-breaking case of *Government of the Republic of South Africa v Grootboom* (“*Grootboom*”),<sup>73</sup> where the Constitutional Court adopted a reasonableness model of review to assess whether the state complied with its positive duties in terms of section 26(2) of the Constitution. In accordance with this model of review, a court examines whether a government programme is flexible, coherent, comprehensive and capable of effectively realising a particular socio-economic right.<sup>74</sup> One particularly important factor that a court considers is the degree to which provision has been made for the most vulnerable members of society.<sup>75</sup> In the *Grootboom* case, the Court also pointed out that section 26 of the Constitution is concerned with ensuring a more equitable distribution of land in general.<sup>76</sup>

Despite the celebrated judgment of *Grootboom*, the case has been criticised for reinforcing the public/private law divide. This is evinced by the Court’s statement that the primary obligations imposed by section 28(1)(c) of the Constitution, which provides every child with the right to basic nutrition, shelter, basic health care services and

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<sup>69</sup> For example, the case of *Volks NO v Robinson* 2005 5 BCLR 446 (CC) (“*Volks*”) has been criticised for the Constitutional Court’s limited recognition of the reality that the structural dependence of women in such relationships often leaves them destitute. This judgment further reinforces a formalistic conception of choice and equality that was detrimental to vulnerable members of families. See part 3 3 5 of chapter three of this study.

<sup>70</sup> Albertyn (2007) *SAJHR* 254.

<sup>71</sup> S 8(1) of the Constitution.

<sup>72</sup> Pieterse (2009) *SAJHR* 198.

<sup>73</sup> 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC).

<sup>74</sup> Para 44.

<sup>75</sup> Para 44.

<sup>76</sup> In *Grootboom*, in para 93, Yacoob J pointed out that:

“The state must also foster conditions to enable citizens to gain access to land on an equitable basis.”

See also, S Liebenberg “Towards an Equality-Promoting Interpretation of Socio-economic Rights in South Africa: Insights from the Egalitarian Liberal Tradition” (2015) 132 *SALJ* 411-437; Liebenberg *Socio-Economic Rights* 205; Liebenberg & Goldblatt (2007) *SAJHR* 335; and De Vos (2001) *SAJHR* 259.



social services, rests upon the parents. The Court cautioned that a finding that this obligation rested on the state could create the dangerous situation of children being used as “stepping stones” by their parents to gain access to housing.<sup>77</sup> The Court held that children have the right to parental care first and only have a right to access alternative state assistance when parental care is absent.<sup>78</sup> This finding by the Court entrenches a limited perception of the state’s duty to intervene within the private sphere when human rights are violated.<sup>79</sup> This is a dangerous line of reasoning, as individuals within the private sphere are also capable of limiting access to socio-economic resources. The exercise of power, whether public or private, is furthermore, now subject to the Constitution. In the subsequent decision of *Minister of Health v Treatment Action Campaign* (“TAC”),<sup>80</sup> the Court did qualify the reasoning in *Grootboom* concerning section 28 of the Constitution. In *TAC*, the Court held that the state is required to ensure that children are accorded the protection contemplated by section 28, where parental or family care is present but lacking.<sup>81</sup> While the primary obligation to give effect to socio-economic rights remains on the state, it is however, also under a duty to develop and regulate private socio-economic responsibilities.

Despite the positive developments emanating from *Grootboom*, as well as the positive outcome of *TAC*,<sup>82</sup> certain socio-economic rights decisions have been criticised for emphasising procedural criteria, in contrast to the substantive values and interests that socio-economic rights are intended to protect.<sup>83</sup> Socio-economic rights jurisprudence has further been criticised for failing to address private gendered

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<sup>77</sup> *Grootboom* para 71.

<sup>78</sup> Para 77.

<sup>79</sup> C Mbazira & J Sloth-Nielsen “Incy-wincy Spider Went Climbing Up Again- Prospects for Constitutional (Re)interpretation of Section 28(1)(c) of the South African Constitution in the Next Decade of Democracy (2007) 2 *Speculum Juris* 147 152. Sloth-Nielsen J “The Child’s Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*” (2001) 17 *SAJHR* 210-232.

<sup>80</sup> (No 2) 2002 5 SA 721 (CC) (“*TAC*”). In *TAC*, the Constitutional Court found that the State’s limited and inflexible provision of Nevirapine to public hospitals did not comply with its obligations under ss 27(1) and 27(2) of the Constitution and made both declaratory and mandatory orders against the government.

<sup>81</sup> *TAC*, paras 78 & 79. The Court held that even where parental care is present, if the children are cared for by parents who are destitute, or unable to provide this care, then the children are entitled to state assistance.

<sup>82</sup> See footnote 80 above.

<sup>83</sup> D Brand “What are Socio-Economic Rights For?” in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 33 36; M Pieterse “Coming to Terms with Judicial Enforcement of Socio-Economic Rights” (2004) 20 *SAJHR* 383 410; and Liebenberg *Socio-economic Rights* 175-176.

barriers to accessing these rights. As emphasised by Albertyn, “poverty is always, also, a matter of gender inequality”.<sup>84</sup>

The jurisprudence on socio-economic rights has paid insufficient attention to the socio-economic implications of gender inequality. In order to be more responsive to gendered relations, private law rules need to be interpreted in accordance with constitutionally entrenched socio-economic rights, particularly where private entities deprive people of existing access to socio-economic resources.<sup>85</sup> While section 26(3) of the Constitution,<sup>86</sup> has catalysed the introduction of legislation which altered the common law governing evictions,<sup>87</sup> certain areas of private law still require development. In particular, there has been an insufficient focus on the need to develop private law rules governing the dissolution of domestic partnerships, in accordance with socio-economic rights.

The need to further develop private law rules is evinced by the fact that the abuse of private power can have serious human rights consequences. For example, parents can deny their children access to essential resources, such as food and water. Entrepreneurs can also set the price of necessities to ensure a greater profit for themselves, while denying poorer members of society access to essential goods.<sup>88</sup>

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<sup>84</sup> C Albertyn “Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court” (2012) 22 *Stell LR* 591 600; and L Chenwi & K McLean “A Woman’s Home is her Castle? Poor Women and Housing Inadequacy in South Africa” in B Goldblatt and K McLean (eds) *Women’s Social and Economic Rights* (2011) 105 110.

<sup>85</sup> Liebenberg “Socio-Economic Rights” in *Symbols or Substance* 71; and Pieterse (2009) *SAJHR* 198.

<sup>86</sup> Section 26(3) provides that:

“No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

<sup>87</sup> For example, s 1(xi) read with s 2 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), provides that PIE applies to unlawful occupiers in respect of all land in South Africa. There has also been jurisprudence which has developed the common law rules pertaining to evictions in accordance with the Constitution. For example, in *Ross v South Peninsula Municipality* 2000 1 SA 589 (C), on page 595G, the Western Cape High Court held that s 26(3) of the Constitution altered the common law by providing the courts with an equitable discretion to determine who bears the onus in an ejection application. In *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC) (“*Port Elizabeth*”) concerned an eviction application by the Port Elizabeth municipality against 68 occupiers. This judgment confirmed that occupiers are the bearers of constitutional rights that confers on them procedural and substantive protections in the context of evictions. See Liebenberg *Socio-Economic Rights* 277.

<sup>88</sup> Liebenberg “Socio-Economic Rights” in *Symbols or Substance* 71.

Given the socio-economic implications of traditional gendered family roles,<sup>89</sup> socio-economic rights are particularly important for the development of family law in South Africa.

With regard to cohabitants, caregiving partners are often forced to sacrifice their equal participation in the labour market to allow their partner the freedom to pursue their vocation. This results in the majority of family assets being registered in the name of the working partner. Consequently, cohabitants who accumulate property are able to invoke their property rights to evict their partner upon the termination of their relationship. This eviction has implications for the caregiver's right of access to adequate housing, as well as section 26(3) of the Constitution. This reveals that in order to give effect to the right of access to adequate housing, section 26 of the Constitution needs to be interpreted in a manner that transcends traditional conceptions of the public/private law divide.<sup>90</sup> Sensitivity to the gendered dynamics implicating this right may also require the development of applicable common law rules or legislative provisions. This is explored in detail in chapter five of this study.

The legal rules governing cohabitation need to be examined to ascertain the extent to which they entrench inadequate state responsibility for private human rights violations. This is vital, as leaving these rules intact undermines the horizontal commitments within the Bill of Rights.<sup>91</sup> It has been pointed out that perceiving existing inequitable distributions of resources as "natural" is a dangerous line of reasoning,<sup>92</sup> given South Africa's excessive levels of domestic violence<sup>93</sup> and poverty.<sup>94</sup> It is thus imperative that the state undertakes a more proactive human rights-based approach to regulating domestic partnerships.

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<sup>89</sup> Nath *We were Never meant to Survive* (2012) 23; and R Kaddaria & MA Freeman "Economic Consequences of Marriage and its Dissolution: Applying a Universal Equality Norm in a Fragmented Universe" (2012) 13 *Theoretical Inquiries in Law* 323 323.

<sup>90</sup> S 26(1) of the Constitution provides that everyone has the right to have access to adequate housing.

<sup>91</sup> Liebenberg *Socio-Economic Rights* 340-341.

<sup>92</sup> FE Olsen "The Myth of State Intervention in the Family" (1984) 18 *University of Michigan Journal of Law Reform* 835 836.

<sup>93</sup> N Abrahams, S Mathews, R Jewkes, LJ Martin & C Lombard *Every Eight Hours: Intimate Femicide in South Africa 10 Years Later!* (2012) 5 Medical Research Council Policy Brief, available at <<http://www.mrc.ac.za/policybriefs/everyeighthours.pdf>> (accessed 06-06-2014).

<sup>94</sup> Stats SA *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011* (2014) 12; see also JP Landman, H Bhorat, C van Aardt & S van der Berg *Breaking the Grip of Poverty and Inequality in South Africa 2004 – 2014* (2003) 1 <<http://www.sarpn.org.za/documents/d0000649/index.php>> (accessed 20-04-2012).

The first step of a relational feminist approach reveals that the failure to scrutinise the socio-economic implications of relevant private law rules exacerbates socio-economic inequality between cohabitants. One reason for failing to engage with the socio-economic implications of private relationships is the judicial tendency to neglect sections 8 and 39 of the Constitution. While both these provisions have been ignored in family law cases concerning cohabitants, section 39 has been given some measure of consideration. The first step under a relational feminist approach thus underscores the need for more robust engagement with the socio-economic rights of female cohabitants. The potential role of sections 8 and 39 of the Constitution in transforming the rules governing cohabitation, is explored later in detail in part 2.7 of this chapter.

### 2.4.3 Conclusion

Given that the legal system already structures relational access to socio-economic resources, a context-sensitive relational feminist response to the socio-economic implications of cohabitation is required. This is necessary to develop responsive accountability measures for enforcing socio-economic duties between cohabitants. A relational feminist lens that is sensitive to the existing relational social context is valuable, as it fosters a more compassionate response to the socio-economic plight of female cohabitants.<sup>95</sup>

While the exact nature and scope of private socio-economic responsibilities is not yet clear, this section emphasises the detrimental impact of failing to address the socio-economic rights of female cohabitants. When developing accountability structures, or when interpreting legal rules, it needs to be kept in mind that cohabitants are predominantly a socio-economically vulnerable group. The status of cohabitants is currently governed by private law rules, which were not formulated to protect socio-economic rights. Collectively, these factors highlight that, to protect and fulfil the socio-economic rights of cohabitants, both the courts and the legislature need to undertake a more proactive regulatory role in ensuring that cohabitants take steps to protect and promote the socio-economic rights of their partners.

The above discussion of the first step of Nedelsky's approach reveals that the failure to recognise and interpret socio-economic rights in a relational feminist manner

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<sup>95</sup> Nedelsky *Law's Relations* 223.

exacerbates the feminisation of poverty, particularly for cohabitants. The second step entails investigating the constitutional values at stake when deciding how to regulate cohabitation. In determining how to regulate the socio-economic consequences of terminated domestic partnerships, the courts and the legislature must consider these values. Existing common law rules and legislation affecting cohabitants should also be evaluated to determine whether they are structuring relations that give effect to constitutional values.

An evaluation of the implicated values is necessitated by the reliance on the choice argument for failing to regulate cohabitation. This choice argument is problematic, as it prioritises the value of freedom, while failing to protect the material aspects underlying the values of freedom, dignity and equality for female cohabitants. The values at stake are thus examined in order to counter the abstract conception of rights prevalent under classic liberalism. The values and norms protected under socio-economic rights are examined in the following section.

## **2 5 A value-sensitive approach: Countering an abstract conception of rights**

### 2 5 1 Introduction

Under classic liberalism, rights are perceived as having an objective and fixed meaning.<sup>96</sup> The result of this approach is that private law rules are abstracted from their existing social context, as well as the detrimental human rights consequences flowing from their enforcement.<sup>97</sup> While there are certain trends under liberalism that address the existing social context,<sup>98</sup> the jurisprudence on family law reveals a predominantly abstract, private law focus.<sup>99</sup> Ignoring the values and purposes

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<sup>96</sup> Liebenberg *Socio-Economic Rights* 59.

<sup>97</sup> 59.

<sup>98</sup> An example of this is the human capabilities approach as developed by Amartya Sen and Martha Nussbaum. This theory considers the extent to which human beings are able to be, do and have what they have reason to value, and the degree to which material deprivation hinders such freedom. See A Sen "Human Rights and Capabilities" (2005) 6 *Journal of Human Development* 151 152; and M Nussbaum "Introduction: Feminism and International Law" in *Women and Human Development: The Capabilities Approach* (2000) 1 2. See also S Van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-economic Rights* LLD dissertation Stellenbosch (2015).

<sup>99</sup> Bonthuys (2015) *SAJHR* 380. See the discussion on South African family law jurisprudence under part 3 3 of this study.

underlying rights is problematic, as it tends to promote formal rather than substantive justice, particularly for vulnerable groups. When a cohabitant evicts his partner upon the termination of a long-term relationship, for instance, this abstract approach permits us to avoid thinking about the connection between her socio-economic plight and his private law privilege.<sup>100</sup>

Due to the gendered disadvantage perpetuated by this liberal response, family law rules require development, particularly in terms of sections 8 and 39 of the Constitution. While sections 8 and 39(2) are discussed in detail in part 2.7 of this chapter, it is important to highlight that section 39(2) enjoins the courts to develop interpretations of the Bill of Rights that promote the values of human dignity, equality and freedom.<sup>101</sup> While these values are specifically listed in the Constitution, they are not the only values associated with socio-economic rights. The values of *Ubuntu*, democracy, accountability, responsiveness, care and openness all represent important dimensions of socio-economic rights.<sup>102</sup> It has also been pointed out that the South African Constitution illustrates a decisive commitment to establishing a “caring and aspirationally egalitarian ethos”.<sup>103</sup>

This project of examining the specific values at stake when protecting the socio-economic rights of female cohabitants is necessary to give effect to the underlying purposes informing these rights.<sup>104</sup> In accordance with this goal, one of the broader purposes underlying socio-economic rights is the state’s responsibility to progressively improve access to these resources.<sup>105</sup> The positive duty to give effect to socio-economic rights should shape interpretations of private socio-economic obligations. Analysing the values at stake for cohabitants has the potential to highlight the contested meanings of rights, while bringing their philosophical dimensions to the forefront.<sup>106</sup> Examining these values also reveals that litigation is a process of deliberation,<sup>107</sup> while fostering a participatory dialogue on the interaction between

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<sup>100</sup> Nedelsky *Law’s Relations* 223.

<sup>101</sup> S 39(1)(a) of the Constitution.

<sup>102</sup> Liebenberg (2008) *Acta Juridica* 160.

<sup>103</sup> *S v Makwanyane* 1995 2 SACR 1; 1995 6 BCLR 665; 1995 ZACC (“*Makwanyane*”), para 262.

<sup>104</sup> Liebenberg “Socio-Economic Rights” in *Symbols or Substance* 64.

<sup>105</sup> 70.

<sup>106</sup> Liebenberg *Socio-Economic Rights* 44.

<sup>107</sup> C Albertyn “Religion, Custom and Gender: Marital Law Reform in South Africa Family law” (2013) 9 *International Journal of Law in Context* 386 387.

theoretical understandings of rights and the lived realities of cohabitants.<sup>108</sup> Highlighting the values at stake, further forces the courts to focus in a more principled and systematic way on the values implicated in a particular case and the impact of the denial of socio-economic rights on cohabiting women.<sup>109</sup>

When determining whether a right requires restraint or positive action, or a combination of these actions, one should not depend on an abstract analysis of the essential nature of the relevant right and the duties it imposes.<sup>110</sup> Instead, what is required is a contextual evaluation of the measures required to generate outcomes consonant with the values and interests promoted by the Bill of Rights. An in-depth examination of the underlying values is similarly important to guard against interpretations of socio-economic rights that run counter to the values that inform our constitutional order.<sup>111</sup> While all of the values referred to above are integral, given the state's reliance on a negative conception of autonomy to justify leaving domestic partnerships unregulated, this section first focuses on the need to develop a substantive conception of freedom.

## 2 5 2 Developing a substantive conception of autonomy

The family law regime's primary focus on form over function often deprives vulnerable cohabitants of access to integral socio-economic resources.<sup>112</sup> When this occurs, the freedom of cohabitants to shape their lives, their socio-economic well-being and that of their families, is compromised. It is necessary to reconceive socio-economic obligations between cohabiting partners as enforceable in certain instances. In order to give effect to socio-economic rights, strict interpretations of common law rules relating to contractual autonomy, jurisdiction and precedent will sometimes need to be relaxed or developed.<sup>113</sup>

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<sup>108</sup> 387.

<sup>109</sup> Liebenberg *Socio-Economic Rights* 165.

<sup>110</sup> 59.

<sup>111</sup> S Woolman "The Amazing, Vanishing Bill of Rights" (2007) 124 *SALJ* 762 763.

<sup>112</sup> This reference to form over function refers to the tendency to predominantly focus on whether strict formalities have been adhered to (such as the formalities pertaining to the registration of customary marriages). In contrast to this, the functional approach to families emphasises the need to focus on the nature of the relationship. See the judgment of Mokgoro and O'Regan JJ in *Volks*, paras 106-108.

<sup>113</sup> E Bonthuys "Realising South Africa's Children's Basic Socio-Economic Rights" (2008) 22 *International Journal of Law, Policy and the Family* 333 333.

Despite the negative impact of failing to regulate cohabitation, this non-recognition is primarily justified on the basis of a liberal conception of autonomy.<sup>114</sup> To allow the law to intervene and attach consequences to domestic partnerships is perceived as legal paternalism and an infringement on the freedom of cohabitants.<sup>115</sup> This approach is premised on a particularly negative conception of autonomy, which is criticised.<sup>116</sup>

One criticism for maintaining this negative notion of autonomy is that it is not conducive to fostering the substantial social change required under our transformative Constitution.<sup>117</sup> Adopting a negative interpretation of choice also resonates with the liberal tendency to distinguish between positive and negative rights. This distinction influenced the neglect of socio-economic rights in family law, with freedom and equality traditionally seen as negative rights requiring abstention from specific behaviour.<sup>118</sup> In contrast, socio-economic claims are seen as positive rights, necessarily entailing the allocation of resources, and thus as inappropriate decisions for courts to make. This liberal assumption is, however, inaccurate as civil and political rights (such as the right to equality and the right to vote) do have resource implications. This is illustrated by the fact that the right to vote necessarily requires resources, such as personnel needed to set up and run voting stations, in order to be realised.<sup>119</sup> In addition, the neglect of socio-economic rights undermines the enjoyment of civil and political rights, particularly for vulnerable groups. This is illustrated by the reality that substantive gender equality requires abused women to have access to adequate health care services.<sup>120</sup> In order to transform our society to allow each person the opportunity to lead a full and dignified human life, the state needs to undertake a range of interconnected social, economic and political steps.

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<sup>114</sup> B Coetzee Bester & A Lou “Domestic Partners and the Choice Argument: Quo Vadis?” (2014) 17 *PELJ* 2951 2958.

<sup>115</sup> Goldblatt (2003) *SALJ* 615.

<sup>116</sup> See for example, D Bilchitz & M Judge “For Whom does the Bell Toll: The Challenges and Possibilities of the Civil Union Act for Family Law in South Africa” (2007) *SAJHR* 466-499; H Kruuse “‘Here’s to you, Mrs Robinson’: Peculiarities in Determining the Treatment of Domestic Partnerships” (2009) 25 *SAJHR* 380 385; and J Heaton “Striving for Substantive Gender Equality in Family Law: Selected Issues” (2005) 21 *SAJHR* 547 552.

<sup>117</sup> Klare (1998) *SAJHR* 150.

<sup>118</sup> Fredman (2007) *SAJHR* 217.

<sup>119</sup> Liebenberg *Socio-Economic Rights* 318.

<sup>120</sup> T Bannister *The Right to have Access to Health Care Services for Survivors of Gender-based Violence* (2012) LLM Thesis, University of Stellenbosch 172.



A negative conception of autonomy is problematic, as it ignores the fact that it is the state's duty to protect vulnerable and weak members of our society.<sup>121</sup> While each person should be held responsible for optimising their available options, this should be balanced with the state's positive duty to develop accountability structures for reinforcing private socio-economic responsibilities. In relation to caregiving work, a relational feminist approach emphasises the substantial difference between choosing to "do nothing" and undertaking the caring work in a relationship so that a partner can participate in the labour market.<sup>122</sup> A negative conception of autonomy undervalues the importance of caring work and the impact it has on the capacity to exercise rights on an equitable basis. Robin West argues that when it comes to caregivers, they do not require rights that falsely presuppose their autonomy and independence. Rather, they require rights that realistically acknowledge their relational reality, while effectively responding to it.<sup>123</sup>

The approach of perceiving legal subjects as simply free atomistic individuals is also based on a faulty assumption. As articulated by Beth Goldblatt, gender inequality specifically prevents women from freely and equally setting the terms of their relationships.<sup>124</sup> It is precisely because less powerful parties (which are predominantly women) are unable to persuade their partner to enter into a contract, or to register their relationship, that they require state assistance.<sup>125</sup> A negative conception of autonomy also often promotes the stereotypical idea that the poor are lazy, dishonest and incompetent.<sup>126</sup> It further reinforces a discourse that denies the social complicity involved in structuring inequality. This stereotyping is detrimental to the constitutional project of aiming to transform our society.

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<sup>121</sup> Goldblatt (2003) *SALJ* 616.

<sup>122</sup> Heaton (2005) *SAJHR* 552.

<sup>123</sup> R West "Rights, Capabilities and the Good Society" (2001) 69 *Fordham LR* 1901 1913.

<sup>124</sup> Goldblatt (2003) *SALJ* 616.

<sup>125</sup> 616.

<sup>126</sup> See T Ross "The Rhetoric of Poverty: Their Immorality, our Helplessness" (1991) 79 *The Georgetown Law Journal* 1499 1522, where he discusses the rhetoric of poverty in the context of American jurisprudence. See also B Goldblatt "The Right to Social Security- Addressing Women's Poverty and Disadvantage" (2009) 25 *SAJHR* 442 464, where she discussed the stereotypes facing young women accessing social grants in South Africa:

"Many young women are also said to be taking the grant money for themselves and leaving their children in the care of grandparents and others. This is a common discourse internationally where welfare mothers are labelled as scroungers and undeserving of state support."

The point of departure is, therefore, that the legal focus should not be exclusively centred on protecting a negative conception of autonomy. Instead, legal rules should be shaped to recognise underlying gender dynamics and how they shape women's choices. In accordance with a transformative constitutional conception of autonomy, the role of the law is to open up avenues for cohabitants to exercise their freedom in ways that improve the quality of their lives.

The argument that choosing not to enter into a civil marriage is an indication that cohabitants elected to have zero state regulation over their relationship is inaccurate. One reason for this inaccuracy is that choosing to avoid a traditional civil marriage does not sufficiently indicate the choice to be exploited or left destitute upon the termination of a relationship.<sup>127</sup> The choice argument can also be countered by the point that sharing socio-economic resources during a relationship illustrates an acceptance of a certain level of socio-economic responsibility.

This liberal conception of autonomy has been criticised, particularly in terms of the manner in which it predominantly protects the freedom and autonomy of powerful family members.<sup>128</sup> Research on cohabitation reveals, for instance that partners who choose to stay at home or to subordinate their career for their families very rarely make that choice entirely freely. Jacqueline Heaton notes that in the majority of relationships, decisions on employment, role divisions and domestic and family-care responsibilities are based on social expectations, the partner's stronger economic position and what

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<sup>127</sup> In the case of *Gundwana v Steko Development CC and Others* 2011 3 SA 608 (CC); 2011 8 BCLR 792 (CC), the Constitutional Court criticised the bank's argument that obtaining a mortgage bond from the Bank indicated that the applicant had waived her right of access to adequate housing. The Court pointed out in paragraph 44 that:

"The voluntary placing at risk argument runs into difficulty. It is true that a mortgagor willingly provides her immovable property as security for the loan she obtains from the mortgagee and that she thereby accepts that the property may be executed upon in order to obtain satisfaction of the debt. But does that particular willingness imply that she accepts that

- (a) the mortgage debt may be enforced without court sanction;
- (b) she has waived her right to have access to adequate housing or eviction only under court sanction under section 26(1) and (3); and
- (c) the mortgagee is entitled to enforce performance, in the form of execution, even when that enforcement is done in bad faith?

I think not."

The Court goes on to argue in para 46, that agreeing to a mortgage bond, without more, does not entail agreeing to forfeit one's protection under section 26(1) and (3) of the Constitution. A cohabitant agreeing to live in a domestic partnership, without more, does not therefore necessarily entail agreeing to forfeit the protection provided by the rights protected in the Constitution, including socio-economic rights.

<sup>128</sup> C Lind "Domestic Partnership and Marital Status Discrimination" (2005) *Acta Juridica* 108 123; and Coetzee Bester & Lou (2014) *PELJ* 2957.

is perceived to be best for the collective family unit.<sup>129</sup> They are not purely autonomous decisions dictated by self-interest, as would be the case in most commercial decisions. It is thus patently unfair to visit the socio-economic disadvantages of these decisions disproportionately on caregivers (who are predominantly women).<sup>130</sup> In addition, a more equitable division of family resources has been shown to enhance the independence and freedom of vulnerable family members.<sup>131</sup> It is thus important to question exactly whose freedom is being prioritised and protected.

A relational feminist conception of substantive autonomy necessarily recognises that fostering autonomy requires both restraint and positive interventions. Both actions are needed in order to facilitate the ability of all people to exercise their agency, make choices and pursue their life plans.<sup>132</sup> It is thus necessary to examine, within a particular political, economic, social and cultural context, which social relationships enhance rather than undermine people's capacity for self-determination.<sup>133</sup> Finally, a commitment to fostering the substantive autonomy of female cohabitants requires putting in place a range of measures that enable meaningful participation in decisions that affect their lives. In South Africa, the value of autonomy cannot neglect the material conditions on which the experience of autonomy depends. However, these material resources need to be extended in a manner that acknowledges a "real and enduring tension between the individual and the collective".<sup>134</sup> Nedelsky expands upon this complexity by pointing out that people desire to enjoy both independence and intimacy,<sup>135</sup> and that any good political system will effectively strive to recognise this tension.<sup>136</sup>

Recognising and responding to this relational aspect of autonomy is essential, as choosing to leave cohabiting women and children unprotected undermines their capacity to exercise a number of their other human rights. This is emphasised by research which reveals that women's poverty reinforces their social subordination,

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<sup>129</sup> Heaton (2005) *SAJHR* 552.

<sup>130</sup> 552.

<sup>131</sup> M Makwane & L Berry "Towards the Development of a Family Policy for South Africa" (2013) *Human Sciences Research Council Policy Brief* 4 <<http://www.hsrc.ac.za/uploads/pageContent/3337/2013febFamily%20Policy.pdf>> (accessed 24-07-2013).

<sup>132</sup> Liebenberg *Socio-Economic Rights* 319; and Nedelsky (2009) *AJ* 149-176.

<sup>133</sup> Liebenberg *Socio-Economic Rights* 160.

<sup>134</sup> Nedelsky *Law's Relations* 131.

<sup>135</sup> 157.

<sup>136</sup> Nedelsky (1989) *Yale Journal of Law and Feminism* 21; and Nedelsky *Law's Relations* 131.

making them vulnerable to violence and exploitation.<sup>137</sup> It is accordingly necessary to acknowledge the relational nature of autonomy, as well as the interrelationship between individual and communal socio-economic welfare in protecting human agency. Mokgoro J specifically underscored this need in *Khosa*, where she wrote that:

“Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.”<sup>138</sup>

Decisions about how private law rules structure cohabiting women’s access to socio-economic resources reflect the extent to which we take their constitutional rights seriously.<sup>139</sup> The traditional tendency to favour negative responsibilities over positive duties, when it comes to human rights, fails to recognise that policy choices are made when judges and law-makers decide to protect only negative liberties. These policy choices should, however, be informed by the values and ethos underlying our Constitution.

A negative approach to autonomy fails to respond to the claims of those who lack the resources needed to participate in our society as equals. Characterising rights as inherently negative or positive is problematic, as it ignores the potential need for positive measures, often from more than one actor.<sup>140</sup> A commitment to developing a substantive understanding of autonomy is consequently required when regulating cohabitation, as it recognises the need for a balanced approach between restraint and positive social interventions to allow people to exercise their agency.<sup>141</sup>

In seeking to develop a substantive conception of autonomy, a context-sensitive approach should be adopted in determining the exact scope and content of private socio-economic responsibilities. Regulating cohabitation to allow both partners the

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<sup>137</sup> International Federation for Human Rights (IFHR) *Montreal Principles on Women’s Economic, Social and Cultural Rights* (2002) 2.

<sup>138</sup> *Khosa* para 74.

<sup>139</sup> Liebenberg (2008) *Acta Juridica* 160.

<sup>140</sup> Liebenberg *Socio-Economic Rights* 56.

<sup>141</sup> 319.

freedom to direct their lives is closely interconnected to the need to protect the human dignity of both cohabitants, a value that similarly requires further consideration.

### 2 5 3 Developing a relational conception of human dignity

The South African Constitutional Court has specifically recognised that those who have no access to food, clothing or shelter are denied the value of human dignity.<sup>142</sup> In *Dawood v Minister of Home Affairs* (“*Dawood*”),<sup>143</sup> the Court held that human dignity is a value that “informs the interpretation of many, possibly all, other rights”.<sup>144</sup> It also held that the right to family life is a crucial component of the right to human dignity. The concept of *Ubuntu* resonates with this reasoning in that “our humanity is forged and moulded by our relationships with others”,<sup>145</sup> with the implication that these relationships are worthy of both social and legal protection.<sup>146</sup> The Constitutional Court has also affirmed the important relationship between dignity and social assistance.<sup>147</sup>

Human dignity is therefore of particular constitutional significance in our post-constitutional family law system. The value of human dignity is subsequently examined in terms of its capacity to enrich our understanding of the need to develop family law rules to protect and fulfil the socio-economic rights of female cohabitants. This value should guide the development of legislative and policy interventions aimed at regulating cohabitation. This is important, as human dignity in the context of family law seeks to reject stereotypes attached to difference, while balancing exploitative gendered hierarchies.<sup>148</sup>

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<sup>142</sup> *Grootboom* para 23.

<sup>143</sup> 2000 3 SA 936 (CC); 2000 8 BCLR 8 37 (CC).

<sup>144</sup> Para 35.

<sup>145</sup> *Dawood* para 35.

<sup>146</sup> Bonthuys (2015) *SAJHR* 394.

<sup>147</sup> *Khosa* para 74. See also A Chaskalson, “Human Dignity as a Foundational Value for Our Constitutional Order” (200) 16 *SAJHR* 193 204, where former Chief Justice Arthur Chaskalson stated that:

“[T]he social and economic rights . . . are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, healthcare, food, water or in the case of persons unable to support themselves, without appropriate assistance?”

<sup>148</sup> Albertyn explains that dignity in this sense concerns:

“Questions of status and recognition. It imputes tolerance and respect, a non-hierarchical approach to groups and individuals that should condemn unequal power relations, and their manifestations in unequal status and recognition. It rejects violence, prevents stereotype and stigma and requires us to see the value of people’s identities and personal choices.”

See Albertyn (2009) *CCR* 188.

While certain progressive judgments have recognised a more substantive notion of human dignity<sup>149</sup> a significant number of judgments have adopted a formalistic approach to this value. The need to redress systematic patterns of inequality and disadvantage has, for instance, often been obscured by the Court's tendency to focus on individual personality issues related to subjective feelings of self-worth.<sup>150</sup> The reality is that both the individual and society are impoverished by our collective failure to ensure living conditions worthy of the dignity of cohabitants. A limited focus on subjective feelings will, therefore, not be enough to transform the socio-economic inequities pervading our society.

For cohabitants, it is not difficult to imagine how being rendered destitute after a lengthy relationship (because you did not ensure that your partner formalised it) infringes upon one's dignity. Leaving caregiving cohabitants destitute also articulates the low value our society tends to attach to caregiving work. The tendency of the courts to focus on subjective notions of dignity in family law cases has resulted in the judicial neglect of the negative socio-economic consequences of certain family law rules. The value of dignity needs to be analysed in a more holistic manner, to effectively allow for the redistribution of the socio-economic consequences of family dissolution.<sup>151</sup> Genuine respect for human dignity requires that society create an environment that provides cohabitants with the basic socio-economic support required to live a dignified life.<sup>152</sup>

A relational conception of human dignity requires society to respect the equal worth of all women,<sup>153</sup> while ensuring that women are not seen as a means to an end.<sup>154</sup> However, allowing caregivers to make socio-economic sacrifices for their families, while failing to place concomitant socio-economic obligations on their partners, enforces the underlying assumption that women are simply a means to ensuring the

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<sup>149</sup> In the *Volks* case, para 181, the minority judgment of Justice Sachs specifically held that by failing to regulate cohabitation, the law effectively relegates cohabiting women to a life of poverty, "coupled with the imputation of having been a lawless interloper". He was therefore able to specifically recognise that this approach severely infringes upon the human dignity of the survivor of a cohabiting relationship. This case is discussed in detail in part 3 3 5 of chapter three of this study.

<sup>150</sup> Albertyn (2007) *SAJHR* 275.

<sup>151</sup> Albertyn (2009) *CCR* 188.

<sup>152</sup> S Liebenberg "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 *SAJHR* 1 1.

<sup>153</sup> 5.

<sup>154</sup> 6.

socio-economic survival of their families. Adopting this approach also reinforces an individualistic notion of human dignity and places all of the responsibility on the caregiver. Developing a relational conception of human dignity could improve the status of cohabiting women, while requiring a heavier burden of justification for infringements upon their socio-economic rights. While the value of human dignity requires that each citizen be seen as an end in themselves, protecting the dignity of all cohabitants is also interconnected to the constitutional value of equality.

#### 2 5 4 The values of non-sexism and equality

Part of our Constitution's transformative capacity includes its responsiveness to the specific needs of women. It is committed to establishing a society based on non-sexism,<sup>155</sup> while providing for the promotion of substantive equality.<sup>156</sup> In terms of giving effect to a substantive conception of equality, the test for unfair discrimination requires analysing the social position of the complainant, the impact of the discriminatory provision on the complainant and the need for a positive recognition of difference and the transformative values in the Constitution.<sup>157</sup> Given this expansive range of factors, a number of scholars have argued that the substantive and contextual nature of this test provides sufficient scope for considering the social and economic implications of family law rules.<sup>158</sup> Sandra Fredman argues that underlying the right to equality are the principles of dignity, identity, redistribution and participation.<sup>159</sup> Despite the potential of the equality test to be more holistic, as proposed by a number of scholars,<sup>160</sup> the courts have yet to develop a balanced normative framework in which

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<sup>155</sup> Preamble to the Constitution.

<sup>156</sup> S 9(2) of the Constitution.

<sup>157</sup> Alberytn (2007) *SAJHR* 253.

<sup>158</sup> Alberytn argues that:

“The idea of substantive equality contemplates both social and economic change and is capable of addressing diverse forms of inequality that arise from a multiplicity of social and economic causes.”

See Alberytn (2007) *SAJHR* 253. See also C Alberytn “The Stubborn Persistence of Patriarchy? Gender Equality and Cultural Diversity in South Africa” (2009) 2 *CCR* 165 208; Alberytn & Goldblatt “Equality” in *Constitutional Law of South Africa* 35-25; and S Fredman “Redistribution and Recognition: Reconciling Inequalities” (2007) 23 *SAJHR* 214 214.

<sup>159</sup> Fredman (2007) *SAJHR* 214.

<sup>160</sup> Heaton (2005) *SAJHR* 547; Bonthuys (2015) *SAJHR* 380; Alberytn (2007) *SAJHR* 253; Alberytn (2009) *CCR* 208; and E Bonthuys “Domestic Violence and Gendered Socio-Economic Rights: An Agenda for Research and Activism” (2014) 30 *SAJHR* 133.

the purposes and values of socio-economic rights are considered within family law cases.<sup>161</sup> While the need to address the context, the impact of discrimination, a positive recognition of difference and transformation inform the test for unfair discrimination, the distributive element underlying equality, has been neglected under jurisprudential conceptions of equality.<sup>162</sup>

As a result of the failure to sufficiently recognise and address the material aspects of gender inequality, socio-economic rights are particularly significant to women.<sup>163</sup> The effective fulfilment of these rights is integral to empowering women. Accordingly, the Constitutional Court has affirmed that socio-economic rights are key to achieving gender equality and establishing a society in which men and women are equally able to achieve their full potential.<sup>164</sup>

The Constitutional Court has held that the value of non-sexism is foundational to our Constitution, requiring a hard look at the reality of the lives that women have been compelled to lead by existing laws.<sup>165</sup> Family law rules governing cohabitation need to be infused with the constitutional goal of achieving substantive gender equality between men and women. Part of this necessarily requires interpreting family law rules to recognise the gendered dynamics underlying traditional conceptions of family roles. An approach aimed at fostering non-sexism and substantive equality also requires recognising that women are essentially “resourceful, exercising agency and rational choices within particular contexts of vulnerability”.<sup>166</sup> A constitutional approach further requires the law to respond to women as complex beings with shifting identities and multifaceted needs.<sup>167</sup> Family law rules should therefore be developed to protect the socio-economic rights of women, while refraining from only focusing on women as mothers and caregivers.

The failure to regulate cohabitation constitutes an infringement of the right to be treated equally before the law. This failure is due to the fact that the lack of access to socio-economic security upon the dissolution of a domestic partnership reinforces broader social patterns of privilege and marginalisation.<sup>168</sup> The hierarchical system

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<sup>161</sup> Liebenberg “Socio-Economic Rights” in *Symbols or Substance* 76.

<sup>162</sup> Fredman (2007) *SAJHR* 214.

<sup>163</sup> IFHR *Montreal Principles on Women’s Economic, Social and Cultural Rights* (2002) 2.

<sup>164</sup> *Grootboom* para 23.

<sup>165</sup> *Daniels v Campbell* 2004 5 SA 331 (CC); 2004 7 BCLR 735 (CC) (“*Daniels*”), para 22.

<sup>166</sup> Alibertyn (2012) *Stell LR* 594.

<sup>167</sup> 603.

<sup>168</sup> *Volks* para 63.



created by our family law regime, with civil marriage perceived as the norm, reinforces relations that undermine the value and well-being of women who deviate from this system. Their socio-economic rights are also undermined, whether they deviate from the norm truly by choice or as a result of intersecting relational dynamics.<sup>169</sup> It is thus necessary to develop interpretations of socio-economic rights that offer protection to all women.

One example of a legal development that recognises the values of equality and non-sexism is the legal protection of a cohabiting caregiver's right to occupy the family home. This should be done in a way that recognises the socio-economic value of caregiving work, while taking care to refrain from reinforcing stereotypes.<sup>170</sup> An approach that recognises the significance of caring work, as well as the need to protect vulnerable members of our society, is more aligned with the transformative aspirations underlying our Constitution. Through effectively taking account of existing power relations, while supporting the values of interdependence, *Ubuntu*, solidarity, care and human dignity, the family law regime can assist in transforming existing relations between cohabiting men and women. The statement that poverty is intertwined with gender inequality<sup>171</sup> elucidates the importance of the value of non-sexism in regulating the socio-economic consequences of cohabitation.

## 2 5 5 Conclusion

Deciding whether to regulate the socio-economic consequences of terminated domestic partnerships clearly has implications for the freedom, human dignity and equality of cohabitants. To date, a liberal conception of freedom has been utilised to justify the failure to regulate these relationships. In order to broaden cohabiting women's freedom of choice, it is necessary to integrate a substantive conception of autonomy into accountability structures aimed at regulating the socio-economic consequences of domestic partnerships.<sup>172</sup>

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<sup>169</sup> J Sloth-Nielsen & B van Heerden "The 'Constitutional Family': Developments in South African Child and Family Law 2003–2013" (2014) 17 *International Journal of Law, Policy and the Family* 121 122.

<sup>170</sup> Albertyn (2007) *SAJHR* 263.

<sup>171</sup> Albertyn (2012) *Stell LR* 603.

<sup>172</sup> Liebenberg *Socio-Economic Rights* 47.

In addition to developing a substantive conception of autonomy, the value of human dignity in relation to cohabitants needs to be enriched by recognising the material dimensions of well-being that are implicated by the non-recognition of domestic partnerships. The human dignity of female cohabitants also requires greater judicial and legislative acknowledgement of the integral value of caring work and its gendered implications for cohabitants. In addition, substantive gender equality requires that social recognition be coupled with redistributing the socio-economic consequences of family dissolution between men and women on a more equitable basis. Given that equality is particularly responsive to group-based forms of disadvantage, this value is especially significant in shaping the legal regulation of cohabitation.

While classic liberalism tends to ignore the values of interdependence and connection, relational feminism highlights their significance for women, as well as their importance to society in general. The problematic dimensions of an individualistic approach to family law are emphasised by the Constitutional Court's statement that the initiation and development of constructive relationships are integral for all individuals to be able to reach their full human potential.<sup>173</sup> Given the importance of relationships to individuals, it is necessary to explore relational interpretations of socio-economic rights to better reflect constitutional values.

The above analysis reveals that the constitutional triad of human dignity, freedom and equality have significant potential to enrich the state's response to domestic partnerships. In order to give effect to the transformative potential of these values, both the courts and the legislature need to engage more effectively with these values and their implications for cohabitants.

In accordance with the second step underlying Nedelsky's approach, it is clear that the current choice argument neglects the material aspects underlying the constitutional values of human dignity, equality and freedom. Following from this, the next step in Nedelsky's approach entails analysing the kinds of relations that would give effect to constitutional values. It is thus necessary to examine the patterns of relations that the law should be structuring in terms of these values.

## **2 6 Structuring relations that give effect to constitutional values**

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<sup>173</sup> *Dawood* para 30.

The third step in Nedelsky's approach entails determining the kinds of relations that give effect to the core constitutional values enumerated above. In this regard, Nedelsky points out that the values that matter to individuals, such as freedom, dignity and equality, cannot exist without supporting constructive relationships.<sup>174</sup> Currently, the choice argument informing the regulation of cohabitation burdens the vulnerable cohabitant with the socio-economic consequences of a terminated domestic partnership. The current approach to domestic partnerships also allows partners who own the family home to evict partners regardless of whether they contributed to the family home. A liberal conception of choice, dignity and difference is therefore, insufficient, in terms of shifting relations in an egalitarian and participatory direction. In order to provide substantive protection to the socio-economic rights of cohabitants, relational responsibility for socio-economic rights needs to be developed. The state needs to enforce these obligations through formulating responsive legislation and interpreting rights in a gender-sensitive manner. The legal focus should therefore shift from blaming cohabitants who have made certain choices to examining how the law can respond to their needs in accordance with the Constitution.

With regard to the South African family law regime, one of the challenges is the preoccupation with blaming the disadvantaged party (usually the woman) for making certain choices. This includes blaming women for staying in abusive relationships, signing unfair contracts or staying in unregulated relationships.<sup>175</sup> This blame often occurs without an in-depth examination of the exploitative relational norms influencing these choices. Choosing to enforce these 'choices' without examining their broader relational impact also undermines the constitutional goal to establish a society based on fundamental human rights. Focusing on the vulnerable party's actions only represents one side of the legal story. The focus should instead be on developing the rules governing cohabitation to align them with the rights and values protected in the Constitution.

Given the gendered nature of socio-economic disadvantage, the state needs to develop accountability measures that enable cohabiting women to enforce their socio-economic rights against their partners. Developing this relational responsibility is

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<sup>174</sup> Nedelsky *Law's Relations* 29.

<sup>175</sup> This is evinced by the Court's predominant focus on a liberal conception of choice in the *Volks* case, which is discussed in part 3 3 5 of chapter three of this study.

necessary, as adopting a neutral response to cohabitation currently legitimates norms of exploitation while undermining sections 8 and 39 of the Constitution.

Moreover, a proactive response is required, as the current liberal response allows organs of state and private individuals to avoid seeing the social relationships of which they are in fact a part.<sup>176</sup> This individualistic approach supports the psychological process of “othering” which facilitates separation and cruelty, leading to a failure of human compassion.<sup>177</sup> While “othering” is an extremely complex process, the prevailing conception of rights as boundaries plays a role in facilitating this approach. As further highlighted by Nedelsky, the manner in which this abstraction has developed, and the norms of thinking associated with it, has unfortunately fostered the capacity for distancing ourselves from others. Our current conception of rights “insulates us from the pain of the poverty around us”, and allows us to let this cruelty continue.<sup>178</sup> Nedelsky offers an example of this by pointing out that if we pass a homeless woman on the street, we can often dismiss our unease with the perception that her condition is not our fault, as we personally have not violated her rights.<sup>179</sup> Placing the responsibility for her situation completely on the vulnerable individual renders us unaccountable. Unfortunately, as pointed out by Meyersfeld, it is when we adopt a stance of apathy that human rights violations are made possible.<sup>180</sup>

In contrast to this liberal approach, Nedelsky points out that the liberal tradition has been dangerously biased in its emphasis.<sup>181</sup> By placing the primary responsibility on unmarried women, the constitutional responsibility of the judiciary and other organs of state to develop the law is undermined. Legal rules should however, be developed in a manner that dislodges many of the underlying causes of gender inequality.<sup>182</sup> The constitutional entrenchment of socio-economic rights requires more than merely acknowledging women’s socio-economic vulnerability. It requires an in depth scrutiny of the manner in which the law reinforces socio-economic vulnerability between cohabitants, particularly for female cohabitants. It also requires the development of the offending private law rule to reflect the “spirit, purport and objects”<sup>183</sup> of the Bill of

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<sup>176</sup> Nedelsky *Law’s Relations* 251.

<sup>177</sup> 208.

<sup>178</sup> 208.

<sup>179</sup> 208.

<sup>180</sup> Meyersfeld *Domestic Violence* 184.

<sup>181</sup> Nedelsky *Law’s Relations* 249.

<sup>182</sup> Liebenberg (2008) *Acta Juridica* 160.

<sup>183</sup> S 39(2) of the Constitution.

Rights. Adopting a relational feminist approach would, at the very least, direct attention to the potential power of socio-economic rights to improve the feasible options of cohabiting women. A conception of socio-economic rights that directs our attention towards existing structures of relationships, as opposed to boundaries and individualism, is better suited to fostering social justice based on non-sexism.

A shift from an individual psychological analysis (which centres on why the individuals did not enter into a contract) to a systemic relational analysis is also required in the legal response to cohabitation. A relational feminist analysis underscores the reality that the current passivity of the South African family law regime creates an environment conducive to the socio-economic exploitation of cohabiting women. A liberal individualistic response thus structures relations that encourage apathy and socio-economic inequality.

Part of the emphasis of a relational feminist approach is on why society has structured systems of power in a way that encourages exploitation and separation between cohabiting partners. Instead of expecting vulnerable parties to persuade their partners to enter into a contract, or to formalise their relationship, the emphasis should be on interpreting the socio-economic rights of female cohabitants in a manner that enforces socio-economic responsibility between cohabitants.<sup>184</sup> A relational feminist analysis also reveals the broader extent of harm that is perpetuated by enforcing an individualistic conception of autonomy, human dignity and equality. It is thus necessary to focus on developing relations that are infused with a positive conception of socio-economic responsibility. In order to transform our family law regime, the unequal power relations between the sexes must be acknowledged and changed, while the socio-economic disadvantage caused by these power imbalances must be addressed. This approach of recognising and addressing the social context of gender inequality is essential if women are to achieve the ability to exercise their rights on an equitable basis.<sup>185</sup>

A relational feminist interpretation of rights that focuses on the dynamics between men and women, as opposed to simply perceiving women as passive victims or men as lawless perpetrators, is conducive to fostering this change. In accordance with her relational feminist approach, Jennifer Nedelsky refers to the capacity for creative

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<sup>184</sup> See part 3.3.5 of chapter three of this study.

<sup>185</sup> IFHR *Montreal Principles on Women's Economic, Social and Cultural Rights* (2002) 2.

interaction that we all possess, something that is enabled by the constellation of personal relations of which we are a part.<sup>186</sup> She states that this creativity has the potential to transform relations and to generate something new from that which already exists.<sup>187</sup> People are able to utilise this capacity within existing relations, to behave differently and to induce a shift, which then calls on the creative capacities of others to respond to it. The legal regime can play a role in encouraging and shaping these more constructive relations. An example of this entails interpreting a cohabitant's right of access to adequate housing within the context of gender inequality and the specific cohabiting relationship. This example is explored in further detail in chapter five of this study.

The power of the state to reinforce or undermine constructive identities is further illustrated through Sally Engle Merry's discussion on the shifting identities that women experience in relation to domestic violence cases. She points out that on the one hand, women are defined by family, kin and work relationships.<sup>188</sup> On the other hand, by seeking to rely on the legal system women are defined as autonomous and reasonable beings entitled to certain protections from the state. If they are, however, undermined by the state, they often withdraw from asserting their rights through the legal system. One example of how the law can undermine women is through trivialising the economic or physical abuse that they experience. Failing to recognise the socio-economic rights of female cohabitants and failing to remove obstacles frustrating access to resources, further undermines women. As a result of the state's failure to regulate cohabitation, many women will remain with an abusive partner in order to satisfy their basic material needs and appease their family. The legal system can, however, intervene in a manner that reconfigures subjective identities, while affirming autonomous conceptions of the self as entitled to human rights.<sup>189</sup> When cohabiting women's relational socio-economic needs are recognised and protected as legitimate obligations enforced by legal mechanisms, women will have a greater opportunity to shift their relational identity. This relational shift has the potential to draw a corresponding shift from their male partners.

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<sup>186</sup> Nedelsky *Law's Relations* 48.

<sup>187</sup> 48.

<sup>188</sup> SE Merry "Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence" (2003) 25 *HRQ* 343 351.

<sup>189</sup> 351.

This process has been described by Rachel Jewkes, who points out that while women are subjected to certain patriarchal constraints they are not passive victims. In fact, women are constantly making strategic choices within the limited options available to them.<sup>190</sup> While there are limits to this creative capacity, the law can play a proactive role in fostering constructive relations, through improving the feasible options available to women.<sup>191</sup> One potential avenue for empowering women is through removing constraints preventing women from independently accessing socio-economic resources. An example of this is provided through the state removing obstacles to vital health care services in the public health care system.<sup>192</sup> This would free women from having to rely on their partner to access health care services. A further example would be innovatively interpreting property law rules so as to allow a woman to access the family home she shared with her ex-partner. This is explored in detail in chapter five of this study.

A relational feminist interpretation of socio-economic rights highlights that socio-economic rights should not be seen as boundaries or constraints between individuals. Socio-economic rights should instead be recognised as the relational threads linking cohabitants.<sup>193</sup> In accordance with a relational feminist perspective, both cohabitants have certain duties in terms of socio-economic rights. This relational feminist conception is important, as it emphasises connection and responsibility to others, while focusing on fostering relationships that protect the dignity, autonomy and equality of female cohabitants. Legal rules should also encourage private parties to treat each other with care and concern. Accordingly, it is necessary to reimagine current conceptions of power, responsibility and trust between cohabitants.

While the law supports, in certain respects, a gender-sensitive approach to unrecognised relationships,<sup>194</sup> the state has not yet done enough in terms of

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<sup>190</sup> R Jewkes & R Morrel "Sexuality and the Limits of Agency among South African Teenage Women: Theorising Femininities and their Connections to HIV Risk Practices" (2012) 74 *Social Science & Medicine* 1729 1735.

<sup>191</sup> Fredman (2009) *SAJHR* 411.

<sup>192</sup> For example, s 28 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 states that in order to access post-exposure prophylaxis ("PEP"), a survivor of rape must report the rape. This often serves as an additional obstacle for survivors of rape seeking to access PEP. See T Bannister *Equal Access to Health Care Services for Survivors of Gender-Based Violence* (2014) 12 *Equal Rights Review* 62 77.

<sup>193</sup> C Albertyn "Feminism and the Law" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 291 301.

<sup>194</sup> The cases that have catalysed positive social change are discussed in detail in part 3 3 of chapter three of this study.

transforming existing inequities within the family law system. This is evinced by the fact that South Africa has one of the highest rates of father absence in the world,<sup>195</sup> with women remaining disproportionately responsible for child care.

In order to develop interpretations of socio-economic rights that are more conducive to fostering equitable relations between cohabitants, the reality that rights structure relationships needs to inform interpretations of socio-economic rights between cohabitants.<sup>196</sup> Nedelsky points out that we will do a better job of making difficult decisions involving rights if we rather focus on the kinds of relationships that we want to foster, what the values at stake are and how different concepts and institutions will best contribute to that fostering.<sup>197</sup>

From the above analysis, it is clear that the legal regime currently places the responsibility for enforcing relational socio-economic rights on the vulnerable cohabitant.<sup>198</sup> In order to give effect to sections 8 and 39 of the Constitution, it is necessary for the state to improve accountability structures so as to allow female cohabitants to enforce their relational socio-economic rights. One potential avenue of shifting relations is in terms of interpreting socio-economic rights to broaden the feasible options available to women.<sup>199</sup>

## **2 7 Interpreting socio-economic rights to structure socio-economic equality between cohabitants**

### **2 7 1 Introduction**

In accordance with the need to transcend the public/private law divide and develop a theoretical framework that enforces private socio-economic responsibilities in accordance with constitutional values, this section examines the content of sections 8 and 39 of the Constitution. While section 39(2) of the Constitution is utilised as the main channel through which the normative values of the Bill of Rights influences the sphere of private law,<sup>200</sup> section 8 is the primary provision governing the horizontal

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<sup>195</sup> Wilson & Cornell *Guide to Carnegie 3* (2014).

<sup>196</sup> Nedelsky *Law's Relations* 251.

<sup>197</sup> 251.

<sup>198</sup> For a further discussion of this point, see part 3 3 5 of chapter three of this study.

<sup>199</sup> Nedelsky *Law's Relations* 29.

<sup>200</sup> Liebenberg "Socio-Economic Rights" in *Symbols or Substance* 83.



application of the Bill of Rights.<sup>201</sup> Both of these provisions are subsequently examined below.

## 2 7 2 Developing a framework for the horizontal application of socio-economic rights between cohabitants

### 2 7 2 1 *Introduction*

Both sections 8 and 39 of the Constitution govern the horizontal application of the Bill of Rights. There remains however, a degree of confusion concerning their application.<sup>202</sup> In certain cases, these provisions may overlap when developing areas of law in accordance with the Constitution. This section first examines section 8 and then moves on to discuss section 39(2) of the Constitution. Section 8 is considered first as it states that the rights in the Bill of Rights, which includes the socio-economic rights, apply to all areas of law. Given the detrimental socio-economic consequences of family law dissolution, there is an urgent need to give substantive content to the specific socio-economic rights of cohabiting women. The interconnection between socio-economic rights and furthering gender equality also requires that the specific socio-economic rights of women are recognised and addressed. A context-sensitive relational feminist approach that recognises and addresses the socio-economic impact of cohabiting relations is thus justified by section 8 of the Constitution.

### 2 7 2 2 *Section 8 of the South African Constitution*

Section 8(1) states that the rights in the Bill of Rights applies to all law and that they bind the legislature, the executive, the judiciary and all organs of state.<sup>203</sup> In this context, “all law” refers to all forms of legislation, common law and customary law. The

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<sup>201</sup> Liebenberg *Socio-Economic Rights* 322.

<sup>202</sup> The judicial application of these provisions has not been consistent. As a result, their interpretation and application has been the subject of much academic debate. See Liebenberg *Socio-Economic Rights* 321; see also D Bhana “The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract” (2015) 26 *Stell LR* 1 2. The application of sections 8 and 39 are also discussed under part 3 3 3 of chapter three of this study.

<sup>203</sup> S 8(1) of the Constitution.

Constitutional Court's recognition that we only have "one system of law,"<sup>204</sup> further requires that all spheres of government proactively promote the "spirit, purport and objects" of the Bill of Rights.<sup>205</sup>

Section 8(2) governs the horizontal application of the Bill of Rights between private persons. This section has been described as somewhat "clumsy,"<sup>206</sup> as it states that a provision in the Bill of Rights "binds" a private party "if, and to the extent that, [the provision] is applicable". This reveals that the rights protected in the Bill of Rights apply directly to legal disputes between private parties, where the legal rule or conduct complained of infringes on one of the substantive rights. Where a cohabitant evicts their partner, removes them from their legal aid or no longer assists them in accessing food, water or social security, the relevant socio-economic rights are implicated.<sup>207</sup> It is apparent, however, that section 8(2) requires a context-sensitive relational analysis to determine the exact scope and form of this horizontal application for domestic partners.<sup>208</sup> This necessarily depends on the means of the parties, the length of their relationship and the socio-economic needs of vulnerable family members. Currie and De Waal point out that when determining whether a socio-economic right is directly applicable, it is not necessary that the private parties exercise the exact same level of power as the state does.<sup>209</sup> This position is emphasised in *Khumalo v Holomisa* ("*Khumalo*"),<sup>210</sup> where the Court instead focused on the "intensity of the constitutional right" and the potential power of the private entity to infringe this right.<sup>211</sup> For many cohabiting women, being evicted after a lengthy domestic partnership entails a serious infringement on their ability to access housing, health care, food and social security. As a result of the gendered division of labour, in many cases the male partner has greater economic power in the relationship. The abuse of this power often results in vulnerable cohabitants and their children being deprived of access to vital resources.

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<sup>204</sup> *Pharmaceutical Manufacturers Association of South Africa In Re: Ex Parte Application of the President of the Republic of South Africa* 2000 2 SA 674 (CC); 2000 3 BCLR 241 (CC) ("*Pharmaceutical Manufacturers*"), paras 44-45.

<sup>205</sup> AJ van der Walt *Property and Constitution* (2012) 20.

<sup>206</sup> Tushnet (2003) *IJCL* 83.

<sup>207</sup> Liebenberg *Socio-Economic Rights* 319.

<sup>208</sup> D Davis "Developing the Common Law of Contract in Light of the Light of Poverty and Illiteracy: The Challenges of the Constitution" in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 403 404.

<sup>209</sup> I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 53.

<sup>210</sup> 2002 5 SA 401; 2002 8 BCLR 771.

<sup>211</sup> Para 33.

How men and women relate to one another and how this private power is exercised therefore requires further scrutiny.

Section 8(3)(a) provides guidelines for how the courts must apply the Bill of Rights. It states that a court “must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right”. Subsequently, in terms of section 8(3)(a), if the private person is so bound, the court must first apply any relevant legislation giving effect to the right. Currently, the family law regime is governed by a number of statutes, resulting in a fragmented system. The potential implications of relying on certain pieces of legislation to protect the socio-economic interests of cohabitants, are explored in detail in chapter five.<sup>212</sup> If there is no legislation giving effect to the right, the court must then develop the common law to give effect to the constitutional right. Section 8(3)(b) further permits the courts to develop the “rules of the common law to limit the right”, provided that this is in accordance with section 36(1) of the Constitution.

A relational feminist lens is responsive to the provisions underlying section 8 in that it highlights how legal rules already structure inequitable socio-economic relations between private individuals. In spite of section 8 of the Constitution, and the detrimental socio-economic implications of family law rules,<sup>213</sup> the courts have yet to develop a coherent jurisprudence on the interaction between the Bill of Rights and the South African family law regime.<sup>214</sup>

In the certification case, *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* (“*Ex parte Chairperson of the Constitutional Assembly*”),<sup>215</sup> the Court stressed that socio-economic rights may be negatively protected from improper invasion within the private sphere. It stated that a breach of this obligation occurs directly when there is a failure to respect the right. The Court went on to explain that these rights can also be breached indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection.<sup>216</sup> The state’s failure to develop a legislative framework to prevent

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<sup>212</sup> See part 5 1 of chapter five of this study.

<sup>213</sup> Bonthuys (2002) *SALJ* 748.

<sup>214</sup> 781.

<sup>215</sup> 1996 4 SA 744 (CC); 1996 10 BCLR 1253 (CC) (“*Ex parte Chairperson of the Constitutional Assembly*”).

<sup>216</sup> Para 78.

violations of the socio-economic rights of cohabitants therefore already indicates an inadequate fulfilment of its duty to protect these rights.

In the *Grootboom* decision, the Court recognised the positive obligations that parents have towards their children in terms of section 28 of the Constitution. The Court also recognised the role of the state in facilitating the fulfilment of this responsibility by the parents.<sup>217</sup> According to the Court, the state must utilise legislative and common law provisions to reinforce these obligations.<sup>218</sup> The problem with the Court's reasoning, as highlighted above, is that children would only be entitled to state assistance when parental care was removed or completely lacking.<sup>219</sup> While the Court focused on the parent-child relationship, the reasoning in *Grootboom* emphasises the need to transform the existing legislative framework governing private socio-economic obligations between family members.<sup>220</sup> The Court recognised parental responsibilities in providing access to socio-economic resources. However, the Court did not adequately address the need for more robust state regulation of the various ways through which private actors can abuse socio-economic power. In addition, where private individuals do not have the means to gain access to socio-economic resources, the state is under a positive duty to progressively improve public services. Accordingly, public services need to be improved, while the "background legal rules"<sup>221</sup> governing relational socio-economic provisioning,<sup>222</sup> also need to be addressed. In order to structure more equitable relations between men and women, public services need to be improved, as well as relational access to resources.

While this does not remove the state's primary obligation to fulfil these rights, the state should develop the necessary legal infrastructure to allow cohabitants to fulfil their socio-economic obligations towards family members. The state's obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for claiming socio-economic resources between cohabitants. In terms of developing the relational aspects of the right of access to adequate housing, the Constitutional Court

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<sup>217</sup> *Grootboom* para 77.

<sup>218</sup> *Grootboom* para 77. See also Liebenberg *Socio-economic Rights* 241.

<sup>219</sup> *Grootboom* paras 76-77. See also Liebenberg *Socio-economic Rights* 241.

<sup>220</sup> *Grootboom* paras 77 & 78.

<sup>221</sup> L Williams "Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South Africa Analysis" (2005) 21 *SAJHR* 436 440.

<sup>222</sup> Such as contracts between domestic partners.

in *Grootboom* has pointed out that while section 26 of the Constitution does not overtly say so:

“There is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.”<sup>223</sup>

This was subsequently confirmed in *TAC*, which stated that this obligation rests within the first subsection of sections 26 and 27 of the Constitution.<sup>224</sup> It has also been pointed out that while sections 26(2) and 27(2) set out the state’s socio-economic obligations, these sections do not eliminate the potential for private responsibilities.<sup>225</sup> While the Court did not elaborate on the exact scope of the negative obligations between private parties in *Grootboom* and *TAC*,<sup>226</sup> this was subsequently expanded on in *Jaftha v Schoeman; Van Rooyen v Stolz* (“*Jaftha*”).<sup>227</sup> This case concerned execution procedures provided for within the Magistrates Court Act 32 of 1944, which allowed for execution against state-subsidised housing for debts unrelated to the property. In this case, the Court held that any measure that permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26.<sup>228</sup> The Court specifically stated that such a measure may, however, be justified in terms of section 36 of the Constitution.

In accordance with section 36, the socio-economic infringement must be based on a law of general application. It must also be reasonable and justifiable in accordance with an open and democratic society based on human dignity, equality and freedom. The nature and importance of the implicated right, the importance and the purpose of the limitation, as well as whether there are less restrictive means to achieve the purpose, must be examined. While the right of access to adequate housing can be justifiably limited, the *Jaftha* case underscores the fact that evictions by private parties

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<sup>223</sup> *Grootboom* para 34.

<sup>224</sup> *TAC* para 77. See also Liebenberg “Socio-Economic Rights” in *Symbols or Substance* 70-71.

<sup>225</sup> Pieterse (2009) *SAJHR* 214.

<sup>226</sup> Liebenberg “Socio-Economic Rights” in *Symbols or Substance* 70.

<sup>227</sup> 2005 2 SA 140 (CC), 2005 1 BCLR 78 (CC) (“*Jaftha*”). See also Liebenberg “Socio-Economic Rights” in *Symbols or Substance* 70.

<sup>228</sup> *Jaftha* para 34.

can implicate both sections 26(1) and 26(3) of the Constitution.<sup>229</sup> While *Jaftha* concerned a bank seeking to enforce a debt, many cohabitants evict their partner upon the termination of their relationship, regardless of whether their partner contributed to the family home. They often succeed with the eviction because domestic partnerships are not legally regulated in a coherent manner. Greater regulation of who is entitled to occupy and own the family home upon the termination of a domestic partnership is thus needed.

In the case of *Maphango v Aengus Lifestyle Properties (Pty) Ltd* (“*Maphango*”),<sup>230</sup> the Court held that constitutionalism has wrought significant changes to private law relationships.<sup>231</sup> This is evinced by the inclusion of socio-economic rights, which have created a right of access to social goods. The Court went on to emphasise that the main burden of fulfilling this right remains on the state, as section 26(2) obliges the state to take reasonable measures within its available resources to achieve the progressive realisation of the right. The Court did, however, emphasise that the impact of the right is not solely on the state; stating that it expands in two specific ways. The first manner in which it does this is through importing an inhibitory duty not to impede or impair access to housing. This obligation rests not only on public bodies but also on private parties.<sup>232</sup> The second way in which the right of access to adequate housing ripples out to private rights is when the state itself takes measures to fulfil the right. These measures will then affect private relationships.<sup>233</sup>

In terms of a relational feminist interpretation of cohabitants’ negative duties it is not reasonable and justifiable to allow a partner, who has assisted in building up the family home through years of value-added services or through caring work, to be evicted from the family home. Her right of access to adequate housing should be considered. The unjust nature of her eviction is further emphasised by the constitutional goal to foster relations based on non-sexism.<sup>234</sup>

In terms of the right of access to adequate housing, it is particularly unjust to allow a woman to be evicted by her long-term partner, because she did not persuade her partner to formalise their relationship. Raising the relational feminist aspect of this right

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<sup>229</sup> Liebenberg “Socio-Economic Rights” in *Symbols or Substance* 70.

<sup>230</sup> 2012 3 SA 531 (CC); 2012 5 BCLR 449 (CC) (“*Maphango*”).

<sup>231</sup> Para 34.

<sup>232</sup> Para 34.

<sup>233</sup> Para 34.

<sup>234</sup> S 1(b) of the Constitution.

will not solve all of the problems within this area of law. Highlighting the socio-economic implications of relevant rules for cohabiting women does however, have the potential to shift the focus within these cases. A relational feminist interpretation of socio-economic rights may also expand the range of potential remedies available to female cohabitants.<sup>235</sup> In this regard, examining the relational implications of this deprivation opens up a wider range of issues for both the court and legislature to consider. It is also possible to develop the positive dimensions of socio-economic rights between cohabitants, particularly as these partnerships constitute intimate relationships. One example would be interpreting the right of access to housing to entail a more equitable division of the family property between the cohabitants upon the dissolution of their relationship. This is discussed in more detail in chapter five. Another example would be interpreting the right of access to health care services to order a cohabitant to retain his ex-partner and children born from the relationship on his medical aid for a certain period of time.

In the case of *Governing Body of the Juma Masjid Primary School v Essay NO* (“*Juma Masjid*”),<sup>236</sup> the Court considered the content of the right to education<sup>237</sup> in the context of an application by a Trust to evict a public school conducted on private property. In the High Court, it was found that the Trust owed no constitutional obligation to the learners.<sup>238</sup> This decision has been criticised, as essentially informed by a “pre-constitutional common law lens”.<sup>239</sup> In contrast, the Constitutional Court judgment is noteworthy for its specific examination of section 8 of the Constitution. In interpreting section 8(2), the Court held that in order to elucidate the scope of the duty owed by the Trust to the learners, the nature of the learner’s right to a basic education needs to be taken into account.<sup>240</sup> The Court emphasised that the purpose of section 8 is not to impede private autonomy or to impose on the Trust the primary duties of the state in protecting the Bill of Rights.<sup>241</sup> Rather, it is intended to require private parties not to

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<sup>235</sup> Bhana (2015) *Stell LR* 3.

<sup>236</sup> 2011 ZACC 13; 2011 8 BCLR 761 (CC) (“*Juma Masjid*”).

<sup>237</sup> S 28(1) of the Constitution provides that everyone has the right to a basic education, including adult basic education.

<sup>238</sup> *Ahmed Asruff Essay NO v The MEC for Education KwaZulu-Natal*, Case No 10230/2008, KwaZulu-Natal High Court, Pietermaritzburg, 16 September 2009 (unreported).

<sup>239</sup> *Juma Masjid* para 54.

<sup>240</sup> Para 57.

<sup>241</sup> Para 58.

interfere with or diminish the enjoyment of a right.<sup>242</sup> The duty to refrain from diminishing the current enjoyment of a right could have implications for cohabitants. When the relationship is terminated it is often existing access to socio-economic resources that is removed by an individual who forces their partner to leave the family home. The party who evicts their partner also often has the means to ensure a more equitable distribution of resources. In *Juma Musjid*, the Court also held that the application of section 8 depends on the “intensity of the constitutional right in question”, coupled with the potential invasion of that right, which could be occasioned by persons other than the state.<sup>243</sup> After examining the reasonableness of the steps undertaken by the Trust, the Court ultimately granted the eviction order.<sup>244</sup> The reasonableness of a cohabiting partner’s eviction application could be evaluated against the need to protect the socio-economic rights of female cohabitants. The impact of the deprivation on vulnerable cohabitants should also be examined.

In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (“Allpay”)*,<sup>245</sup> the Court held that when an entity has performed a constitutional function for a significant period of time, it cannot unilaterally relinquish its responsibility and walk away.<sup>246</sup> In this case, the Court dealt with the just and equitable remedy arising out of a tender that had been declared void due to being invalidly awarded. Of significance for private socio-economic responsibilities is the Court’s statement that, after fulfilling its obligation for some time, the beneficiaries of grants had grown increasingly dependent on Paymaster. The applicant could, therefore, not simply walk away without ensuring that a payment system remained in place until a new one was instituted.<sup>247</sup> When a cohabiting partner has undertaken to fulfil the socio-economic needs of his partner over a significant period of time, the decision to simply remove his partner’s access to family resources should be scrutinised, particularly when the socio-economic impact is severe.

These decisions reveal that the primary responsibility for protecting and fulfilling socio-economic rights remains on the state. However, they also reveal that private individuals do have a level of responsibility in terms of refraining from undermining

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<sup>242</sup> Para 58.

<sup>243</sup> *Juma Musjid* para 58; see also Currie & De Waal *The Bill of Rights Handbook* (2005) 53.

<sup>244</sup> *Juma Musjid* para 79.

<sup>245</sup> 2014 6 BCLR 641 (CC); 2014 4 SA 179 (CC) (“*Allpay*”).

<sup>246</sup> Para 66.

<sup>247</sup> Para 66.



existing access to socio-economic resources. This is particularly appropriate when there is an intimate long-term relationship, with the dependence of beneficiaries increasing over time.<sup>248</sup> In these instances, positive socio-economic obligations should be developed.<sup>249</sup>

### 2 7 2 3      *Section 39 of the South African Constitution*

While section 8 remains the point of departure for the horizontal application of the Bill of Rights, it is clear that specific rights within the Bill of Rights will not always engage all law and conduct.<sup>250</sup> The independent purpose of section 39(2) is to empower courts to engage with law and conduct that is not covered by any of the specific provisions set out in chapter three of the Constitution.<sup>251</sup> Ultimately, whether one applies a specific socio-economic right to develop legal rules, or whether one relies on the underlying values of the Constitution, both have the potential to significantly transform the family law regime.<sup>252</sup> In accordance with Nedelsky's approach, rights are seen as the rhetorical and institutional means to give effect to values. The constitutional values implicated in cohabitation cases therefore require attention. The effect of section 39 is that even if a court finds that no specific socio-economic right is implicated between cohabitants, the courts are nevertheless still required to examine the implications of the relevant private law rules. A court is required to analyse whether the existing common law rules, or legislative provisions governing the domestic partnership, are being interpreted and enforced in a manner that is consistent with the broader spirit, purport and objects underlying the Bill of Rights. Section 39(2) allows the courts to go beyond focusing on the specific substantive rights between cohabitants and requires them to analyse whether existing rules structure relations between cohabitants that reflect the constitutional commitment to social justice and fundamental human rights.<sup>253</sup> Section 39(2) of the

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<sup>248</sup> SR Ratner "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 *Yale LJ* 443 462; H Shue "The Interdependence of Duties" in P Alston & K Tomasevski (eds) *The Right to Food* (1984) 83 90; and Pieterse (2009) *SAJHR* 200.

<sup>249</sup> Pieterse (2009) *SAJHR* 200.

<sup>250</sup> D Davis & Klare K "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *SAJHR* 403 420.

<sup>251</sup> Liebenberg *Socio-Economic Rights* 324.

<sup>252</sup> Davis & Klare (2010) *SAJHR* 420.

<sup>253</sup> Liebenberg *Socio-Economic Rights* 324.

Constitution thus provides a mechanism for infusing all law, including the common law, with constitutional values.<sup>254</sup> This also highlights the need to scrutinise how the values underlying socio-economic rights can restructure our conception of private responsibility between cohabitants.

The danger of largely ignoring section 8 and predominantly relying on section 39 is, however, that the courts tend to resort to a vaguely defined normative value system (in terms of section 39(2)), to avoid engaging with the substantive content of specific rights protected within the Bill of Rights.<sup>255</sup> Stuart Woolman argues that this typically “slack analysis of vaguely defined values, almost invariably substitutes a more rigorous interrogation of constitutional challenges,” in terms of specific substantive rights.<sup>256</sup> The evasion of section 8 allows the courts to avoid the difficult task of balancing competing constitutional rights. For example, by evading the question of whether an eviction has infringed upon a cohabitant’s right of access to adequate housing, the court eludes the question of how to balance the property rights of the owner with his partner’s right of access to adequate housing. This strategy further enables the court to skirt the nuanced process of justification required in terms of section 36 of the Constitution.<sup>257</sup>

However, if section 39(2) is applied in a sufficiently robust manner, it could play a role in transforming many of the background legal rules to structure greater equity between private parties, such as cohabitants.<sup>258</sup> In certain cases, the courts have endorsed a particularly expansive interpretation of section 39(2).<sup>259</sup> In *K v Minister of Safety and Security*,<sup>260</sup> for instance, the Court specifically held that:

“The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law.”<sup>261</sup>

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<sup>254</sup> *Pharmaceutical Manufacturers* para 44.

<sup>255</sup> Liebenberg *Socio-Economic Rights* 321.

<sup>256</sup> Woolman (2007) *SALJ* 762-763; and Liebenberg *Socio-Economic Rights* 336.

<sup>257</sup> Woolman (2007) *SALJ* 763.

<sup>258</sup> 763.

<sup>259</sup> Liebenberg *Socio-Economic Rights* 324.

<sup>260</sup> 2005 6 SA 419 (CC); 2005 9 BCLR 835 (CC).

<sup>261</sup> Para 17.

In terms of the current family law regime, the tendency to disproportionately protect a negative conception of autonomy, structures family relations based on individualistic values. Examples of this include judicial decisions that emphasise and protect self-interest, self-serving behaviour and independence. It is however, necessary to develop a substantive conception of autonomy that resonates with the transformative aspirations underlying our Constitution. Simultaneously, the values of *Ubuntu*, accountability and care underlying socio-economic rights need to be further integrated into the family law regime.

The values implicated within the family law system have expanded significantly since the advent of the Constitution. We now live in an open and democratic society in which pluralism and diversity are valued.<sup>262</sup> These changes are reflected in the recognition of customary marriages and same-sex unions, as well as statements by the Constitutional Court recognising the diversity of family forms found within South Africa.<sup>263</sup>

Former Constitutional Court Justice Albie Sachs points out that the new constitutional dispensation steers us in the direction of establishing a legal landscape consistent with the values of diversity, tolerance of difference and a concern for human dignity.<sup>264</sup> In *Volks*, he held that this requires a shift from locating conjugal rights and responsibilities exclusively within the framework of formalised relationships. Rather, it envisions embracing a wider array of rights and responsibilities to include all “marriage-like”, intimate and permanent relationships.<sup>265</sup> It also requires a greater focus on the human rights implications of private interactions as opposed to the official form of a relationship. It should be noted that the values enumerated above are not mutually exclusive, but instead enhance and reinforce one another.<sup>266</sup>

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<sup>262</sup> *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) (“*Fourie*”); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 1 SA 6; 1998 12 BCLR 1517 (“*National Coalition v Minister of Home Affairs*”), para 60; and *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC); 2008 2 BCLR 99 (CC) (“*Pillay*”), para 65.

<sup>263</sup> *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC); 2000 8 BCLR 8 37 (CC) (“*Dawood*”), para 31, where Justice O’Regan pointed out that:

“Families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family we must take care not to entrench particular forms of family at the expense of other forms.”

<sup>264</sup> *Volks* para 181.

<sup>265</sup> Para 181.

<sup>266</sup> Liebenberg (2005) *SAJHR* 5.

## 2 7 2 4      *The transformative potential of sections 8 and 39*

While the exact nature and scope of private socio-economic responsibilities has not yet been elucidated by our courts, there are certain guidelines that can be distilled from the cases discussed in this section. The first principle is that the state is primarily responsible for fulfilling socio-economic rights. In this regard, the state is already failing to fulfil this responsibility, given the lack of a comprehensive and coherent legislative framework regulating the socio-economic consequences of cohabitation. The second principle is that regardless of the state's primary duty, these rights do entail a measure of private responsibility. The human rights norms in the Constitution do explicitly apply to "all law" and extend to both public and private power. These private socio-economic responsibilities necessarily have implications for the existing "background" common law rules governing cohabitation.<sup>267</sup> The scope of the horizontal application of socio-economic rights between cohabitants is, however, dependent on a number of contextual factors. Examples of these factors include the nature of the rights;<sup>268</sup> the means of the parties; the intensity of the violation of the right;<sup>269</sup> the length of their relationship;<sup>270</sup> the existence of any patterns of abuse within the relationship and the presence of any dependents.

## 2 7 3    Reflections on the need to develop private socio-economic responsibility

This section underscores the manner in which the failure to recognise and develop private socio-economic duties between cohabitants exacerbates gender inequality. In accordance with this, the final step under Nedelsky's approach centres on how socio-economic rights can be interpreted to structure constructive relations in accordance with constitutional values. This final step examines how a relational feminist interpretation of socio-economic rights can transform our law to structure more equitable socio-economic relations between cohabitants. Protecting and promoting the socio-economic rights of cohabitants is needed, as a significant number of women remain in exploitative partnerships in order to access resources.<sup>271</sup> While relational feminism can inform interpretations of existing rights, this theoretical framework should

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<sup>267</sup> Williams (2005) 21 *SAJHR* 440.

<sup>268</sup> *Khumalo* para 33.

<sup>269</sup> *Khumalo*, para 33; *Juma Masjid* para 58.

<sup>270</sup> *Allpay* para 66.

<sup>271</sup> Goldblatt (2003) *SALJ* 615.

also inform family law legislation aimed at fulfilling the socio-economic rights of female cohabitants.<sup>272</sup>

Through recognising socio-economic duties between cohabiting partners in accordance with sections 8 and 39(2) of the Constitution, the state has a powerful role to play in supporting more constructive identities. This is integral when it comes to women's agency and socio-economic independence. When rights are claimed and effectively enforced, for instance, people's beliefs about who is entitled to what can shift.<sup>273</sup>

When developing accountability structures, or when interpreting legal rules, it needs to be kept in mind that cohabitants are predominantly a socio-economically vulnerable group. The status of cohabitants is currently governed by private law rules, which were not formulated to protect socio-economic rights. Collectively, these factors highlight that, to protect and fulfil the socio-economic rights of cohabitants, both the courts and the legislature need to undertake a more proactive regulatory role in ensuring that cohabitants take steps to protect and promote the socio-economic rights of their partners.

## **2 8 Conclusion: Key concepts underlying a relational feminist interpretation of socio-economic rights**

The goal of a relational feminist interpretation of cohabitants' socio-economic rights is to expose the inadequacies of the liberal paradigms currently underpinning our family law regime. The relational feminist approach directs legal interpretations in a manner that is more conducive to developing the relevant rules governing cohabitation in accordance with our transformative Constitution.<sup>274</sup> Through applying Nedelsky's four-step approach, this chapter illustrated how the liberal choice argument governing cohabitation is undermining the social transformation that is constitutionally required.<sup>275</sup> The liberal elements of a public/private law divide and individualism are also aiding in creating an environment that is conducive to the exploitation of female cohabitants.

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<sup>272</sup> Nedelsky *Law's Relations* 305.

<sup>273</sup> 308.

<sup>274</sup> Bhana (2015) *Stell LR* 3.

<sup>275</sup> Liebenberg *Socio-Economic Rights* 47.

In contrast to this, a relational feminist interpretation of the socio-economic rights of cohabitants can generate alternative modes of reasoning, which are more responsive to the specific needs of cohabiting women. Relational feminism reflects a substantive conception of autonomy, a relational notion of human dignity and a commitment to substantive equality for female cohabitants. Relational feminism can thus aid in transforming the socio-economic consequences of terminated domestic partnerships to empower female cohabitants.

While the specific implications of a relational feminist interpretation of the socio-economic rights of female cohabitants are explored in detail in chapter five of this study,<sup>276</sup> this section attempted to highlight key concepts that can be distilled from Nedelsky's relational feminist framework. In this regard, there are four elements underlying the current legal approach to cohabitation that undermine the socio-economic rights of female cohabitants and require development.

The first key aspect underlying a relational feminist approach is the need for a context-sensitive relational analysis of how the family law system currently structures socio-economic relations between cohabitants. This context-sensitive approach reveals that the state's current neutral response to cohabitation undermines the constitutional rights of female cohabitants, while exacerbating exploitative relations.

The second key aspect underlying a relational feminist lens entails adopting a value-sensitive approach to interpreting the socio-economic rights of female cohabitants. This step highlights the specific values at stake and emphasises the need to move away from an abstract conception of rights and the tendency to focus on the form of a relationship. In accordance with this shift, the focus should be directed towards the specific values at stake and how rights can be developed to give effect to the underlying purposes of the socio-economic rights of cohabitants. Sensitivity to a value-based approach facilitates a more robust enquiry into whether a law, the judicial interpretation of a law or a government policy fosters the material aspects of human dignity, equality and freedom for female cohabitants.<sup>277</sup> While section 8 remains the point of departure in terms of the horizontal application of socio-economic rights, section 39 of the Constitution requires the normative influence of the Bill of Rights be felt "throughout the common law" of South Africa.<sup>278</sup>

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<sup>276</sup> See part 5.3 of chapter five of this study.

<sup>277</sup> Bhana (2015) *Stell LR* 3.

<sup>278</sup> *K v Minister of Safety and Security* para 17.

The third element underlying a relational feminist approach entails questioning the kinds of relations that give effect to the values informing socio-economic rights. Relational feminism calls for the development of private socio-economic responsibilities between cohabitants. The focus is particularly on the positive role of the state in developing and enforcing accountability structures for the socio-economic consequences of terminated domestic partnerships.

The final step underlying relational feminism requires redistributive and transformative interpretations of socio-economic rights that structure more constructive relations between cohabiting men and women. While the specific implications of these steps are explored in detail in chapter five of this study,<sup>279</sup> this step entails linking social recognition with redistributive measures grounded in the socio-economic rights of cohabitants.

The key concepts underlying relational feminism can be utilised to guide the interpretation and development of family law rules to give effect to the socio-economic rights of cohabitants. These concepts can also be utilised to develop and test state legislation and policy aimed at governing cohabitation. A relational feminist approach can, for instance, provide a basis for evaluating how the absence of a comprehensive legislative framework regulating cohabitation leads to disparities in terms of the socio-economic resources cohabitants are able to access. A relational feminist interpretation of socio-economic rights also requires more robust justifications for adopting a neutral response to cohabitation, if it ultimately deprives women of access to these resources.

This chapter has revealed that the classic liberal framework currently informing interpretations of the rights of cohabitants is insufficiently responsive to the socio-economic needs of cohabiting women. In contrast to this liberal framework, relational feminism is far more conducive to transforming the law to give effect to the socio-economic rights of cohabiting women. The following chapter examines the South African legal framework governing cohabitation through applying the key concepts of a relational feminist lens developed in this chapter. Relevant South African jurisprudence, legislation and common law provisions are examined in terms of how they hinder or improve relational access to socio-economic resources between cohabitants.

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<sup>279</sup> See chapter five of this study.

## Chapter 3: The South African legal framework through a relational feminist lens

### 3 1 Introduction

The previous chapter set out key concepts underlying a relational feminist framework for the application of socio-economic rights between cohabitants. Utilising a relational feminist lens, this chapter critically examines the South African legal framework pertaining to cohabitants. In particular, a relational feminist framework is used to examine how the problematic paradigms underlying the family law regime exacerbate the feminisation of poverty.

This analysis commences with an overview of the South African family law regime before the adoption of the final Constitution.<sup>1</sup> Following the advent of democracy, the Bill of Rights has been utilised to develop various areas of the South African family law regime.<sup>2</sup> This chapter subsequently examines relevant jurisprudence concerning the interaction between the Bill of Rights and unrecognised relationships, focusing on domestic partnerships.

Given that South Africa has not yet developed a fully-fledged “law of life partnerships” to regulate domestic partnerships,<sup>3</sup> the piecemeal legislative framework governing cohabitation is examined. This is followed by an analysis of the various forms of cohabitation that have arisen due to existing gaps within the statutory framework. The balance of this chapter highlights the manner in which the common law has been utilised to protect domestic partners, focusing on the extent to which private law rules exacerbate the socio-economic vulnerability of female cohabitants upon the termination of their relationship.<sup>4</sup>

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<sup>1</sup> Constitution of the Republic of South Africa, 1996 (the “Constitution”).

<sup>2</sup> E Bonthuys “The South African Bill of Rights and the Development of Family Law” (2002) 119 *SALJ* 748 748.

<sup>3</sup> B Smith “The Dissolution of a Life or Domestic Partnership” in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 389 390-391.

<sup>4</sup> B Clark & B Goldblatt “Gender and Family Law” in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 195 205; South African Law Reform Commission (SALRC) *Project 118: Report on Domestic Partnerships* (2006) 7 <[http://www.justice.gov.za/salrc/reports/r\\_prj118\\_2006march.pdf](http://www.justice.gov.za/salrc/reports/r_prj118_2006march.pdf)> (accessed 20-10-2012); B Meyersfeld “If You Can See Look: Domestic Partnerships and the Law” (2010) 3 *Constitutional Court Review* 271 310; P de Vos “Still Out in the Cold? The Domestic Partnership Bill and the (Non)Protection of Marginalised Women” in J Sloth-Neilson & Z du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (2008) 129



Through employing a relational feminist lens, this chapter illustrates the South African legal system's problematic tendency to focus on form over function, liberal conceptions of choice, and contractual principles.<sup>5</sup> Through highlighting these paradigms, this chapter demonstrates the need and potential for transforming the rules governing cohabitation. This chapter underscores the need for transformation informed by a relational feminist interpretation of the socio-economic rights of female cohabitants.

### 3 2 The South African family law regime before the advent of democracy

Before the watershed decision of *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* (“*Fourie*”),<sup>6</sup> marriage was defined under the South African common law as a “union of one man with one woman, to the exclusion, while it lasts, of all others”.<sup>7</sup> For decades, South African family law only recognised heterosexual and monogamous unions.<sup>8</sup> Traditionally, this fixed structure was seen as the cornerstone of society, with procreation perceived as its primary function. The family law regime thus ignored families shaped by diverse religions and cultures, such as religious marriages and customary unions.<sup>9</sup> Following the advent of democracy, there have been significant legislative and jurisprudential developments with regard to same-sex unions and customary marriages.<sup>10</sup>

Historically, domestic partnerships were largely ignored by the legal system.<sup>11</sup> This is illustrated by a 1972 article by Hahlo, where he highlights that there was no “law of concubinage” in South Africa.<sup>12</sup> He explains that this was due to the low number of

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129; and B Goldblatt “Regulating Domestic Partnerships: A Necessary Step in the Development of South African Family Law” (2003) 120 *SALJ* 610 611.

<sup>5</sup> E Bonthuys “Developing the Common Law of Breach of Promise and Universal Partnerships: Rights to Property Sharing for all Cohabitants?” (2015) 132 *SALJ* 76 76.

<sup>6</sup> 2006 3 BCLR 355 (CC); 2006 1 SA 524 (CC) (“*Fourie*”).

<sup>7</sup> This was the definition used by Innes CJ in *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 at 61, as referenced by Sachs J in the *Fourie* case, para 2.

<sup>8</sup> D Meyerson “Who’s In and Who’s Out? Inclusion and Exclusion in the Family Law Jurisprudence of the Constitutional Court of South Africa” (2010) 3 *CCR* 295 297.

<sup>9</sup> Clark & Goldblatt “Gender and Family Law” in *Gender, Law and Justice* (2007) 205.

<sup>10</sup> These developments are explored below in parts 3 3 and 3 4 of this chapter.

<sup>11</sup> Smith “The Dissolution of a Domestic Partnership” in *The Law of Divorce* (2014) 399.

<sup>12</sup> HR Hahlo “The Law of Concubinage” (1972) 89 *SALJ* 321 321.

recorded cases of unmarried cohabitation in South Africa, emphasising the perceived immoral nature of these relationships.<sup>13</sup>

Patterns of gender discrimination were simultaneously interwoven into traditional family law rules, exacerbating the plight of many South African women. This is illustrated through the extensive feminist critique of family law.<sup>14</sup> One example of how gender inequality was perpetuated by family law rules is the Roman-Dutch<sup>15</sup> rule governing the marital power that established the husband as the *paterfamilias* or the “head of the family”.<sup>16</sup> This provided him with the power to determine all matters concerning the common life, such as where the family would reside and their standard of living. This power further authorised the husband to administer the joint estate, including his wife’s separate property, unless specifically excluded through an antenuptial contract.<sup>17</sup> Married women also had no *locus standi* and could not sue or be sued.<sup>18</sup>

Since then, the law has significantly developed, as evinced by the abolition of certain aspects of the marital power in 1984,<sup>19</sup> and its final abolition in 1993.<sup>20</sup> Despite these developments, certain constraining elements in civil law (Roman-Dutch) tradition continue to infuse our family law system. One example of this is the dominance of a private law lens within family law cases, particularly in lower courts.<sup>21</sup>

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<sup>13</sup> 321.

<sup>14</sup> F Kaganas & C Murray “Law and Women’s Rights in South Africa: An Overview” (1994) *Acta Juridica* 1 1; J Sinclair “The Financial Consequences of Divorce in South Africa: Judicial Determination or Private Ordering?” (1983) 32 *ICLQ* 785 786; J Heaton “Striving for Substantive Gender Equality in Family Law: Selected Issues” (2005) 21 *SAJHR* 547; and E Bonthuys “*RH v DE: A Feminist Minority Judgment on Adultery*” (2015) 31 *SAJHR* 379 380.

<sup>15</sup> Much of South Africa’s civil law is based on Roman-Dutch law.

<sup>16</sup> Kaganas & Murray (1994) *Acta Juridica* 9; HR Hahlo *The South African Law of Husband and Wife* (1953) 60.

<sup>17</sup> Kaganas & Murray (1994) *Acta Juridica* 9.

<sup>18</sup> 9.

<sup>19</sup> The Matrimonial Property Act 88 of 1984 (MPA) abolished marital power in s 11 and entrenched the idea that married partners are involved in an equal partnership through s 14, which states that:

“Subject to the provisions of this Chapter, a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act.”

The MPA abolished marital power in marriages contracted between whites after it came into force.

<sup>20</sup> Marital power was finally abolished in all its manifestations and for all races retrospectively by the General Law Fourth Amendment Act of 1993.

<sup>21</sup> E Bonthuys (2015) *SAJHR* 380, where she specifically highlights that:

A further example of how legal rules have exacerbated gender inequality is provided by the rules governing marital rape, which was legal in South Africa until its criminalisation under the Prevention of Family Violence Act 133 of 1993 (“PFVA”). Despite its abolition, many subsequent family law cases continue to trivialise marital rape, as well as rape within cohabiting relationships. Many of these decisions also demonstrate misogynistic ideas regarding women and the family.<sup>22</sup> This inadequate judicial engagement with existing gendered dynamics emphasises the need for a relational feminist approach to family law issues.<sup>23</sup>

These traditional family law rules and formalistic judgments illustrate the patterns of gender inequality established in our society. As articulated by former Justice O’Regan in *Brink v Kitshoff* (“*Brink*”),<sup>24</sup> while gendered discrimination has not been as visible as racial inequality, it has nevertheless resulted in “deep patterns of disadvantage”.<sup>25</sup> Justice O’Regan specifically went on to state that a key message of our Constitution is the need to eradicate all such discrimination from our society.<sup>26</sup> In order to combat gender inequality and to give effect to the Constitution’s horizontal commitments, a more robust scrutiny of whether family law rules align with the Constitution is required.

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“The Supreme Court of Appeal [SCA] judgments [on family law], although advancing gender equality in many respects, fail to acknowledge the impact of existing rules on gender equality. It seems as if the SCA prefers to leave the issue of gender equality to the Constitutional Court, rather than engaging in its own analysis of gender. This results in legal developments which are too often formally rather than substantively equal.”

<sup>22</sup> In the case of *S v Moipolai* (CA 53/2004) 2004 ZANWHC 19 (20 August 2004), in determining the sentence for rape committed by a man against his domestic partner of seven years, the Court held that some of the mitigating factors included that the applicant and the complainant were not strangers and that they had two children together. When discussing the complainant’s visit to the home of the appellant’s parents, the Court stated that she must have known that sexual intercourse was likely to occur and that she was, given the nature of their relationship, willing to take part in the intercourse. In *S v Modise* (113/06) 2007 ZANWHC 73 (9 November 2007), the High Court was also criticised for lowering the sentence for rape, due to mitigating factors such as the intimate relationship that existed between the complainant and the accused. The more recent Supreme Court of Appeal decision of *Ndou v S* 2014 1 SACR 198 (SCA) offers a further example of the persistent and damaging nature of gendered stereotypes within rape decisions. In this case, the Court reduced the sentence of life imprisonment that the appellant had originally received after being found guilty of raping his 15-year-old stepdaughter to a sentence of 15 years. In determining whether there were compelling reasons to deviate from the minimum sentence, the court specifically referred to the fact that the victim did not fight back during the attack and that the perpetrator had bought her gifts that she accepted.

<sup>23</sup> Bonthuys (2015) *SAJHR* 394.

<sup>24</sup> 1996 4 SA 197 (CC); 1996 6 BCLR 752 (CC) (“*Brink*”).

<sup>25</sup> Para 44.

<sup>26</sup> Para 44.

### 3 3 Jurisprudence on the interaction between the Bill of Rights and unrecognised relationships

#### 3 3 1 Introduction

Since the advent of democracy, the South African family law regime has undergone certain progressive developments in accordance with our Bill of Rights.<sup>27</sup> For example, customary unions<sup>28</sup> and same-sex marriages<sup>29</sup> are now legally recognised. The Constitutional Court has also utilised the Bill of Rights to extend many of the legislative benefits previously reserved for married couples to Muslim unions, both monogamous and polygamous.<sup>30</sup> As a result of these advances, the Constitution has been described as launching South Africa into an era characterised by improved respect for human dignity, privacy and diversity.<sup>31</sup> Significantly, in the context of family law, the Constitution requires a particular focus on protecting the most vulnerable groups in our society.<sup>32</sup>

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<sup>27</sup> E Bonthuys “The South African Bill of Rights and the Development of Family Law” (2002) 119 *SALJ* 748 748. See for example, the specific cases where the Constitutional Court extended many of the material benefits previously reserved for heterosexual spouses to same-sex relationships: *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 2000 2 SA 1; 2000 1 BCLR 39; *Satchwell v President of Republic of South Africa* 2002 6 SA 1; 2002 9 BCLR 986; and *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae)*; *Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC); 2006 3 BCLR 355 (CC) (“*Fourie*”).

<sup>28</sup> Before November 2000, customary marriages were not legally recognised due to their polygamous nature and as a result of not fulfilling the requirements set out in the Marriage Act 25 of 1961. This was finally changed on 15 November 2000, when customary marriages were given full legal recognition through the Recognition of Customary Marriages Act 120 of 1998.

<sup>29</sup> For example, the ground-breaking decision in *Fourie* effectively served as the catalyst for the recognition of same-sex unions in South Africa. See also the Civil Union Act 17 of 2006 (“CUA”).

<sup>30</sup> See: *Daniels v Campbell* 2004 5 SA 331 (CC); 2004 7 BCLR 735 (CC), which concerned extending the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 to monogamous Muslim unions and *Hassam v Jacobs NO* 2009 11 BCLR 1148 (CC); 2009 5 SA 572 (CC) which concerned extending the Intestate Succession Act 81 of 1987 to polygynous Muslim unions. See also: Bonthuys (2002) 119 *SALJ* 748; and Meyerson (2010) *CCR* 297.

<sup>31</sup> J Sloth-Nielson & B van Heerden “The Constitutional Family: Developments in South African Family Law Jurisprudence under the 1996 Constitution” (2003) 17 *International Journal of Law, Policy and the Family* 121 121.

<sup>32</sup> *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC); 2005 1 BCLR 1 (CC) paras 93 & 130; *Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC); 2009 3 SA 152 (CC) para 43; *South African*

While these status-based developments are important, they are primarily based on formal<sup>33</sup> interpretations of the constitutional right to equality.<sup>34</sup> Certain formalistic interpretations of section 9 of the Constitution entrench conservative and stereotypical ideas on gender and marriage, while ignoring the socio-economic needs of women.<sup>35</sup> With regard to the horizontal application of the Bill of Rights to family law issues, the courts have tended to ignore section 8 of the Constitution, while primarily relying on the provisions underlying section 39.<sup>36</sup>

A recent example of the gender bias found in family law cases, as well as the neglect of section 8 of the Constitution, is provided in the case of *RH v DE*,<sup>37</sup> which concerned the question whether a non-adulterous spouse has the right to delictual action against a third party for injury and loss of comfort.<sup>38</sup> The legal issue was essentially whether this area of the common law should be developed in accordance with public policy, either resulting in its abolishment or its development in accordance with the Constitution. While the decision by the Supreme Court of Appeal, to do away with this claim has, for the most part, been positively received,<sup>39</sup> the court's approach has been criticised for failing to address the double standards that apply to male and female sexuality, particularly in the context of extra-marital affairs. These double standards were specifically illustrated by the High Court's inappropriate treatment of the adulterous wife.<sup>40</sup> This case underscores the judiciary's tendency to avoid an in-

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*Police Services v Solidarity obo Barnard* 2014 6 SA 123 (CC); 2014 10 BCLR 1195 (CC) para 33.

<sup>33</sup> Formal equality entails the identical treatment of different groups, regardless of the outcome. In contrast to this, substantive equality requires addressing the specific social and economic circumstances of a particular group to ensure equality of outcome. For example, Catherine Albertyn and Beth Goldblatt describe the goal of substantive equality as embracing the idea of the "redistribution of power and resources and the elimination of material disadvantage". See C Albertyn & B Goldblatt "Equality in the Final Constitution" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (Original Service, June 2008) 35-1 35-5.

<sup>34</sup> B Goldblatt "Case Note: Same-sex Marriage in South Africa: The Constitutional Court's Judgment" (2006) 14 *Feminist Legal Studies* 261 268.

<sup>35</sup> C Albertyn "Substantive Equality and Transformation in South Africa" (2007) 23 *SAJHR* 253 255. See also Bonthuys (2002) 119 *SALJ* 754.

<sup>36</sup> This was discussed in detail in parts 2 4 3 and 2 5 2 of chapter two of this study.

<sup>37</sup> 2014 6 SA 436 (SCA). ("*RH v DE*").

<sup>38</sup> The Court had to decide whether, nowadays, the act of adultery meets the element of wrongfulness in order for delictual liability to attach to it. See *RH v DE* para 11.

<sup>39</sup> The Supreme Court of Appeal's decision in *RH v DE* provided good policy reasons for the abolishment of the actions for *contumelia* and loss of consortium on the basis of adultery, which garnered significant public interest. See Bonthuys (2015) *SAJHR* 394.

<sup>40</sup> *RH v DE* para 39; Bonthuys (2015) *SAJHR* 394.

depth engagement with gendered issues prevalent in family law cases.<sup>41</sup> While the Constitutional Court confirmed the Supreme Court of Appeal's decision to do away with the claim,<sup>42</sup> the Constitutional Court only briefly touched upon the intrusive manner in which the wife had been questioned in the High Court.<sup>43</sup> The Court discussed how this questioning infringed upon the privacy rights of the wife, without discussing the need to address sexism in our society.<sup>44</sup> This decision further emphasises the need for a gender sensitive engagement with the potential implications of the Bill of Rights in family law cases.<sup>45</sup>

The focus of this section's jurisprudential analysis is primarily on developments relating to cohabitation. Certain cases on the interrelationship between the Bill of Rights and other forms of unrecognised relationships are, however, relevant as they demonstrate aspects of liberalism,<sup>46</sup> which continue to pervade our family law jurisprudence. Unless these liberal modes of reasoning are questioned and developed, the family law regime will continue to exacerbate the socio-economic vulnerability of female cohabitants. One example of this is the tendency of courts to focus on contractual paradigms, which has a constraining effect on the transformative potential of the Bill of Rights.

In order to render the law more responsive to the needs of domestic partners, these limiting aspects are examined and criticised in the following sections. A number of women in our society have been rendered cohabitants through their failure to adhere to formal legal requirements pertaining to their relationship. For this reason, relevant jurisprudence on customary marriages and Muslim marriages will be considered. The

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<sup>41</sup> 394.

<sup>42</sup> *DE v RH* 2015 5 SA 83 (CC); 2015 9 BCLR 1003 (CC) ("*DE v RH*").

<sup>43</sup> In *DE v RH*, in para 6, the Court stated that in terms of the affair:

"Intimate details of it were laid bare in a very raw and intrusive way before the High Court and then, to a lesser extent before the Supreme Court of Appeal."

<sup>44</sup> In para 54, of *DE v RH*, Justice Madlanga held that:

"The delictual claim is particularly invasive of, and violates the right to privacy. This very case is illustrative of this. The Supreme Court of Appeal dealt with the abusive, embarrassing and demeaning questioning that Ms H suffered in the High Court. She was 'made to suffer the indignity of having her personal and private life placed under a microscope and being interrogated in an insulting and embarrassing fashion.'"

<sup>45</sup> While the Court in *DE v RH*, para 9, did emphasise that: "Public policy is now infused with constitutional values and rights contained in the Constitution," the need to foster gender equality was not discussed.

<sup>46</sup> For example, the adoption of a formal approach to equality and a liberal conception of choice has often impeded the ability of the legal system to respond to the reality of women's lives.

primary focus of this analysis is, however, on *Volks NO v Robinson* (“*Volks*”), the leading case on cohabitation.<sup>47</sup>

### 3 3 2 Constitutional jurisprudence on same-sex relationships

The Constitutional Court has emphasised that section 9 of the Constitution entails a commitment to substantive equality, as opposed to formal equality.<sup>48</sup> Certain cases concerning the interpretation of equality for same-sex unions have resulted in substantial positive social change. However, in the majority of cases a formal equality framework was utilised, which enabled same-sex unions to be included in the family law regime. As emphasised by Goldblatt, the recognition of domestic partnerships necessarily requires a substantive equality framework as this recognition extends to a novel form of legal regulation of family.<sup>49</sup> In the majority of family law cases the courts have, therefore, primarily relied on a formal approach to equality.

One positive development is the Court’s articulation of the far-reaching doctrines of dignity and “inclusive moral citizenship”.<sup>50</sup> This reasoning is illustrated in *National Coalition for Gay and Lesbian Equality v Minister of Justice* (“*National Coalition v Minister of Justice*”),<sup>51</sup> where the Court recognised the equal rights of gay men by holding that the common law crime of sodomy discriminated unfairly on the ground of sexual orientation. Whilst referring to the case of *Harksen v Lane NO*,<sup>52</sup> the Court in *National Coalition v Minister of Justice*<sup>53</sup> specifically emphasised the need to place itself in the complainants’ position.<sup>54</sup> Bonthuys points out the particularly progressive

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<sup>47</sup> 2005 5 BCLR 446 (CC) (“*Volks*”).

<sup>48</sup> Justice Sachs emphasised this in *Volks*, para 163, with the statement that:

“This Court has on numerous occasions stressed the importance of recognising patterns of systematic disadvantage in our society when endeavouring to achieve substantive and not just formal equality.”

See also *Brink, President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) (“*Hugo*”); and *Bannatyne v Bannatyne* (Commission for Gender Equality, as Amicus Curiae) 2003 2 SA 363 (CC) (“*Bannatyne*”).

<sup>49</sup> Goldblatt (2006) *Feminist Legal Studies* 268.

<sup>50</sup> *Fourie* para 15.

<sup>51</sup> 1999 1 SA 6; 1998 (12) BCLR 1517 (“*National Coalition v Minister of Justice*”).

<sup>52</sup> 1997 11 BCLR 1489; 1998 1 SA 300 (“*Harksen v Lane NO*”).

<sup>53</sup> *National Coalition v Minister of Justice* para 22.

<sup>54</sup> Para 22.

nature of this reasoning, as it indicates a shift from the traditional legal approach of objectivity and neutrality to one of “imaginative empathy and compassion”.<sup>55</sup>

*National Coalition v Minister of Justice*<sup>56</sup> is particularly noteworthy for serving as the catalyst for the subsequent judicial extension of many of the benefits of civil marriages to same-sex cohabitants. These extensions include the right to inherit intestate,<sup>57</sup> the right to adopt children jointly<sup>58</sup> and the right to claim for loss of support as a result of the death of a breadwinner.<sup>59</sup> In the subsequent decision of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (“*National Coalition v Minister of Home Affairs*”),<sup>60</sup> the Court held that gay and lesbian couples are also just as capable as heterosexual couples of establishing the *consortium omnis vitae* associated with marriage.<sup>61</sup>

In the subsequent celebrated judgment of *Fourie*, the Court decided that the exclusion of same-sex couples from the common law definition of marriage and the statutory marriage formula as described under the Marriage Act 25 of 1961 was unconstitutional.<sup>62</sup> While the Court emphasised that the common law definition of marriage violated sections 9(1), 9(3) and 10 of the Constitution, by preventing same-sex unions from enjoying the benefits accorded to heterosexual couples,<sup>63</sup> the majority declined to develop the common law definition. When discussing the appropriate remedy to be provided, the Court pointed out that the legislature has an important, democratic and legitimating role to play in our society. According to Justice Sachs, it was therefore more appropriate and desirable to leave it to Parliament to correct the defect in the Marriage Act, while adding that this would have an automatic impact on the common law definition of marriage.<sup>64</sup>

The majority decision of the Court therefore suspended the declaration of invalidity for one year in order to allow Parliament to enact new legislation to correct the defects.

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<sup>55</sup> Bonthuys (2002) SALJ 773.

<sup>56</sup> *National Coalition v Minister of Justice* para 22.

<sup>57</sup> *Gory v Kolver* NO 2007 3 SA 97 (CC); 2007 3 BCLR 294 (CC) (“*Gory*”).

<sup>58</sup> *Du Toit v Minister of Welfare & Population Development (Lesbian & Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC); 2002 10 BCLR 1006 (“*Du Toit*”).

<sup>59</sup> *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) (“*Du Plessis*”).

<sup>60</sup> 2000 2 SA 1 (CC) (“*National Coalition v Minister of Home Affairs*”).

<sup>61</sup> In *National Coalition v Minister of Home Affairs*, para 15, the Court refers to “companionship, love, affection, comfort, mutual services and sexual intercourse” as all belonging to the marriage state.

<sup>62</sup> *Fourie* para 135.

<sup>63</sup> Para 135.

<sup>64</sup> *Fourie* para 122.



The order specified that if Parliament failed to do so, certain words would then be read into the Marriage Act to accommodate same-sex marriages.<sup>65</sup> While both the common law definition of marriage and section 30(1) of the Marriage Act were declared unconstitutional for excluding same-sex unions, upon the condition of Parliament failing to enact legislation, it was only the definition under section 30 of the Marriage Act that would have words read into it. By leaving the common law definition of marriage intact, the Court therefore neglected the opportunity to develop this construction to recognise a variety of family forms, including domestic partnerships. It was further stated that given that marriage involves a question of personal status, it would lead to greater stability if such matters were regulated by an Act of Parliament rather than by the Court.<sup>66</sup>

Justice O'Regan in her minority judgment pointed out that the case was concerned with the common law rule regarding the definition of marriage as developed by the courts. This is due to the fact that the provisions of section 30 of the Marriage Act rested on the common law definition. She went on to state that the development of the common law to comply with constitutional requirements essentially falls under the responsibility of the courts.<sup>67</sup> Referring to the decision of *Carmichele v Minister of Safety and Security* ("*Carmichele*"),<sup>68</sup> she elaborated that it is the responsibility of the courts to ensure that the common law is in conformity with the Constitution.<sup>69</sup> This proactive response to developing the common law is particularly necessary when it comes to cohabitants, as their socio-economic interests are primarily regulated by private law rules.

While the majority judgment in *Fourie* declined to develop the unconstitutional common law definition of marriage, it did emphasise the value of diversity, with the statement that families can be constituted in a number of different ways and that social regulation of families should change in accordance with this reality.<sup>70</sup> This judgment also significantly served as the catalyst for the promulgation of the Civil Union Act 17 of 2006 ("CUA"), which is discussed in detail later.<sup>71</sup> The potential possibility of

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<sup>65</sup> *Fourie* para 159; See also Goldblatt (2006) *Feminist Legal Studies* 262-270.

<sup>66</sup> *Fourie* para 165.

<sup>67</sup> Para 165.

<sup>68</sup> 2001 4 938 (CC); 2001 10 BCLR 995 (CC) ("*Carmichele*"), para 62.

<sup>69</sup> *Fourie* para 167.

<sup>70</sup> Para 15.

<sup>71</sup> See part 3 4 6 of this chapter.

extending the common law definition of marriage to a broader range of relationships, such as unmarried cohabitants and Muslim marriages was, however, not raised before the court and therefore not addressed in the Court's decision.<sup>72</sup>

### 3 3 3 Jurisprudence on customary marriages

While the Recognition of Customary Marriages Act 120 of 1998 ("RCMA") regulates customary unions, certain customary wives remain vulnerable to socio-economic disadvantage. The RCMA is discussed in detail in section 3 4 of this study, which examines the legislative framework governing our family law regime.<sup>73</sup> The RCMA is noted in this section as certain gaps in the RCMA have given rise to legal cases concerning the vulnerability of customary wives.

An example of the vulnerability of customary wives is provided in *K v P*.<sup>74</sup> In this case, a customary marriage was held to be invalid due to the husband already being married according to civil law, while his customary "wife" was unaware of this marriage. In this case, the defendant initially promised to marry her in accordance with civil law. Once he found out that she was HIV positive though, he stated that she was not worthy of concluding a civil marriage with him. In terms of the social norms dictating his experience, a civil marriage had a higher status than a traditional customary marriage.<sup>75</sup> The Court confirmed that due to the existence of the civil marriage, and in accordance with the RCMA, it was not possible or legally competent for the plaintiff to register her customary marriage.<sup>76</sup> The result of not registering her marriage was that the plaintiff unintentionally became party to a domestic partnership. This is unfortunately a widespread problem that emphasises the need for effective regulation of cohabitation in South Africa. *K v P* also highlights the problematic issue of polygamous relationships, which is dealt with in further detail in chapter five of this study. While the plaintiff's marriage was ultimately found to be invalid due to not being registered, the court did award her damages,<sup>77</sup> particularly as the defendant had

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<sup>72</sup> *Fourie* paras 60 and 87.

<sup>73</sup> See part 3 4 3 of this chapter.

<sup>74</sup> 2010 ZAGPJHC 93 (15 October 2010) ("*K v P*").

<sup>75</sup> P Bakker "Chaos in Family Law: A Model for the Recognition of Intimate Relationships in South Africa" (2013) 16 *PELJ* 116 116.

<sup>76</sup> *K v P* para 5.

<sup>77</sup> Para 13.

misrepresented his marital status and caused the plaintiff significant emotional and psychological harm. Although this case clearly implicated the right to equality, the Bill of Rights was not mentioned or utilised in the court's decision.

A further example of the vulnerability experienced by customary wives is offered by the Constitutional Court case of *Mayelane v Ngwenyama*.<sup>78</sup> In this case, the Court considered the development of the customary law relating to Tsonga marriages, in line with the Constitution, through relying primarily on section 39(2) of the Constitution. The applicant had been married to the deceased in terms of customary law since 1984. The deceased entered into a second marriage with the respondent in 2008 and passed away in 2009. The issue was whether the customary law relating to Tsonga marriages required the first wife's consent to the second marriage in order for it to be valid. The Court developed the customary law to require the first wife's consent.<sup>79</sup> In essence, therefore, the second wife was in a domestic partnership with the deceased, regardless of her intentions.

While the Court's decision represents a progressive line of reasoning in terms of protecting the constitutional rights of the first wife, the Court has been criticised for ruling that the second marriage is automatically rendered null and void.<sup>80</sup> This is due to the fact that automatic invalidity of the second marriage could have serious economic and social consequences for the second wife and any children born from that relationship.<sup>81</sup> While the first wife's consent should be required, the appropriate remedy should depend on all the circumstances of the case, as well as the constitutional rights of all the parties involved, including the second wife. This is necessary, as she may have been in a vulnerable position when she entered into the relationship, where marriage exerted an "irresistible economic and social pull".<sup>82</sup> Ultimately, the Court's reliance on the right to equality and section 39(2) of the

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<sup>78</sup> 2013 ZACC 14; 2013 4 SA 415 (CC) ("*Mayelane*").

<sup>79</sup> Para 75.

<sup>80</sup> M Mamashela & Marita Carnelley "The Catch 22 Situation of Widows from Polygamous Marriages being Discarded under Customary Law" (2011) 87 *Agenda* 112 112.

<sup>81</sup> This declaration of voidness usually occurs after the death of the husband and has devastating legal and emotional consequences for the "discarded" wife. See Mamashela & Carnelley (2011) *Agenda* 112.

<sup>82</sup> Women's Legal Centre Trust, Rural Women's Movement and the Commission for Gender Equality "*Mayelane v Ngwenyama & Another. Amicus Curiae Heads of Argument*" (2013) 41 <<http://www.constitutionalcourt.org.za/Archimages/19940.PDF>> (accessed 31-05-2013).

Constitution facilitated the failure to engage with the socio-economic rights of the second wife.

If robustly applied, the horizontal application of socio-economic rights could, however, facilitate the transformation of existing legislation and “background legal rules”<sup>83</sup> governing cohabitation. Despite this transformative potential and the growing judicial acceptance of the need for the horizontal application of the Bill of Rights, uncertainty remains as to precisely how the common law should be developed. In this regard, there is a degree of ambivalence in terms of the extent to which the Bill of Rights should apply to our traditional system of private law.<sup>84</sup> For example, should the Constitution operate directly on the conduct of cohabitants, in the manner of an ordinary law, or should the Constitution operate directly only on the law.<sup>85</sup> The precise application of a constitutional obligation within the private sphere is, therefore, currently determined “case-by-case through a balancing test”.<sup>86</sup>

The judicial failure to robustly engage with the socio-economic rights of cohabitants is problematic though, as rural women’s lack of access to basic services often overlaps with unequal rights in family structures. As a result, rural women often experience limited access to family resources, such as land and livestock.<sup>87</sup>

An examination of socio-economic rights can assist in ensuring that the legal analysis in a case concerning a customary marriage is more responsive to the material deprivation experienced by women married according to customary law. Focusing on the socio-economic deprivation of a woman married according to customary law can also shift the focus back onto group-based understandings of material disadvantage. Considerations of socio-economic disadvantage reveal the manner in which poverty exacerbates the inequality experienced by cohabiting women. Addressing the relational nature of poverty and gender equality prevalent in cohabiting relationships, as well as relationships formalised according to customary law would also facilitate a more responsive jurisprudence to the needs of poor women. The manner in which the

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<sup>83</sup> L Williams “Issues and challenges in addressing poverty and legal rights: A comparative United States/South Africa analysis” (2005) 21 *SAJHR* 436-472 440. Davis “Developing the Common Law of Contract” in Liebenberg & Quinot (eds) *Law and Poverty* 404.

<sup>84</sup> D Bhana “The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract” (2015) 26 *Stell LR* 1 2.

<sup>85</sup> Davis & Klare (2010) *SAJHR* 421.

<sup>86</sup> 420.

<sup>87</sup> J Kehler “Women and Poverty: The South African Experience” (2001) 3 *Journal of International Women’s Studies* 1 45.

RCMA is being interpreted and implemented could also be examined in terms of whether it is facilitating the realisation of the socio-economic rights of women. Customary law rules should structure relations that enhance the dignity and autonomy of women whose needs are urgent and who are living in intolerable conditions. Cases concerning customary marriages can take account of socio-economic rights as tools to redress issues of material disadvantage resulting from unrecognised marriages or family dissolution.

The South African customary law framework has already been criticised for not being sufficiently gender-sensitive.<sup>88</sup> This section sought to utilise the case of *Mayelane v Ngwenyama*, as an example of the need to consider and balance the specific socio-economic rights of female partners, particularly in polygamous relationships. A relational feminist interpretation of the socio-economic rights of women in relationships governed by customary law is more conducive to protecting the constitutional rights of all women involved. The principles outlined in *Grootboom* pertaining to the need to progressively realise the right of access to adequate housing,<sup>89</sup> could furthermore, inform the examination of the customary law framework. While *Grootboom* concerned an evaluation of the government's housing policy, family law legislation could also be examined in terms of whether their provisions facilitate or undermine access to socio-economic rights. For example, the RCMA could be examined in terms of whether this framework facilitates access to socio-economic resources for women married according to customary law.

Examining the socio-economic implications of polygamous relationships can also foreground the underlying assumptions regarding the role of men and women in our society. For example, an analysis of these cases reveals that in these disputes the women are often pitted against each other. This underlying rhetoric therefore structures relations between women that are based on competition, ultimately undermining the dignity of the female partners. An effort should be made to consider and weigh the constitutional rights of all the parties involved in a manner that protects

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<sup>88</sup> E Bonthuys "The South African Bill of Rights and the Development of Family Law" (2002) 119 *SALJ* 748 748; C Alberyn "Using Rights and the Law to Reduce Women's Vulnerability to HIV/AIDS" (2001) 5 *Law, Democracy & Development* 179 184.

<sup>89</sup> See part 2 4 2 of chapter two of this study. In accordance with the reasonableness model of review, a court examines whether a government programme is flexible, coherent, comprehensive and capable of effectively realising a particular socio-economic right. One particularly important factor that a court considers is the degree to which provision has been made for the most vulnerable members of society. See *Grootboom* para 44.

their socio-economic rights and their human dignity. The potential implications of a relational feminist interpretation of socio-economic rights for women involved in polygamous relationships, is discussed further in chapter five.

### 3 3 4 Jurisprudence on religious marriages

As a result of the law's failure to recognise Muslim marriages,<sup>90</sup> Muslim wives technically have the legal status of cohabitants. Although certain cases have extended some benefits underlying civil marriages to Muslim wives, it is worth noting the jurisprudential habits and patterns of reasoning found within these cases, as they further emphasise the need for a constitutional gender-sensitive approach to unregulated relationships.

The need for development in accordance with our Constitution is illustrated by the predominant focus on contractual principles, as evinced by the case of *Ryland v Edros* ("Ryland").<sup>91</sup> In this case, the Cape High Court innovatively recognised some of the contractual obligations flowing from a monogamous Muslim marriage as valid and enforceable. The wife was not treated as a spouse entitled to spousal support. The marriage was instead recognised as a contract that could be enforced between the parties.<sup>92</sup> In considering whether the contract was against public policy and invalid, the court specifically pointed out that the meaning of open-ended common-law concepts like "*boni mores*" and "public policy" should be informed by basic constitutional values such as freedom and equality.<sup>93</sup>

This is an important recognition in terms of the need to develop family law contracts. These concepts should, however, be further informed by broader constitutional values, such as those underlying socio-economic rights. This is due to the fact that Muslim women and children are often deprived of access to socio-economic resources, such as access to adequate housing, food, water and social security, upon the dissolution

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<sup>90</sup> Muslim personal law has been described as religion-based family law. Matters governing Muslim marriages are regulated under the prescripts of the eighth century classical Islamic Law (Shari'a) as established in the Qur'an and Sunna. See N Moosa "The Dissolution of a Muslim Marriage by Divorce" in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 281 281, footnote 1.

<sup>91</sup> 1997 2 SA 690 (C) ("*Ryland*").

<sup>92</sup> Moosa "The Dissolution of a Muslim Marriage" in *Law of Divorce* 335.

<sup>93</sup> *Ryland* p 708.

of their family.<sup>94</sup> It is also unfortunate that this case was decided primarily on the basis of the validity of the contract and not on the validity of Muslim marriages in general. The court's emphasis on the monogamous nature of the marriage further hinted that this protection may not be available to polygamous marriages,<sup>95</sup> thus limiting the ambit of protection provided.

Subsequently in *Amod v Multilateral Motor Vehicle Accidents Fund* ("Amod"),<sup>96</sup> the Supreme Court of Appeal held that the surviving spouse in a monogamous Muslim marriage qualified as a dependant in terms of a dependant's action for a loss of support claim.<sup>97</sup> This decision was also based on contract, with the court recognising that a valid contractual duty flows from a Muslim marriage. While this case did afford Muslim wives a certain level of protection, the court has again been criticised for its narrow focus on contract, rather than focusing on family relationships.<sup>98</sup>

The Court has also been criticised for its pre-occupation with the *de facto* monogamous nature of the marriages. For example, Goldblatt has indicated that this approach retains the traditional common-law bias in favour of monogamous family groups.<sup>99</sup> In order to align our family law regime with the Constitution, a broader conception of the family unit is necessary. This is especially true if we are to assist the most disadvantaged groups of women in our society; who are often involved in polygamous relationships. Constitutionally-inspired development is also required as many Muslim women face the same socio-economic challenges as domestic partners. Choosing to focus on the human rights of cohabitants as opposed to contractual principles, or the form of the relationship, therefore has the potential to provide more substantial socio-economic protection to a greater number of women.

The courts have briefly alluded to the material impact of non-recognition in a number of cases. In *Daniels v Campbell* ("Daniels"),<sup>100</sup> for example, the applicant had gained a Council house, which she occupied from 1976. After she was married according to Muslim Personal Law ("MPL") in 1977, ownership of the house was transferred to her

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<sup>94</sup> This is evinced by the facts of the *Ryland* case, p 708, and *Daniels v Campbell* 2004 5 SA 331 (CC); 2004 7 BCLR 735 (CC) ("Daniels"), which is discussed later.

<sup>95</sup> *Ryland* p 707.

<sup>96</sup> 1999 4 All SA 421 (SCA) ("Amod").

<sup>97</sup> Para 23.

<sup>98</sup> Bonthuys (2002) SALJ 763.

<sup>99</sup> B Goldblatt "*Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA)" (2000) 16 SAJHR 138 143.

<sup>100</sup> 2004 5 SA 331 (CC); 2004 7 BCLR 735 (CC) ("Daniels").

husband who then passed away without a will. Due to the state's non-recognition of Muslim marriages, she was unable to inherit the house under the Intestate Succession Act 81 of 1987 ("ISA"). The Court recognised that the ISA effectively withheld economic protection from Muslim widows, with the statement that, as a result of her marriage being solemnised in terms of MPL, she stood to lose a home that "but for her marriage to the deceased, would have been her property".<sup>101</sup>

In spite of this recognition, the Court never considered the applicant's right to have access to adequate housing,<sup>102</sup> or the potential implications of this right in developing the law relating to Muslim marriages.<sup>103</sup> In contrast, the Court referred to the constitutional values of equality, dignity and respect for diversity.<sup>104</sup> The Court held that these values ultimately required the word "spouse" as used in the ISA, to include the surviving partner to a monogamous Muslim marriage. The word "survivor" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 ("MSSA") was also interpreted to include parties to a monogamous Muslim marriage.<sup>105</sup> In the case of *Hassam v Jacobs NO* ("*Hassam*"),<sup>106</sup> the Constitutional Court also had to decide on the constitutionality of the ISA for excluding widows of polygamous Muslim marriages. The Court specifically observed that:

"The effect of the failure to afford the benefits of the Act to widows of polygamous Muslim marriages will generally cause widows significant and material disadvantage of the sort which it is the express purpose of our equality provision to avoid."<sup>107</sup>

However, it is not only the right to equality that seeks to protect the material interests of women. Socio-economic rights are also aimed at protecting the social and economic conditions necessary for women to fully and equally enjoy their constitutional rights.<sup>108</sup> There is therefore a need to further scrutinise how family law rules are structuring inequitable relations between men and women. Giving effect to a relational feminist

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<sup>101</sup> Para 106.

<sup>102</sup> S 26 of the Constitution.

<sup>103</sup> C de Villiers "*Daniels v Campbell NO: The Long Battle of a Woman Married According to Muslim Personal Rights to Acquire Ownership of her Home*" (2003) 4 *ESR Review* 1 8-10.

<sup>104</sup> *Daniels* para 21.

<sup>105</sup> Para 40.

<sup>106</sup> 2009 11 BCLR 1148 (CC); 2009 5 SA 572 (CC) ("*Hassam*").

<sup>107</sup> Para 34.

<sup>108</sup> Liebenberg "Socio-Economic Rights" in *Symbols or Substance* (2014) 70.



interpretation of the socio-economic rights of women has the potential to structure more constructive patterns of relating between men and women.

Despite the socio-economic implications of unrecognised relationships, the above cases underscore the jurisprudential trend to focus on common law contractual principles within family law cases. These cases also emphasise the tendency of the courts to protect and recognise relationships that closely resemble the traditional conception of a civil marriage, such as monogamous relationships. As a result of this, vulnerable women continue to fall through the gaps of the legal system. In the light of the need to further examine the socio-economic rights of cohabiting women, the leading case on cohabitation will now be analysed.

### 3 3 5 Cohabitation: *Volks NO v Robinson*

The leading case on the status of unmarried cohabitants is *Volks NO v Robinson* (“*Volks*”).<sup>109</sup> This case is particularly noteworthy for illustrating many of the constraining elements underlying our traditional legal culture.<sup>110</sup> In this case, the first respondent (Mrs Robinson) had been involved in a long-term relationship with a lawyer, Mr Shandling (the deceased), which spanned over a period of sixteen years. During this time, she lived with him, cared for him when he was ill and accompanied him to work functions and on family holidays.<sup>111</sup> She claimed that the survivor of such a stable and permanent relationship, who had lived a life akin to that of husband and wife, should be afforded the same protection that is afforded to the survivor of a civil marriage.<sup>112</sup> This was in terms of the provisions of section 2(1), read with section 1, of the MSSA. The issue before the Court was whether the exclusion of unmarried cohabitants from the definition of “survivor” under the MSSA was unconstitutional. The case was argued on the basis of the constitutional rights to dignity and discrimination on the basis of marital status.

As marital status is included under section 9(3) of the Constitution, Skweyiya J (writing for the majority) was initially prepared to accept that it was presumed unfair

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<sup>109</sup> 2005 5 BCLR 446 (CC) (“*Volks*”).

<sup>110</sup> Heaton (2005) SAJHR 555; and Liebenberg *Socio-Economic Rights* (2010) 318.

<sup>111</sup> *Volks* para 6.

<sup>112</sup> Para 1.

discrimination.<sup>113</sup> Ultimately, however, Justice Skewyiya found that due to the fact that marriage is a vital social institution, serving as the foundation of our society, it was not unfair to distinguish between those who were married and those who were not.<sup>114</sup> In his analysis of difference, Skewyiya J also pointed out that there was a fundamental difference between spouses and cohabitants. In deciding that it was fair to distinguish between those who were married and those who were not, he relied on a contractual paradigm, referring to the fact that there was no duty to maintain a domestic partner during the lifetime of the parties. He specifically went on to state that it would be “incongruous, unfair, irrational and undesirable” to impose this duty posthumously.<sup>115</sup> He further pointed out that, to the extent that any obligation would arise between cohabitants during the subsistence of their relationship, this would only be in terms of an agreement and would only be within the limits of that agreement.”<sup>116</sup> This perception is evinced by the statement that:

“Marriage is a matter of choice. Marriage is a manifestation of that choice and more importantly, the acceptance of the consequences of a marriage.”<sup>117</sup>

The majority’s common law contractual reasoning in *Volks* was primarily based on a libertarian conception of choice. This is illustrated by the Court’s statement that this exclusion did not amount to unfair discrimination, as heterosexual cohabitants have a choice to marry. Accordingly, if cohabitants do not exercise this choice to marry, they deserve the negative consequences of failing to do so.<sup>118</sup> In contrast to this contractual approach, however, there should have been a deeper engagement with whether the MSSA gives effect to the “spirit purport and objects of the Bill of Rights.”<sup>119</sup>

The majority judgment’s adoption of a liberal conception of choice as free and unconstrained has been extensively criticised.<sup>120</sup> One reason for this criticism is the

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<sup>113</sup> Paras 52-54.

<sup>114</sup> Paras 52-54.

<sup>115</sup> Para 60.

<sup>116</sup> Para 58.

<sup>117</sup> Para 93.

<sup>118</sup> Para 56.

<sup>119</sup> S 39(2) of the Constitution.

<sup>120</sup> Beth Goldblatt criticised the liberal choice argument as it is applied to domestic partnerships in her 2003 article: Goldblatt (2003) *SALJ* 616. The Court’s liberal conception of choice was specifically criticised by Elsje Bonthuys (2008) *CJWL* 13-14; and C Albertyn “Substantive Equality and Transformation in South Africa” (2007) 23 *SAJHR* 253 266.

formalistic reasoning adopted by the Court, which ignored the existing social context of gendered dynamics currently shaping cohabitation in South Africa.<sup>121</sup> The majority's approach perceived a distinction between those with free will (such as the applicant) and those without. Even if the applicant had the "choice" to marry, the Court could have considered this case within its broader social context, where poor women are often severely disadvantaged by the non-recognition of their relationships. There are, furthermore, significant social and interpersonal factors that often hinder one's freedom of choice within relationships. Substantial empirical evidence was submitted to the court by women's groups that specifically emphasised how African female cohabitants' choices to enter into domestic partnerships are influenced by their dire socio-economic position.<sup>122</sup> The evidence also underscored how these women were often left destitute upon their partner's death.<sup>123</sup>

While Skewiya J was able to recognise that many cohabiting women are socio-economically vulnerable, he held that this was not due to the under-inclusiveness of section 2(1) of the MSSA.<sup>124</sup> He argued that the plight of cohabiting women is due to the absence of any law regulating cohabitation. From a relational feminist perspective this is a rather limited view of the state's duty to address socio-economic inequality between cohabitants. While Skewiya J was able to concede that specific laws are required in order to ensure that a vulnerable cohabitant is not unfairly taken advantage

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<sup>121</sup> A discussion of the social inequality prevalent in cohabiting relationships is provided in chapter one of this study. Beth Goldblatt has also described the inadequate nature of the liberal choice argument to respond to this inequality in detail, see Goldblatt (2003) *SALJ* 616, where she points out that:

"The libertarian presumption of free choice is incorrect. It is itself premised on the idea that all people entering into family arrangements are equally placed. This is not so. Men and women approach intimate relationships from different social positions with different measures of bargaining power. Gender inequality and patriarchy result in women lacking the choice freely and equally to set the terms of their relationships. It is precisely because weaker parties (usually women) are unable to compel the other partner to enter into a contract or register their relationship that they need protection."

<sup>122</sup> The Amicus Curiae in this case, the Centre for Applied Legal Studies ("CALs"), the University of the Witwatersrand, made submissions regarding the vulnerability of female cohabitants upon the termination of their relationship. See: Centre for Applied Legal Studies "Written Submission on Behalf of the Amicus Curiae" (2004) 1 -32.

<sup>123</sup> B Goldblatt, C Yose & S Mills "Cohabitation and Gender in the South African Context: Implications for Law Reform" (2001) 2 (research report prepared by the Gender Research Project of CALS at the University of the Witwatersrand); and Bonthuys (2008) *CJWL* 13-14.

<sup>124</sup> *Volks* para 65.

of, he gave no further guidance as to what constitutional principles should inform this legislative response under a constitutional democracy.<sup>125</sup>

In a separate but concurring judgment, Ngcobo J stated that the constitutional recognition of the right to marry and the institution of marriage are consistent with the obligations imposed on our country by international and regional human rights instruments. He shared the opinion that it is a logical consequence of the recognition of civil marriage that the law may, in appropriate circumstances, distinguish between married and unmarried people.<sup>126</sup> He also argued that it is not the law that places legal impediments to heterosexual couples wishing to get married. He stated that the law simply provides a legal regime that regulates the rights and obligations of those who choose this option.<sup>127</sup> In accordance with a relational feminist interpretation of the socio-economic rights of female cohabitants, the legal regime is however, only providing benefits to an institution that many socio-economically vulnerable women are unable to access. In this manner, the legal system is playing a role in entrenching relations based on inequality. It is also reinforcing patterns of domination and inequality between men and women. In order to give effect to the transformative aspirations of our Constitution, the law needs to respond to socio-economic inequality in intimate relationships. The constitutional values of equality, autonomy and dignity also require that the legal regime is scrutinised to determine whether it is giving effect to the rights of vulnerable members of our society.

Justices Mokgoro and O'Regan gave a dissenting opinion which agreed with the conclusion reached by Justice Sachs, which is discussed below, but for different reasons. They pointed out that only providing benefits to civil marriages does in fact reproduce hierarchical and unequal relations in our society. They also pointed out that long-term domestic partnerships can produce patterns of dependence and vulnerability which in the light of the high number of cohabitants, cannot simply be ignored by the legislature.<sup>128</sup> Mokgoro and O'Regan JJ also agreed that the legislature is in the best position to determine how domestic partnerships should be regulated. They accordingly found that the order of constitutional invalidity should be suspended to give the legislature an opportunity to cure the constitutional defect.<sup>129</sup>

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<sup>125</sup> Para 66.

<sup>126</sup> Para 82.

<sup>127</sup> Para 91.

<sup>128</sup> *Volks* Para 134.

<sup>129</sup> *Volks* Para 137.

The minority judgment of Sachs J was far more responsive to the existing social reality. For example, he clarified that the constitutional consideration of unfair discrimination requires an in-depth scrutiny of the manner in which the law reinforces gender inequality.<sup>130</sup> His analysis was also more in line with a relational feminist approach to family law issues. For example, he stated that the question of the fairness enquiry needs to be assessed not in the narrow confines of marital rules but rather within the broader and more situation-sensitive framework of the [evolving] principles of family law. He emphasised that the investigation into unfair discrimination is necessitated by the ancient and entrenched nature of patriarchy and sexism,<sup>131</sup> which often renders these issues invisible to certain legal officers. He went on to observe that the primary consideration should be whether the relationship was deserving of protection and whether it was unfair to leave the surviving partner without any means of support simply because they were unmarried.<sup>132</sup> Justice Sachs also specifically held that by failing to regulate cohabitation, the law effectively relegates cohabiting women to a life of poverty “coupled with the imputation of having been a lawless interloper”.<sup>133</sup> He was thus able to specifically recognise that this approach severely infringes upon the human dignity of the survivor of a cohabiting relationship.<sup>134</sup>

The majority judgment on the other hand, adopted a formalistic approach to the conception of dignity, stating that Mrs Robinson’s dignity was not infringed, as they did not think that her dignity was worth less than that of a married person.<sup>135</sup> Instead, the Court claimed that the difference between her relationship and a marriage relationship justifiably limited her ability to access maintenance without implicating her dignity.<sup>136</sup> The need to redress systematic patterns of inequality and disadvantage was obscured by the Court’s focus on individual personality issues related to subjective feelings of self-worth.<sup>137</sup> It is not difficult to recognise how her dignity was infringed, particularly when you examine her position in relation to protected surviving spouses. The material

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<sup>130</sup> Para 163.

<sup>131</sup> Para 163.

<sup>132</sup> Para 172.

<sup>133</sup> Para 181.

<sup>134</sup> Para 181.

<sup>135</sup> Para 62.

<sup>136</sup> Para 62.

<sup>137</sup> Kruuse (2009) *SAJHR* 387.

aspects of human dignity were also clearly ignored.<sup>138</sup> The moral conservatism of the majority judgment thus resulted in the application of formal equality, while failing to recognise the nuances of powerlessness that many poor women experience in relationships.

The Court's uncritical prioritisation of civil marriages ignores the diversity prevalent within our society. This approach essentially undermines what the High Court termed "the dignity of difference" in our society.<sup>139</sup> The reality is that, regardless of the official form of a relationship, all intimate partnerships have the potential to become sites of exploitation and abuse.<sup>140</sup> The state needs to play some form of a regulatory role in these relationships, irrespective of its official form. The Court's liberal conception of choice thus reinforced a negative conception of autonomy that is particularly detrimental to vulnerable family members.

The reasoning in *Volks* illustrates the tendency to maintain a public/private law divide that justifies refraining from interrogating the socio-economic implications of private law rules. For example, while Ms Robinson was able to reside in the family home for a year after her partner's death, she was ultimately forced to leave the shared residence and was deprived of her existing access to housing.<sup>141</sup> This occurs for many poor cohabiting women upon their partner's death, even if they contributed to the home through rent.<sup>142</sup> Ms Robinson was also at an advanced age and would have needed to access a pension fund, which implicated her right to have access to social security.<sup>143</sup> Following the deceased's death she would have also been removed from his medical aid, with implications for her right to have access to health care services.<sup>144</sup>

During the case it was raised in evidence that the applicant had cared for the deceased over the course of their relationship, when he had suffered from bipolar disorder. The Court did not, however, consider the integral value of this caring work and its socio-economic worth as a contribution to the deceased's estate. The majority

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<sup>138</sup> See part 2 5 3 of chapter 2 of this study, which discusses the need to develop a relational conception of human dignity that recognises the material dimensions underlying the value of human dignity for female cohabitants.

<sup>139</sup> *Robinson v Volks* NO 2004 6 SA 288 (C) at 299f; 2004 6 BCLR 671 (C) at 682H.

<sup>140</sup> FE Olsen "The Myth of State Intervention in the Family" (1984) 18 *University of Michigan Journal of Law Reform* 835 836.

<sup>141</sup> *Volks* para 3.

<sup>142</sup> See part 1 1 of chapter one of this study, where this is discussed in detail.

<sup>143</sup> S 27(1)(c) of the Constitution.

<sup>144</sup> S 27(1)(a).

judgment also held that the primary root of cohabiting women's vulnerability was their poverty, as opposed to the law's failure to regulate cohabitation.<sup>145</sup> The failure to regulate these relationships does, however, exacerbate the socio-economic disadvantages facing cohabiting women. The majority's decision reinforced the idea that it is constitutionally acceptable for people to enter into long-term intimate relationships, to allow their partner to provide caring work and then to leave them destitute upon the termination of the relationship. Adopting this liberal approach to domestic partnerships does not align with the need to treat everyone "with care and concern".<sup>146</sup> The failure to regulate cohabitation therefore plays a role in structuring inequitable socio-economic relations in our society. The duty on the state to "promote and fulfil"<sup>147</sup> socio-economic rights also requires more than a simple acknowledgement of women's socio-economic vulnerability. It requires a robust analysis of the manner in which the law reinforces socio-economic vulnerability for cohabitants. The lack of engagement with the potential implications of socio-economic rights resulted in a failure to allow these rights to influence the interpretation of the MSSA. This lack of engagement also prevented the further development of the common law to improve the socio-economic well-being of female cohabitants.<sup>148</sup>

The outcome of *Volks* is also surprising in that the Court had previously been willing to extend a number of statutory rights to same-sex unions, as well as Muslim marriages. In the *Daniels* case, for instance, the Constitutional Court was willing to extend the application of both the MSSA and the Intestate Act to include spouses of Muslim marriages.<sup>149</sup> Despite the divided judgement in *Volks*, all of the judges agreed that some form of legal regulation of unmarried partnerships is necessary and the majority agreed that the legislature was the best institution to determine how these relationships should be regulated.

Academics have already criticised the choice argument and the majority's decision to privilege the institution of marriage.<sup>150</sup> This section sought to emphasise the need for a relational feminist lens when examining the socio-economic implications of failing

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<sup>145</sup> *Volks* paras 65-66.

<sup>146</sup> *Grootboom* para 44.

<sup>147</sup> S 7(2) of the Constitution, read with ss 26 and 27 of the Constitution.

<sup>148</sup> Goldblatt (2003) *SALJ* 615.

<sup>149</sup> See part 3 3 4 of this chapter.

<sup>150</sup> Goldblatt (2003) *SALJ* 616. The Court's liberal conception of choice was specifically criticised by Elsje Bonthuys (2008) *CJWL* 13-14; and C Albertyn "Substantive Equality and Transformation in South Africa" (2007) 23 *SAJHR* 253 266.

to address cohabitation. The majority opinion in *Volks* expressed the sentiment that cohabitants must “choose” to conform or be left without protection. In contrast, a relational feminist analysis focuses on the exploitative relations structured between cohabiting men and women, through failing to regulate cohabitation.

A relational feminist lens reveals that a liberal conception of choice restricts relational access to socio-economic resources while failing to respond to the existing social context. Currently, our society encourages relations based on exploitation with gendered socio-economic implications. A relational feminist lens foregrounds this gender inequality. It also reveals how inequitable relations between cohabiting women and men undermine the autonomy and human dignity of vulnerable female cohabitants. In particular, this discussion sought to reveal the relational socio-economic implications for Mrs Robinson upon the termination of her relationship. Examples of this include her being forced to leave the family home, her no longer enjoying the benefit of being listed as a dependant on her partner’s medical aid and her need to access a pension fund. In this case her right of access to adequate housing, her right of access to health care services and her right of access to social security, were implicated and undermined.

The collective outcome of the cases on same-sex unions and *Volks* is that unmarried same-sex cohabitants now have access to more of the benefits associated with marriage than heterosexual cohabitants. This anomaly emphasises the need for a relational feminist interpretation of the socio-economic rights of individuals within relationships, in a manner that fosters substantive autonomy, dignity and diversity. This relational feminist approach is also valuable in terms of how it transcends the current focus on contractual paradigms and moralistic debates on the form of a relationship.

### 3 3 6 Jurisprudential analysis

The constitutional obligation to develop the common law to give effect to the rights protected in the Bill of Rights,<sup>151</sup> and the values underlying the Constitution,<sup>152</sup> have wrought fundamental changes to the family law landscape since 1994.<sup>153</sup> It is,

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<sup>151</sup> S 8 of the Constitution.

<sup>152</sup> S 39.

<sup>153</sup> Bonthuys (2015) *SALJ* 76; and Bonthuys (2002) *SALJ* 773.



however, evident that the majority of ground-breaking cases have been decided in accordance with a formal approach to equality, while the socio-economic rights of women have predominantly been ignored. Jurisprudential developments have occurred within defined “institutional, doctrinal and normative boundaries,” in a manner that has limited the potential of the legal system to shift gendered relations.<sup>154</sup> Viewing these cases through a relational feminist lens, which focuses on socio-economic rights, highlights a number of formalistic elements that continue to pervade our family law jurisprudence.

The first concern highlighted by a relational feminist interpretation of socio-economic rights is the failure of the courts to adequately scrutinise the existing social context governing cohabitation. In this regard, the courts have not sufficiently examined the patterns of relations that have been exacerbated by existing legal rules. As a result, there has been an inadequate engagement with the socio-economic impact of family law rules for female cohabitants.<sup>155</sup> Failing to engage with existing hierarchies and systemic inequalities in family law cases will only entrench existing inequality in our society. The failure to recognise the family unit, as a socio-economic institution that is currently exacerbating the socio-economic disadvantages experienced by cohabiting women, is thus problematic.

The formalistic failure to engage with the relational social context is also evinced by the courts’ tendency to rely on a contractual paradigm, as opposed to examining the specific human rights implications of terminated relationships. This is illustrated by the jurisprudence on Muslim marriages, as well as the Court’s statement in *Volks* that any duty of support arising between cohabitants would only be in terms of an agreement and would be limited to that agreement.<sup>156</sup>

Focusing on contractual principles further limits the contextual analysis of the impact of underlying relational power imbalances on contractual autonomy.<sup>157</sup> Notwithstanding the disadvantage perpetuated by family law rules, an analysis of the relevant cases reveal that socio-economic rights arguments have not been raised by applicants, *amici curiae* or the courts, within our family law jurisprudence. This

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<sup>154</sup> Albertyn (2007) *SAJHR* 273.

<sup>155</sup> Bonthuys (2015) *SAJHR* 380.

<sup>156</sup> *Volks* para 58.

<sup>157</sup> E Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *SAJHR* 31 32.

approach is often due to strategic reasons.<sup>158</sup> In order to foster substantive gender equality and social justice, it is necessary to develop relational feminist interpretations of socio-economic rights, particularly for cohabiting women.

Closely interrelated to the inadequate recognition of the existing social context is the judicial tendency to rely on section 39 of the Constitution, as opposed to engaging with the provisions underlying section 8 of the Constitution. The decision of *RH v DE* illustrates this point, as well as the jurisprudence on customary marriages. This is in spite of the constitutional normative framework, which clearly calls for transcending the traditional public/private law divide. A robust application of section 39(2) of the Constitution could catalyse significant development of the family law regime. Focusing on the specific socio-economic rights that are implicated in a cohabitation case, in accordance with the provisions of section 8, would however, also provide an opportunity to develop interpretations of socio-economic rights that are responsive to relational dynamics and cohabiting women's specific needs.

A relational feminist lens similarly reveals the tendency of the courts to focus on the form of a relationship,<sup>159</sup> as opposed to engaging with the specific constitutional values at stake for female cohabitants. This highlights the transformative potential of focusing on socio-economic rights, which evades the traditional moralistic debates concerning

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<sup>158</sup> With regard to family law, an example of strategic litigation is offered by the challenges undertaken by the National Coalition for Gay and Lesbian Equality. It chose not to attack the root cause of the exclusion of same-sex unions from family law, namely the common-law definition of marriage. Instead, it focused on separate common-law and legislative provisions with the aim of extending the consequences of common-law marriage to same-sex relationships. In this, the Constitutional Court has assisted it most manifestly by indicating that same-sex couples are capable of all the elements of the *consortium omnis vitae* traditionally ascribed to marriage. An example of not addressing the gendered dimensions of socio-economic rights is provided in *Minister of Health v Treatment Action Campaign (No 2) 2002 5 SA 721 (CC)* ("TAC"). In this case it was feared that the "choice" argument would be used against the applicants. In particular, it was feared that the focus would then centre on women as rational beings capable of making constructive choices relating to motherhood and capable of refusing treatment. The TAC wanted to shift the focus from motherhood to the irrationality of the state's ineffective programme. This reveals the strategic challenges facing amicus curiae in public interest litigation, while also revealing their particular responsibility in such cases. This case therefore illustrates that the social and political context of litigation cannot be divorced from legal strategies. However, it also underscores the need for more gender-sensitive arguments and perspectives on interpretations of socio-economic rights. See Albertyn (2012) *Stell LR* 60.

<sup>159</sup> The predominant focus on form over function is evinced by the Constitutional Court's endorsement of a negative conception of autonomy in *Volks*. The majority decision in this case also focused on civil marriage as the norm while endorsing a limited conception of human dignity.

which relationship is more deserving of protection.<sup>160</sup> In addition, focusing on the socio-economic rights of cohabitants has the potential to avoid the judicial tendency to conflate equality and dignity considerations.<sup>161</sup>

In contrast to a liberal approach, relational feminism is conducive to developing the state's responsibility to structure equitable relations between cohabiting men and women. While the role of the legislature and the executive are explored later,<sup>162</sup> these cases reveal the transformative potential of progressive constitutional interpretation by the courts.<sup>163</sup> They also emphasise the need to explicitly raise socio-economic rights arguments in family law cases to illuminate the socio-economic implications of family law rules.

Despite certain positive developments, these cases ultimately reveal that the jurisprudential focus on form over function, formal applications of equality and contractual principles undermine the constitutional goal of fostering substantive gender equality. The neglect of socio-economic rights in family law cases further reveals the need to transform the underlying causes of gendered socio-economic inequality.<sup>164</sup>

While the need for development remains, certain family law decisions have had the positive impact of prompting the legislature to enact legislation that recognises different relationships. The relevant legislative developments are examined in the following section.

### **3 4 Legislative interventions following the advent of democracy**

#### **3 4 1 Introduction**

Before 1994, the family law system was primarily governed by the Marriage Act 25 of 1961 and its ancillary acts. These ancillary acts include the Divorce Act 70 of 1979, the Matrimonial Affairs Act 37 of 1953, the Matrimonial Property Act 88 of 1984 and the Mediation in Certain Divorce Matters Act 24 of 1987. These statutes were

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<sup>160</sup> Bhana (2015) *Stell LR* 3.

<sup>161</sup> Albertyn & Goldblatt (1998) *SAJHR* 258; Albertyn (2007) *SAJHR* 254.

<sup>162</sup> See parts 5 3 and 5 4 of chapter five of this study.

<sup>163</sup> Klare (1998) *SAJHR* 150.

<sup>164</sup> Albertyn (2007) *SAJHR* 254.

introduced well before the advent of the 1996 Constitution, underscoring the need for constitutional development in this area of law. Following the advent of democracy, there was a flurry of legislative activity aimed at regulating a wider variety of relationships in South Africa.

This section sets out the gendered impact of the current fragmented legislative framework governing cohabitation in South Africa. It also seeks to illustrate how relying on statutory mechanisms, without engaging with whether they give effect to the Bill of Rights, undermines the Constitution's horizontal commitments. For example, research demonstrates how certain pieces of family law legislation continue to reinforce existing patterns of gender inequality.<sup>165</sup>

This section also examines the language used in relevant family law statutes in terms of primarily recognising relationships that resemble traditional civil marriages. The legislative framework should be interrogated to determine whether it positively recognises diversity, as well as the fundamental human rights protected in the Bill of Rights. After setting out the various pieces of legislation that offer piecemeal recognition to cohabitants, this section discusses how certain gaps in the legislative framework have given rise to inadvertent forms of cohabitation.

### 3 4 2 Incremental legislative recognition to cohabitants

There have been a number of *ad hoc* legislative extensions to conjugal relationships outside of marriage over the previous decades. For instance, the acknowledgment of domestic partnerships can be traced as far back as the Insolvency Act 24 of 1936.<sup>166</sup> In terms of section 21(13) of this Act, the word "spouse" not only means wife or husband in the legal sense, but includes a wife or husband by virtue of marriage according to any law or custom, as well as a woman living with a man "as his wife" or a man living with a woman "as her husband". Other piecemeal legislative extensions include the Medical Schemes Act 131 of 1998,<sup>167</sup> the Compensation for Occupational

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<sup>165</sup> Heaton (2005) *SAJHR* 547.

<sup>166</sup> *Volks* para 175.

<sup>167</sup> S 24(2)(e) of the Medical Schemes Act 131 of 1998 states that no medical scheme will be registered if it discriminates on the ground of marital status.

Injuries and Diseases Act 130 of 1997<sup>168</sup> and the Basic Conditions of Employment Act 75 of 1997.<sup>169</sup> Certain pieces of legislation are also applicable to both opposite-sex and same-sex life partnerships, such as the Estate Duty Act 45 of 1955, the Pension Funds Act 24 of 1956 and the Maintenance Act 99 of 1998. Section 2(1) of the Maintenance Act states that the provisions of the Act apply in respect of the legal duty of any person to maintain another person, regardless of the nature of the relationship. This duty can be overtly or tacitly undertaken. As stated in *Volks*, there is no automatic duty to maintain a domestic partner during the lifetime of the parties.<sup>170</sup> The Court emphasised that a duty of support could be agreed upon and that the limits of that duty would be in terms of the agreement. The difficulty lies therefore, in proving that a duty of maintenance has been tacitly undertaken.

In terms of extending *ad hoc* recognition to cohabitants, it has been argued that the Marriage Act and the Divorce Act could be extended to cohabitants. These Acts contain remedies aimed at protecting divorcing parties from becoming financially vulnerable upon their divorce. Specific examples of these remedies include the provision of on-going financial maintenance and the allocation of marital property to the more vulnerable spouse.<sup>171</sup> It has been argued that these matrimonial laws could shed some light on the types of mechanisms that might be useful in terms of protecting unmarried cohabitants.<sup>172</sup>

While this may be feasible, one problem with these statutes is that they retain a predominantly private law lens. Since they were enacted well before the advent of the Constitution, they are also informed by a very different ethos.<sup>173</sup> While extending these acts to include cohabitants may achieve increased social recognition, it will not be sufficient to fundamentally shift inequitable gendered relations in our society.<sup>174</sup> It has been pointed out that in order to transform family relations, a shift towards a more

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<sup>168</sup> S 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1997 states that a dependant of an employee includes, if there is no widow or widower, a person with whom the employee was living as husband and wife, at the time of the employee's death.

<sup>169</sup> S 27(2)(c)(i) of the Basic Conditions of Employment Act 75 of 1997 provides that an employee is entitled to three days leave paid leave in the event of the death of the employee's spouse or life partner.

<sup>170</sup> *Volks*, para 60.

<sup>171</sup> S 7 of the Divorce Act 70 of 1979 provides for the division of assets and maintenance between the parties, while s 9 provides for forfeiture orders.

<sup>172</sup> A Barratt "Private Contract or Automatic Court Discretion? Current Trends in Legal Regulation of Permanent Life-Partnerships (2015) 26 *Stell LR* 110 111.

<sup>173</sup> Liebenberg *Socio-Economic Rights* 378.

<sup>174</sup> Albertyn (2007) *SAJHR* 273.

equitable distribution of the socio-economic consequences of terminated domestic partnerships, between men and women, is required.<sup>175</sup> Greater attention therefore needs to be paid to the socio-economic consequences of how men and women interact with one another. The role of the legal regime in either challenging or reinforcing these patterns of relating also needs to be addressed.

In addition to the piecemeal recognition provided to cohabiting relationships discussed in this section, there have been certain innovative legislative developments that offer limited recognition and protection to cohabitants. These developments are discussed below.

### 3 4 3 Protection provided by the Domestic Violence Act 116 of 1998

Within South Africa, domestic violence is a critical gendered issue.<sup>176</sup> For female cohabitants, domestic violence intersects with the lack of legal regulation over their relationship status, exacerbating their socio-economic vulnerability.<sup>177</sup> In turn, women's poverty makes them particularly vulnerable to violence.<sup>178</sup> The Domestic Violence Act 116 of 1998 ("DVA") is thus important, as it recognises that domestic violence is a serious social evil, while explicitly protecting domestic partners. In addition, the DVA provides protection to same-sex partnerships, people who were or are engaged, people in a dating or customary relationship and people who are living together or separately.

The DVA's preamble highlights that the victims of domestic violence are among the most vulnerable members of our society, while section 1 of the Act includes a broad description of domestic violence.<sup>179</sup> The Act is one of the few pieces of legislation that provides some form of legal regulation and protection to female cohabitants who experience abuse and exploitation. For example, the DVA specifically defines

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<sup>175</sup> Albertyn (2007) *SAJHR* 263; and R Leckey "Gimme Shelter" (2001) 34 *Dalhousie Law Journal* 198-228.

<sup>176</sup> T Bannister "Equal Access to Health Care Services for Survivors of Gender-Based Violence" (2014) 12 *Equal Rights Review* 62-76.

<sup>177</sup> Goldblatt (2003) *SALJ* 615.

<sup>178</sup> International Federation for Human Rights (IFHR) *Montreal Principles on Women's Economic, Social and Cultural Rights* (2002) 2.

<sup>179</sup> S 1 of the DVA.

“economic abuse” as unreasonably depriving a cohabiting partner<sup>180</sup> of economic or financial resources to which they are entitled through law.<sup>181</sup> It also includes the unreasonable deprivation of resources that the complainant requires out of necessity.<sup>182</sup>

The Act also provides complainants with a broad range of remedies. In this regard, the DVA enables a court to tailor the terms of a protection order to the specific needs of an applicant.<sup>183</sup> A protection order may therefore prohibit a respondent from committing any act of domestic violence or from entering a specified place.

Cohabiting women who are victims of domestic violence thus have the power to evict batterers from the family home, even if the female complainant does not own the property herself. Police officers’ duties to assist victims and the courts’ remedial powers indicate an appreciation of the socio-economic aspects of domestic violence, even within domestic partnerships. For example, respondents can be instructed to pay rent or mortgage and they can be instructed to provide money for food and other necessary household expenses.<sup>184</sup>

While the DVA clearly offers innovative remedies for unmarried cohabitants, it is restricted to cases involving domestic violence. There have also been severe implementation problems surrounding this Act.<sup>185</sup> These implementation problems are often due to sexist responses by police officials and legal officers. These implementation issues underscore the need for further gender sensitivity training of judicial officers and policemen in the context of family matters.

In terms of developing accountability structures for the socio-economic rights of cohabitants, a relational feminist framework is particularly responsive to the existing power dynamics within a relationship. Given the socio-economic impact of domestic violence, the existence of patterns of violence or exploitation within a cohabiting

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<sup>180</sup> Under s 1 of the DVA, a “domestic relationship” is defined broadly to include domestic partners.

<sup>181</sup> Under s 1 of the DVA, “economic abuse” is defined as the unreasonable deprivation of financial resources to which a complainant is entitled under law.

<sup>182</sup> S 1(a).

<sup>183</sup> S 4.

<sup>184</sup> S 7(4).

<sup>185</sup> L Vetten, T Le, A Leisegang & S Haken *The Right and The Real: A Shadow Report Analysing Selected Government Departments’ Implementation of the 1998 Domestic Violence Act and 2007 Sexual Offences Act* (2010) 28.

relationship should play a significant role in determining the socio-economic consequences of a terminated domestic partnership.<sup>186</sup>

#### 3 4 4 Potential relief under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

While there have been certain progressive cases based on the constitutional right to equality, a number of discrimination cases are criticised for ignoring the social context which often reveals systemic patterns of gender inequality. This is particularly evident in the case of *Volks*.<sup>187</sup> Discrimination takes on many different forms, both in terms of discrimination perpetrated by the state against its citizens and in terms of private discrimination. In order to give effect to substantive equality, as protected in the Constitution, there was therefore the need to enact a more expansive legislative response to discrimination. Section 9(4) of the Constitution specifically requires that national legislation be drafted in order to prohibit unfair discrimination. The enactment of more expansive legislation was also necessary in order to provide more responsive remedies to complainants. For these reasons, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“PEPUDA”) was enacted.<sup>188</sup> When interpreting PEPUDA, the courts must give effect to the Constitution.<sup>189</sup>

PEPUDA is examined in terms of its potential to offer cohabitants innovative remedies upon the termination of their relationship. It is, in a similar vein to the DVA, responsive to some of the gaps within the existing legal framework. PEPUDA is particularly significant, as it has the potential to address some of the shortcomings of prior equality jurisprudence pertaining to unmarried cohabitants. While the majority of the ground-breaking cases have been based upon section 9 of the Constitution, future challenges should be brought under the provisions of PEPUDA.<sup>190</sup> This is due to the fact that PEPUDA gives effect to section 9 and is now the primary mechanism

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<sup>186</sup> E Bonthuys “Domestic Violence and Gendered Socio-Economic Rights: An Agenda for Research and Activism” (2014) 30 *SAJHR* 133 133.

<sup>187</sup> *Volks* para 60.

<sup>188</sup> Preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“PEPUDA”).

<sup>189</sup> S 39(2) of the Constitution.

<sup>190</sup> Clark & Goldblatt “Gender and Family Law” in *Gender, Law and Justice* (2007) 205.



prohibiting both public and private discrimination.<sup>191</sup> The Act has important implications for cohabitants, as it applies to all persons and the state.<sup>192</sup> Its application therefore extends to the private domain. Family relationships, contracts and wills are not excluded from its scope. A female cohabitant could potentially utilise PEPUDA to challenge the exploitative behaviour of her partner. This legislation could also serve as a powerful tool in challenging the law's traditional reluctance to penetrate the public/private divide.<sup>193</sup> In seeking to rely on PEPUDA, cohabitants would need to be cognisant of the negative precedent created in *Volks*. Nevertheless, it is worth examining the innovative and progressive provisions in PEPUDA.

PEPUDA has enriched the constitutional commitment to equality, in that it provides for a more detailed description of discrimination in section 1, whilst providing concrete mechanisms for promoting substantive equality. In relation to cohabitants, PEPUDA goes further than section 9 of the Constitution and specifically states that socio-economic status, family responsibility and family status can be potential grounds of discrimination. The grounds of socio-economic status, family responsibility and family status were not expressly included as listed prohibited grounds of discrimination under PEPUDA. This was in spite of active lobbying by a range of civil society groups.<sup>194</sup> PEPUDA does however, recognise the “overwhelming evidence of their importance” and thus included these grounds by way of a directive principle.<sup>195</sup> This facilitates an examination of the intersecting grounds of socio-economic and gender discrimination within the private sphere. Expressly addressing the interconnection between family responsibilities, their socio-economic impact and gender inequality has the potential

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<sup>191</sup> This is in accordance with the subsidiarity principle, in terms of which a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. Doing so would fail to recognise the import and the task conferred upon the legislature to respect, protect, promote and fulfil the rights in the Bill of Rights. See *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC); 2008 2 BCLR 99 (CC) (“*Pillay*”), para 40.

<sup>192</sup> S 6 of PEPUDA sets out a general prohibition of unfair discrimination that applies to both the state and any person.

<sup>193</sup> Liebenberg & O’Sullivan (2001) 21 *Acta Juridica* 70 89.

<sup>194</sup> Liebenberg & O’Sullivan (2001) 21 *Acta Juridica* 70 95.

<sup>195</sup> S 34 of PEPUDA provides for directive principles on HIV/AIDS, nationality, socio-economic status and family responsibility and status:

“(1) In view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status- (a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of 'prohibited grounds' by the Minister.”

to foster more responsive interpretations of fundamental rights for women. In this regard, PEPUDA highlights the need for constitutional law to acknowledge the specific vulnerabilities associated with relational access to socio-economic resources. It further reveals the need for proper oversight of, and accountability for, the manner in which socio-economic obligations are recognised, defined and enforced within private relationships.<sup>196</sup>

Of particular importance for cohabitants, is the definition of family responsibility as referring to a complainant's "spouse, partner, dependant, child or other members of his or her family in respect of whom the member is liable for care and support".<sup>197</sup> The Act therefore recognises that various forms of inequality and vulnerability arise within family relationships. PEPUDA also recognises the discrimination that exists against families that do not fit into the traditional mould, as well as the disadvantage arising through care-giving roles.<sup>198</sup>

In terms of its description of the prohibited grounds of discrimination, it specifically includes all of the grounds listed in section 9 of the Constitution, while including "any other ground" where that discrimination (i) causes or perpetuates existing systemic disadvantage; (ii) undermines the complainant's dignity; or (iii) "adversely affects the equal enjoyment of a person's rights" in a serious manner.<sup>199</sup> PEPUDA therefore specifically acknowledges the systemic nature of discrimination. This is important, as one of the key critiques against our equality jurisprudence is the tendency to focus on individual conceptions of dignity, as opposed to group-based disadvantage.<sup>200</sup>

PEPUDA specifically prohibits discrimination against women on the basis of gender and marital status, including conduct that unfairly impairs equal access to socio-economic resources, such as land and finance.<sup>201</sup> In terms of its emphasis on positive measures, designed to protect or advance persons disadvantaged by unfair discrimination, PEPUDA also draws an important linkage between the constitutional right to equality and socio-economic rights. For example, the Act specifically states that any law or conduct that limits women's access to social services, including health

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<sup>196</sup> Pieterse (2009) *SAJHR* 199.

<sup>197</sup> S 1 of PEPUDA.

<sup>198</sup> Liebenberg & O'Sullivan (2001) *Acta Juridica* 93.

<sup>199</sup> S 1(xxii) PEPUDA.

<sup>200</sup> Albertyn (2007) *SAJHR* 253; and Bonthuys (2015) *SALJ* 76.

<sup>201</sup> S 8(e) of PEPUDA.

and social security,<sup>202</sup> is unfair. PEPUDA also describes discrimination as any act or omission (including a law) that directly or indirectly withholds benefits, opportunities or advantages from any person, on one or more of the prohibited grounds,<sup>203</sup> while prohibiting the systemic inequality of access to opportunities resulting from the sexual division of labour.<sup>204</sup>

Of particular importance is the manner in which the Act has shifted the burden of proof when making out a claim for unfair discrimination, which is a lesser onus than the constitutional onus. Under the Constitution, a complainant would have to prove discrimination by their partner, on one of the listed grounds on a balance of probabilities. The burden of proof in PEPUDA was drafted, taking cognisance of the fact that discrimination claims are notoriously difficult to prove. Section 13 of PEPUDA provides for the burden of proof in relation to cases brought on a listed ground of discrimination in paragraph (a) under the specific prohibited grounds mentioned. PEPUDA also provides for cases where the alleged discrimination is on the basis of an unlisted prohibited ground in accordance with paragraph (b) of the definition. Under PEPUDA, the complainant has to make out a case that would not result in absolution from the instance.<sup>205</sup> Once the complainant has made out a *prima facie* case of discrimination, the onus shifts to the state or the respondent, to prove that the discrimination is fair.<sup>206</sup> In doing so, the respondent must prove either that the discrimination did not take place or that the conduct was not based on one or more of the prohibited grounds.<sup>207</sup> The Act sets out the specific factors that will aid the court in determining whether the discrimination is fair or unfair.<sup>208</sup> This list contains elements of section 36 of the Constitution, as well as elements of the test as developed in *Harksen v Lane NO*.<sup>209</sup>

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<sup>202</sup> S 8(g).

<sup>203</sup> S 1(viii).

<sup>204</sup> S 8(i).

<sup>205</sup> Liebenberg & O'Sullivan (2001) *Acta Juridica* 99.

<sup>206</sup> S 14(3).

<sup>207</sup> S 13.

<sup>208</sup> S 14.

<sup>209</sup> This case was referenced in part 3 3 2 of this study. In terms of the test for unfair discrimination as developed under the case of *Harksen*, the first aspect of the enquiry is whether an impugned provision differentiates between people or groups of people. The court then needs to determine if the differentiation amounts to discrimination and if such discrimination is unfair. If such discrimination is found to be unfair then it needs to be justified in terms of the limitations clause (s 36).

It is worth pausing to consider how a cohabiting woman could argue that her partner's attempt to evict her after a long-term relationship, characterised by significant family responsibility, discriminates unfairly against her. The specific grounds that she could rely on include the grounds of gender,<sup>210</sup> marital status<sup>211</sup> and family responsibility,<sup>212</sup> under the provisions of PEPUDA. Due to the shift in onus, after the complainant makes out a *prima facie* case, the onus will then shift to her partner seeking to evict her. He would have to prove that the eviction is justifiable and that he has taken reasonable steps in attempting to alleviate the detrimental consequences of the eviction.

A cohabitant seeking to evict his partner from their common home would, therefore, have to prove that his conduct is fair in the light of the existing social context and patterns of gender discrimination within our society. In examining the nature and extent of his discriminatory conduct, section 14 of PEPUDA will aid the court in determining whether his decision to evict his partner is fair. Examples of the factors referenced in section 14, include whether the eviction has a legitimate purpose, to what extent evicting his partner achieves this purpose and whether there are less restrictive and disadvantageous means to do so.<sup>213</sup>

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<sup>210</sup> "Prohibited grounds" are defined in section 1(xxii) of PEPUDA to include gender.

<sup>211</sup> S 1(xxii) of PEPUDA also specifically refers to marital status.

<sup>212</sup> S 34(1).

<sup>213</sup> S14 of PEPUDA provides that:

"(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

(a) The context;

(b) the factors referred to in subsection (3);

(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2) (b) include the following:

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity."

If the Equality Court finds that the eviction does amount to discrimination, PEPUDA empowers the Court with wide remedial powers under section 21. The potential remedies available under this section could be of particular use to cohabitants. The Court is empowered to make an order for damages,<sup>214</sup> they can order a settlement between the parties,<sup>215</sup> they can provide an order restraining individuals from partaking in discriminatory behaviour<sup>216</sup> and they can order that certain privileges that were unfairly removed be reinstated.<sup>217</sup> One example of the potential of this latter remedy could be ordering a respondent to reinstate their ex-cohabiting partner on his medical aid scheme, which implicates her right of access to health care services.<sup>218</sup> In the context of eviction, the court could order a financial settlement between the parties, or the court could order the evicting partner to pay damages, or to reinstate the caregiving partner's use of the property. This provision, if properly interpreted and enforced, has significant potential to shift conceptions of power and socio-economic responsibility in the context of cohabiting relationships. PEPUDA could, consequently, play a role in structuring more equitable socio-economic relations between male and female cohabitants.

In terms of its emphasis on positive measures designed to protect or advance persons disadvantaged by unfair discrimination, PEPUDA draws an important linkage between the constitutional right to equality and socio-economic rights. For example, the Act specifically states that any law or conduct that limits women's access to social services, including health and social security,<sup>219</sup> is unfair. PEPUDA also describes discrimination as any act or omission, including a law, which directly or indirectly withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.<sup>220</sup> The provisions underlying PEPUDA, therefore, have substantial potential to shift the focus in our law and to empower the courts to develop innovative remedies to assist cohabiting women. The innovative provisions in PEPUDA have, however, not yet been utilised optimally.

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<sup>214</sup> S 21(2)(d).

<sup>215</sup> S 21(2)(c).

<sup>216</sup> S 21(2)(f).

<sup>217</sup> S 21(2)(g).

<sup>218</sup> S 27(1)(a) of the Constitution.

<sup>219</sup> S 8(g).

<sup>220</sup> S 1(viii).

### 3 4 5 Inadvertent forms of cohabitation due to legislative gaps

This section primarily focuses on women married according to customary law and MPL, who are technically rendered domestic partners through the gaps in our legislative framework. After the Bill of Rights came into force, customary unions were officially recognised through the RCMA. While this social recognition was necessary and admirable, the family law system has been criticised for creating a hierarchical system, with civil marriage remaining at the apex. This is illustrated through the RCMA, which provides that a monogamous customary marriage can be converted into a civil marriage.<sup>221</sup> A civil marriage cannot, however, be converted into a customary marriage. This conveys the message that a civil marriage is still preferred to a customary marriage.<sup>222</sup> This perception is not only an academic understanding, as illustrated by the case of *K v P* (discussed above),<sup>223</sup> which highlights the specific vulnerability of customary wives in polygamous marriages.

The failure to recognise unregistered customary marriages in the RCMA is acknowledged as a significant and unfortunate lacuna in our law.<sup>224</sup> The result of this gap is that, in cases like *K v P*, the plaintiff cannot obtain the usual order concerning the proprietary and personal consequences accompanying a decree of divorce. In the event of the plaintiff seeking to claim a division of property or maintenance by virtue of her void marriage, she would therefore have to formulate a claim based on a breach of contract or on the dissolution of a tacit universal partnership.<sup>225</sup>

The RCMA further reveals that, even if social recognition is extended through legislation, there is still the possibility that certain relationships will not be recognised due to individuals failing to adhere to prescribed formalities. Unfortunately, many of these women usually believe that they are officially married and only become aware of their legal position once it is too late.<sup>226</sup> Instead of focusing on relationship

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<sup>221</sup> S 10 of the RCMA.

<sup>222</sup> D Bilchitz & M Judge “For Whom does the Bell Toll: The Challenges and Possibilities of the Civil Union Act for Family Law in South Africa” (2007) *SAJHR* 466-499; P De Vos (2007) *SAJHR* 462; and P Bakker (2009) *JJS* 31.

<sup>223</sup> See part 3 3 3 of this chapter.

<sup>224</sup> This is partially due to the fact that, according to the government, only between 4 and 8 per cent of customary marriages are registered at all. See RJ Kovacs, S Ndashe & J Williams “Twelve Years Later: How the Recognition of Customary Marriages Act of 1998 is Failing Women” (2013) 13 *Acta Juridica* 273 278.

<sup>225</sup> *K v P* para 11.

<sup>226</sup> Meyersfeld (2010) *CCR* 275.

formalities, recognising and developing the socio-economic rights and duties between domestic partners would provide protection to a greater number of women. Focusing on the socio-economic consequences of relationships is also more responsive to the needs of customary wives. This is due to the fact that customary marriages develop gradually, as opposed to coming into effect after one ceremony, as is the case with civil marriages.<sup>227</sup> The focus should thus be on the relational socio-economic implications of terminated relationships. Simply extending the RCMA or the Marriage Act to apply to cohabitants also fails to address the fact that it is the underlying patterns of relating between men and women that need to be addressed. In contrast to only focusing on relationship formalities, these relational patterns and their socio-economic consequences also deserve consideration

The RCMA is vital in South Africa, given that it affects a significant majority of the female population. These women are also disproportionately affected by poverty. Given the living nature of customary law, the drafters of the RCMA attempted to adopt a nuanced approach to these marriages and consequently did not provide strict guidelines in terms of formalising these unions. In spite of this, there is a disconnection between the living customary law and the administrative practices that have become increasingly determinative of one's marital status.<sup>228</sup> Research shows that many women married according to customary law who attempt to register their marriage experience bureaucratic obstacles from officials at the Department of Home Affairs.<sup>229</sup> This prevents women from being able to prove the existence of their unregistered marriage. The emphasis on form over function intersects with inequitable social norms, such as those pertaining to the rise in individualisation within our society. The previously crucial role of women in the agricultural economy has thus become less significant, resulting in a decrease in women's bargaining positions.<sup>230</sup> Increasing numbers of widows and deserted wives face greater vulnerability to eviction from their married homes. Land shortages have also increased, with the significance of agricultural production and women's labour, subsequently devalued.<sup>231</sup>

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<sup>227</sup> Kovacs, Ndashe & Williams (2013) *Acta Juridica* 274; and A Classens & D Smythe "Marriage, Land & Custom: What's Law Got To Do With It?" (2013) 13 *Acta Juridica* 1 1-2.

<sup>228</sup> Classens & Smythe (2013) *Acta Juridica* 2.

<sup>229</sup> 2.

<sup>230</sup> 2.

<sup>231</sup> 2.

Unsurprisingly, increasing numbers of African mothers are advising their daughters against marriage.<sup>232</sup>

This reveals the complexity surrounding the intersection between legal rules and social norms, as well as the need to be cautious in terms of painting all unmarried women with the same brush. For example, it cannot be assumed that all unmarried women wish to be married. The point of departure remains, however, that regardless of the form of a relationship, the law needs to provide better regulation of the resources built up during these relationships. In particular, the law needs to be more responsive to the underlying gender dynamics shaping these relations to protect vulnerable parties from eviction and destitution upon the dissolution of their relationship. The legal regime therefore needs to pay closer attention to how men and women relate to one another.

A number of these vulnerabilities are shared by women married according to MPL.<sup>233</sup> There is a proposed Bill in the form of the 2010 “Code” of MPL titled the Muslim Marriages Bill. It appears that the Bill has remained with the Commission for Gender Equality since 2011, without any substantial development.<sup>234</sup> While there have been certain incremental developments of the law in terms of protecting Muslim wives, the delay in enacting the Bill is problematic.

One example of an incremental development is the graduation of 100 Muslim clerics (or imams) as marriage officers in April of 2014. This development means that when an imam marries a Muslim couple, they are empowered to conduct the civil ceremony at the same time. Simultaneously conducting a civil marriage would entitle Muslim women to approach the courts to dissolve their marriage or to apply for the benefits provided under the Marriage Act. A civil ceremony does not happen automatically though and must be agreed upon. The training and graduation of the imams was in terms of a pilot project initiated by the South African Department of Home Affairs to

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<sup>232</sup> D Cooper, E Moore & J E Mantell “Renegotiating Intimate Relationships with Men: How HIV Shapes Attitudes and Experiences of Marriage for South African Women Living with HIV: ‘Now in my life, everything I do, looking at my health’” (2013) 13 *Acta Juridica* 218 218.

<sup>233</sup> Moosa “The Dissolution of a Muslim Marriage” in *Law of Divorce* 281.

<sup>234</sup> H Abrahams “South African Engagement with Muslim Personal Law: The Women’s Legal Centre, Cape Town and Women in Muslim Marriages” (2011) 15 *Feminist Africa* 39 52; and C Albertyn “Religion, Custom and Gender: Marital Law Reform in South Africa Family law” (2013) 9 *International Journal of Law in Context* 386 387.



enable them to officiate unions.<sup>235</sup> The imams completed a three-day course during which they learned about the Marriage Act and wrote an official exam. The Director of the Women's Legal Centre, Hoodah Abrahams, has pointed out that having Muslim clerics as official marriage officers has important implications for Muslim women. However, she also observed that while this entailed a step in the right direction, it is not the equivalent of enacting the Muslim Marriages Bill.<sup>236</sup> Muslim marriages are still not officially recognised under the Marriage Act. In addition to this, the practices governing Muslim marriages and their dissolution still cause disadvantage for many women. As a result, a significant number of Muslim women are socio-economically vulnerable upon the termination of their relationship.

### 3 4 6 Civil Union Act 17 of 2006

Shortly after the ground-breaking decision of *Fourie*, same-sex unions were recognised through the Civil Union Act 17 of 2006 ("CUA"). Under the CUA, a civil union is a voluntary monogamous union of two persons, who are both 18 years or older, which is solemnised and registered by way of a marriage or a civil partnership, in accordance with the CUA.<sup>237</sup>

The co-existence of the Marriage Act 25 of 1961 and the CUA does, however, offer a further example of the hierarchical nature of our family law regime. This co-existence insinuates that, rather than incorporating same-sex unions into the common law definition of marriage, civil marriages remain the preferred form of intimate relationship.<sup>238</sup> It reveals the tendency to protect form over function, as well as the persistent neglect of the human rights of individuals in the context of personal relationships.

A further indication of inequality is that the CUA allows *ex officio* marriage officers appointed in terms of the Marriage Act 25 of 1961 to object to solemnising a same-

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<sup>235</sup> Legalbrief Today "Minister ordered to provide Nkandla documents" (2014) Issue number 3502 1 <<http://legalbrief.co.za/story/muslim-marriages-finally-recognised/>> (accessed 30-04-2014); Department of Home Affairs (DHA) "How to Register a Muslim Marriage in South Africa" (2015) 1 <<http://www.ciibroadcasting.com/2015/01/28/how-to-register-a-muslim-marriage-in-south-africa/>> (accessed 10-10-2015).

<sup>236</sup> 1.

<sup>237</sup> S 1 of the Civil Union Act ("CUA") 17 of 2006.

<sup>238</sup> Bakker (2013) *PELJ* 116.

sex union on grounds of conscience, religion and belief.<sup>239</sup> The same Act does not, however, allow marriage officers to object to solemnising a union between heterosexual couples.<sup>240</sup> While seeking to balance the rights to freedom of religion<sup>241</sup> and equality, this provision reinforces the perception that heterosexual relationships are the norm, while same-sex unions are the deviation.

This hierarchy is problematic, as legal rules play a crucial role in shaping gendered relations and social perceptions. The CUA underscores the need to reconceptualise our legal response to relationships in a way that is not governed by heterosexual marriage norms, liberal conceptions of choice and patriarchal paradigms. These hierarchal social norms need to be addressed and questioned if we are to develop the South African family law regime in accordance with the Constitution.<sup>242</sup>

It is thus important to utilise a relational feminist interpretation of socio-economic rights to illustrate the norms of behaviour that we as a society either endorse or challenge through the application of laws. A relational feminist framework is appropriate, as it questions whether these social norms are ultimately compatible with the core constitutional values of autonomy, dignity and equality.

The existing hierarchy in the legislative framework further underscores the need for a shift in focus towards a relational feminist conception of the socio-economic rights of vulnerable family members, particularly female cohabitants. This relational feminist response is necessary if we are to undermine the heteronormative and patriarchal paradigms currently underlying our family law regime.

### 3 4 7 Domestic Partnerships Bill of 2008

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<sup>239</sup> S 6 of the CUA.

<sup>240</sup> S 6 of the CUA. See also P de Vos & J Barnard "Same-sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga" (2007) 124 *SALJ* 795 821.

<sup>241</sup> S 15 of the Constitution.

<sup>242</sup> The need to recognise and address the 'background legal rules' that govern our society has been emphasised by Nancy Fraser in her article: N Fraser "From Redistribution to Recognition" in N Fraser (ed) *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (1997) 20 20; and JM Modri "The Rhetoric of Rape: An Extended Note on Apologism, Depoliticisation and the Male Gaze in *Ndou v S*" (2014) 30 *SAJHR* 134 134.

The *Volks* case is widely regarded as disappointing in terms of extending important legal rights to opposite-sex cohabitants.<sup>243</sup> Despite the disappointing outcome, attempts to address the lack of a coherent legislative framework governing cohabitants began more than a decade ago. For example, the South African Law Reform Commission (“SALRC”), launched an investigation into the legal position of cohabitation as early as 1998. This culminated in its March 2006 report.<sup>244</sup>

In this report the various policy arguments regarding the legal recognition of domestic partnerships were set out and examined. Of particular importance was the report’s discussion of the argument that recognising domestic partnerships would threaten the sanctity of marriage. The report also discussed the argument that it would infringe upon the private autonomy of individuals, as well as the argument that recognising domestic partnerships would encourage polygamy.<sup>245</sup>

In response to these arguments, it was pointed out, that the value of autonomy should not override the needs of women who suffer upon the termination of their relationship.<sup>246</sup> In addition, it was said that women are often unable to enforce their interests and may inadvertently sign away their rights due to relational power imbalances.<sup>247</sup> For example, inequitable relations reveal that private law rights and mechanisms are often inadequate if the relational subordination experienced by women is not addressed. Adopting an individualistic private law approach is therefore, insufficiently responsive to the socio-economic realities in our society. In order to prevent the reinforcement of female disadvantage, the relational implications of failing to regulate cohabitation need to be addressed. In order to adequately determine how to structure more equitable socio-economic relations between cohabiting men and women, a relational feminist analysis of the socio-economic consequences of terminated domestic relations is thus required.

In examining potential means of regulating cohabitation, the SALRC’s report considered foreign jurisdictions, focusing on how domestic partnerships are regulated in Canada, the USA, Australia, the Netherlands and Sweden. After canvassing the different legal approaches and the policy arguments for and against the regulation of

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<sup>243</sup> E Bonthuys “Developing the Common Law of Breach of Promise and Universal Partnerships: Rights to Property Sharing for all Cohabitants?” (2015) 132 *SALJ* 76 76.

<sup>244</sup> SALRC *Domestic Partnerships Project 118 Report* (2006) 91.

<sup>245</sup> SALRC *Domestic Partnerships Project 118 Report* (2006) 91.

<sup>246</sup> 79.

<sup>247</sup> 79.

cohabitation, the report provided recommendations regarding law reform, which are expanded upon in chapter five of this study.

These recommendations resulted in the publication of the 2008 draft Domestic Partnerships Bill, where public comments were invited and received.<sup>248</sup> In its *Strategic Plan for 2008/2009-2010/2011*, the Department of Home Affairs (“DHA”) specifically stated that the Bill was one of the legislative changes that was planned to occur over the next two to three years.<sup>249</sup> However, this Bill has not been amended since 2008 and as of July 2016, is still with the SALRC.<sup>250</sup> Despite extensive pressure from the public, there has been no clear indication as to whether and when it will be tabled before Parliament. It is suggested that the significant seven-year delay is due to the need to set up registration infrastructure and to train officers. This has, however, not been confirmed by the DHA.

In terms of content, the Bill provides for two types of partnerships (registered partnerships and unregistered partnerships), with chapter three of the Bill providing for a formal registration process. In terms of formalising a domestic partnership, parties enter into a public commitment through registration. This can be undertaken by two persons (irrespective of their sex), neither of whom is allowed to be married, in a civil union or other registered domestic partnership.<sup>251</sup> After registration, many of the legal consequences that attach to a valid marriage are extended to the partners. For instance, according to the Bill registered domestic partners will be placed under an *ex lege* duty to support one another according to their respective means and needs. This will allow unmarried cohabitants in registered partnerships to claim maintenance.

In terms of the property regime, registered domestic partnerships are by default out of community of property. The default matrimonial system of a civil marriage is, in contrast, in community of property. The proposed matrimonial property system for registered cohabitants seems inequitable, as one of the purposes of this Bill should be

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<sup>248</sup> SALRC *Domestic Partnerships Project 118 Report* (2006) 19.

<sup>249</sup> DHA *Department of Home Affairs Strategic Plan: 2008/2009-2010/2011* (2008) 17 <<http://www.info.gov.za/view/DownloadFileAction?id=94074>> (accessed 12-04-03).

<sup>250</sup> There was a section on domestic partnerships in the first Draft Civil Union Bill in GG 29237 of 21-09-2006. The Commission for Gender Equality has also made submissions urging promulgation of the Bill. See B Smith “The Interplay between Registered and Unregistered Domestic Partnerships under the Draft Domestic Partnerships Bill, 2008 and the Potential Role of the (Contextualised) Putative Marriage Doctrine” (2011) 128 *SALJ* 560 563. The current draft bill appears in GN 36 in GG 30663 of 14-01-2008. See also A Barratt (2015) *Stell LR* 111.

<sup>251</sup> Clauses 4-6 of the Domestic Partnerships Bill of 2008.

to protect vulnerable caregivers in domestic partnerships from being exploited upon the dissolution of their relationship.

One positive change that will be brought about by the enactment of the Bill is that, during the subsistence of the relationship, both parties in a registered domestic partnership are entitled to occupy the family home, regardless of who owns or leases the property.<sup>252</sup> While this development is positive, it is limited to registered domestic partnerships. Regardless of whether the Bill is enacted, a domestic partner who is subjected to domestic violence during their relationship can apply to have their abusive partner removed from the family home through the mechanisms of the DVA.

A further consequence of the Bill for registered domestic partnerships is that domestic partners are prohibited from disposing of joint property without the written consent of their partner. Provision is also made for registered domestic partners to automatically qualify as a “spouse” for the purposes of the ISA and the MSSA.

With regard to unregistered partnerships, the Bill makes provision for judicial discretion in terms of regulating the consequences of these relationships.<sup>253</sup> There are, therefore, no *ex lege* consequences in terms of these partnerships. Instead, either one of the parties can apply to a competent court for an order relating to maintenance, intestate succession and property division.<sup>254</sup> When a court is faced with making an order in terms of any of these issues, the Bill provides a list of factors that the Court must consider.

With regard to property division, the Court must consider the nature and duration of the relationship and the common residence.<sup>255</sup> It must also consider the financial interdependence between the partners, the ownership of property, the degree of mutual commitment, the presence and care of children and the performance of household duties.<sup>256</sup> While these factors are integral, there is no explicit mention of the need to prioritise the socio-economic needs and rights of vulnerable partners.

When making a maintenance order, the factors to be considered are somewhat similar.<sup>257</sup> Included under these factors are the age of the parties; their standard of living; their respective earning capacities; and their ability to support themselves in

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<sup>252</sup> Clause 11.

<sup>253</sup> Clauses 26-29.

<sup>254</sup> Clause 27.

<sup>255</sup> Clause 26(2)(a)-(b).

<sup>256</sup> Clause 26(c)-(i).

<sup>257</sup> Clause 27(2).

light of responsibilities for children. The list of factors also specifically refers to the future prospects of the parties, as well as their financial needs.

One major criticism regarding the Domestic Partnerships Bill is that it provides very little protection to unregistered cohabitants, with the rights of these parties primarily left up to judicial discretion. Primarily focusing on registered domestic partners is problematic, as the individuals who will be most in need of legal protection will be those who have not adhered to any legal formalities. Research has emphasised this point, in that most socio-economically vulnerable cohabitants are unaware of their unregulated status or the potential remedies available to them. The most vulnerable cohabitants would, therefore, most likely continue to fall through the cracks in the legal system. The Bill's failure to address the gendered nature of domestic partnerships and the socio-economic consequences of terminated relationships is also problematic. The predominant focus on registered partnerships and the neglect of the socio-economic impact of cohabitation undermines one of the central purposes of family law, which is to protect vulnerable family members.<sup>258</sup> Proposed amendments to the Bill, in accordance with a relational feminist interpretation of the socio-economic rights of female cohabitants, are set out in further detail in chapter five of this study.<sup>259</sup>

### 3 4 8 Conclusion: A separate and unequal family law system

The South African family law regime is comprised of a disparate number of statutes and draft legislation.<sup>260</sup> While the DVA and PEPUDA offer certain limited remedies for cohabitants, they emphasise the need for a more coherent and comprehensive legislative response to the socio-economic needs of female cohabitants upon the termination of their relationship. Certain rights protected within legislation have also been extended on an *ad hoc* basis through judicial decisions based primarily on the right to equality and non-discrimination in section 9 of the Constitution. The most obvious complication arising from this framework is that the average person does not know the legal consequences of his or her intimate relationship due to the complex

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<sup>258</sup> Bonthuys (2004) *SALJ* 897; and Sloth-Nielson & Van Heerden (2003) *International Journal of Law, Policy and the Family* 121.

<sup>259</sup> See part 5 4 of chapter five of this study.

<sup>260</sup> Bakker (2013) *PELJ* 118.

system of rules applicable to these various relationships.<sup>261</sup> This is a particular problem when it comes to unmarried cohabitants, as these relationships are predominantly prevalent in the poorer and illiterate sections of our society. A further consequence is the creation of a hierarchy of intimate relationships in South Africa. This was not the intention of the legislature, which endeavoured to provide the same recognition to all intimate relationships. It is, however, a practical consequence of regulating intimate relationships by different Acts.<sup>262</sup>

One of the biggest discrepancies with regard to developing the family law regime is between same-sex cohabitants and heterosexual cohabitants. While the Court has been willing to aid same-sex relationships, there has been an evident reluctance to extend protection to heterosexual cohabitants, as evinced by the *Volks* decision. This is primarily due to the reasoning that heterosexual couples have the choice to enter into a civil marriage. This results in same-sex cohabitants receiving more protection under our law than heterosexual cohabitants.<sup>263</sup> The traditional justification for this position has, however, been removed by the enactment of the Civil Union Act 17 of 2006, which now provides same-sex couples with the choice to enter into a civil union.

In terms of the discrepancies between these two relationships, there are certain common law developments,<sup>264</sup> which have reduced the legal differences between heterosexual and same-sex cohabitants to the context of intestate succession.<sup>265</sup> Discussions surrounding the privileged position of same-sex cohabitants often, however, result in moralistic debates regarding who is more deserving of protection.<sup>266</sup> While same-sex couples have undoubtedly been subjected to severe discrimination, which needs to be addressed, this does not justify leaving vulnerable family members in heterosexual domestic partnerships destitute upon the breakdown of their relationship. These discussions also run the risk of obscuring the need to eradicate all forms of discrimination from our family law system. Focusing on the socio-economic rights of partners may also be necessary for same-sex couples, as certain couples may refrain from entering into a civil union, given the high incidence of homophobia in

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<sup>261</sup> 118.

<sup>262</sup> 118.

<sup>263</sup> Smith "The Dissolution of a Domestic Partnership" in *Law of Divorce* 399.

<sup>264</sup> These common law developments are discussed in part 3 5 of this chapter.

<sup>265</sup> Smith "The Dissolution of a Domestic Partnership" in *Law of Divorce* 399.

<sup>266</sup> See for example, H de Ru "A Critical Analysis of the Retention of Spousal Benefits for Permanent Same-Sex Life Partners after the Coming into Operation of the Civil Union Act 17 of 2006" (2009) 23 *Speculum Juris* 111 114; and Meyerson (2010) *CCR* 297.

South Africa.<sup>267</sup> The high levels of poverty facing South Africa further justify addressing the manner in which our society currently organises relational access to socio-economic resources.

An examination of the draft Domestic Partnerships Bill through a relational feminist lens highlights specific issues that need to be addressed. The first issue is the Bill's failure to adequately acknowledge the existing social context. This is illustrated by the insufficient protection provided to unregistered domestic partnerships, which research reveals are the relationships specifically requiring protection. The Bill is also informed by a liberal conception of choice and is not conducive to fostering social transformation through its formal approach to equality. The potential implications for amending the Bill in terms of a relational feminist framework are explored in detail in chapter five.<sup>268</sup> Given that there is no comprehensive legislative framework governing the status of cohabitants, it is necessary to set out the applicable common law framework regulating these relationships.

### **3 5 Common law framework governing cohabitation**

#### **3 5 1 Introduction**

The socio-economic consequences of terminated relationships are regulated through different statutes. Civil marriages and civil unions are, for example, terminated through the provisions of the Divorce Act 70 of 1979. Customary marriages are dissolved in terms of section 8 of the RCMA,<sup>269</sup> while Muslim marriages are dissolved according to MPL. In contrast, a domestic partnership is simply terminated by the death of one of the parties or through their separation.<sup>270</sup> As highlighted above, marriage rates are declining in South Africa, particularly amongst African women.<sup>271</sup> Due to formalistic administrative anomalies, even women who are married according to customary law often fall through the gaps in our legal system, inadvertently

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<sup>267</sup> Smith "The Dissolution of a Domestic Partnership" in *Law of Divorce* 399.

<sup>268</sup> See part 5 3 of chapter five of this study.

<sup>269</sup> Certain provisions of the Divorce Act 70 of 1979 are also applicable to customary marriages. For example, ss 6, 7, 8, 9 and 10 apply to the dissolution of a customary marriage. See also ss 8(3) and 8(4) of the RCMA.

<sup>270</sup> Smith "The Dissolution of a Domestic Partnership" in *Law of Divorce* 427.

<sup>271</sup> See part 1 1 1 of chapter one of this study.



solidifying their status as cohabitants. The point of departure remains that a domestic partnership should be dissolved in a manner that evinces care and concern for all parties involved.

While parties to a domestic partnership are able to enter into an agreement to regulate the socio-economic consequences of their separation, there is no automatic “common law partner” as is often believed. In relation to the family property, the common law makes no provision for unmarried cohabitants to share in each other’s property.<sup>272</sup> If the family home is not registered in the name of both partners, or if the lease is not in both partners’ names, the cohabitant whose name is not registered does not have a right to occupy the family home. As a result, when domestic partnerships are terminated, it is disproportionately women and children who are forced to leave the family home.<sup>273</sup> Given this legislative gap, it is necessary to examine the common law mechanisms that are used to protect cohabitants.<sup>274</sup>

### 3 5 2 Contracts

One particular area of common law that cohabitants are forced to rely on is contract law. In this regard, cohabitants are able to enter into an express contract<sup>275</sup> (as noted earlier) or they can enter into a tacit contract, such as a tacit universal partnership. South African law has thus progressed in that it no longer regards cohabitation contracts as *contra bonos mores*.<sup>276</sup>

Relying on contract law is problematic though, due to the fact that these common law rules are informed by liberal conceptions of freedom and fairness. These supposedly “neutral rules” advantage those who are already powerful,<sup>277</sup> entrenching the unequal *status quo*.<sup>278</sup> When interpreting contracts, for instance, the courts often

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<sup>272</sup> Smith “The Dissolution of a Domestic Partnership” in *Law of Divorce* 428.

<sup>273</sup> Alliance for the Legal Recognition of Domestic Partnerships (ALRDP) *Submission to the Department of Home Affairs on the Draft Partnerships Bill, 2008* (2008) 3 <<http://www.tlac.org.za/wp-content/uploads/2012/01/domestic-partnership-alliance-submission-on-the-draft-domestic-partnerships-bill.pdf>> (accessed 26-02-2013); and Clark & Goldblatt “Gender and Family Law” in *Gender, Law and Justice* 242.

<sup>274</sup> SALRC *Report on Domestic Partnerships* (2006) 39.

<sup>275</sup> Barratt (2015) *Stell LR* 111.

<sup>276</sup> 112.

<sup>277</sup> J Nedelsky “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 *Yale J of Law and Feminism* 7 19.

<sup>278</sup> 19.

formalistically equate family law contracts with commercial agreements. This is in spite of considerable academic scholarship recommending a distinctive approach between commercial contracts, usually negotiated at arms-length, and contracts involving intimate partners that impact upon access to basic human needs.<sup>279</sup> This distinction is also necessary when it comes to family law, as these relations are complex and often characterised by subtle power struggles based on economic and emotional dependency.

Given that the underlying rules governing contract law have traditionally been formulated to favour the party with stronger bargaining power,<sup>280</sup> these rules often facilitate the exploitation of less powerful family members. The strict enforcement of these contracts also often results in substantial gender inequality.<sup>281</sup> The tendency to focus on contractual paradigms therefore allows the courts to effectively ignore other fundamental human rights issues within family law cases.

The common law's cherished value of individual autonomy is, at times, meaningless in a society as unequal as South Africa.<sup>282</sup> Scholars have warned that if these rules remain unquestioned and untransformed, the common law will continue to exercise an inhibiting effect on the Constitution's transformative project, possibly undermining it altogether.<sup>283</sup> It is necessary to pay greater attention to the manner through which the South African common law currently structures socio-economic responsibility within the private sphere. As women are socially expected to be altruistic when it comes to their relationships, their bargaining power is often undermined when concluding family contracts.<sup>284</sup> The feminisation of poverty and the lack of adequate services also prevent many women from accessing socio-economic resources independently. Legal responses to these relationships therefore need to acknowledge and address this social reality.

Employing an individualistic contractual paradigm to relationships is further problematic, as only those obligations that are expressly undertaken will be

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<sup>279</sup> G Lubbe "Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law" (2004) 121 *SALJ* 395 423; E Bonthuys "Family Contracts" (2004) 121 *SALJ* 879 880; and Heaton (2005) *SAJHR* 555.

<sup>280</sup> E Bonthuys (2004) *SALJ* 879 880.

<sup>281</sup> Heaton (2005) *SAJHR* 555.

<sup>282</sup> Davis & Klare (2010) *SAJHR* 411.

<sup>283</sup> Davis & Klare (2010) *SAJHR* 411; and Albertyn (2007) *SAJHR* 253.

<sup>284</sup> Bonthuys (2004) *SALJ* 897.

enforced.<sup>285</sup> An individualistic contractual paradigm neglects the broader purposes and values underlying socio-economic rights, such as the need to ensure a more humane distribution of resources and the need to protect existing access to socio-economic resources.

### 3 5 3 Universal partnerships

One of the most significant developments with regard to unmarried cohabitants is the extension of the universal partnership by the Supreme Court of Appeal. While there are different types of universal partnerships, the most frequently encountered form in family law is the *societas universorum bonorum*.<sup>286</sup> In terms of this partnership, the partners agree to share in all current and future profits acquired individually or collectively from commercial undertakings or otherwise. An example is provided in *Butters v Mncora* (“*Butters*”),<sup>287</sup> where the Supreme Court of Appeal utilised this common law construction to provide protection to a woman who had been living with her partner for nearly twenty years.<sup>288</sup>

After being involved for almost two decades, the respondent had accumulated a significant amount of assets, while the applicant had primarily remained responsible for the maintenance of the family home and their children.<sup>289</sup> As is often the case, the family home and other properties were all registered in the name of the respondent only. Due to the fact that the applicant had no right to occupy the family home,<sup>290</sup> she was under an obligation to leave the family home upon the dissolution of her relationship. After her partner sought to evict her, the applicant claimed in reconvention that she and the respondent had entered into a tacit universal partnership. In terms of determining whether a tacit partnership had come into being, the court pointed out that

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<sup>285</sup> Pieterse (2009) *SAJHR* 214.

<sup>286</sup> When referring to the elements of a tacit universal partnership, the court in *Butters v Mncora* 2012 4 SA 1 (SCA); [2012] 2 All SA 485 (SCA) (“*Butters*”) in para 11 that:

“The three essentials are, firstly, that each of the parties brings something into the partnership or bind themselves to bring something into it, whether it be money or labour or skill. The second element is that the partnership business should be carried on for the joint benefit of both parties. The third is that the object should be to make a profit.”

<sup>287</sup> *Butters* para 11.

<sup>288</sup> Para 1.

<sup>289</sup> Para 8.

<sup>290</sup> These are rights that are conferred under the common law definition of marriage, which excludes cohabitants.

it must decide whether it is more probable than not, based on the conduct of the parties, that they had entered into a universal partnership.<sup>291</sup> The evidentiary burden in this regard, rests on the party claiming that there is a tacit universal partnership. The socio-economic needs of cohabitants do not, therefore, play a role in determining whether there is a tacit universal partnership.

In terms of this burden of proof, cohabitation does not in and of itself provide sufficient evidence of a universal partnership. According to the Supreme Court of Appeal, the first requirement that needs to be satisfied is that both parties must have brought something into the relationship, or bound themselves to bring something into the relationship.<sup>292</sup> The second requirement is that the partnership business must be conducted for the joint benefit of both parties. The final requirement is that the object of the partnership should be to make a profit. With regard to this final requirement, the court in *Butters* specifically pointed out that the partnership need not be restricted to a commercial enterprise.<sup>293</sup> For example, one party's caring work can allow their partner the freedom to focus the majority of their time and energy on pursuing their career and increasing their earning potential. This often results in the employed partner profiting through improving their skills and accumulating additional assets in their name.

The Court developed the law to recognise the commercial value of caring work and held that this is sufficient to constitute a contribution.<sup>294</sup> This extension of the universal partnership is heralded for creating an avenue by which cohabitants can circumvent the formalistic approach that was adopted in *Volks*. Universal partnerships therefore allow cohabitants to lay claim to some of the financial assets that were accumulated during the existence of the partnership.<sup>295</sup> The majority's decision has also been heralded for establishing a precedent for a presumption that domestic partners who have cohabited over a significant period of time intend to deal fairly with each other.<sup>296</sup> The decision in *Butters*<sup>297</sup> arguably establishes that a more equitable sharing of partnership property between cohabitants is "presumptively fair".<sup>298</sup>

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<sup>291</sup> *Butters* para 18.

<sup>292</sup> Para 11.

<sup>293</sup> Para 8.

<sup>294</sup> Para 19.

<sup>295</sup> *Volks* paras 53-60. See also Bonthuys (2015) *SALJ* 76 and Barratt (2015) *Stell LR* 111.

<sup>296</sup> Barratt (2015) *Stell LR* 111.

<sup>297</sup> *Butters* para 8.

<sup>298</sup> Barratt (2015) *Stell LR* 111.

While the gendered value of this extension needs to be recognised, this protection may not be sufficient for the poorest members of our community. One reason for this is that this remedy requires a certain amount of legal knowledge and sophistication. It also presupposes equal bargaining power between the partners.<sup>299</sup> There is, furthermore, a level of uncertainty as to whether a court will definitely be willing to infer a contract,<sup>300</sup> while it is difficult to predict the specific terms that will be inferred.<sup>301</sup> For example, in the case of *Zulu v Zulu* (“Zulu”),<sup>302</sup> which involved a polygamous relationship, the High Court was reluctant to recognise a tacit universal partnership. The Court referred to the three requirements of a universal partnership, as well as the general requirement that all contracts must be lawful. The High Court emphasised that in order for the agreement to be valid all the requirements must be met.<sup>303</sup> As the deceased in this case was previously married in community of property, the subsequent contract between himself and the applicant was held to be unlawful. The Court therefore found that the contract of partnership lacked an essential element, and was therefore invalid. The courts have furthermore, only tended to recognise universal partnerships where the parties were engaged, while less than half of the estate is always awarded to the caregiving (female) cohabitant.

In addition, while the court in *Butters* provided relief to the applicant, the manner in which the minority judgment analysed and evaluated the evidence to determine the

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<sup>299</sup> Smith “The Dissolution of a Domestic Partnership” in *Law of Divorce* 440.

<sup>300</sup> An example of a case where the court was unwilling to infer a tacit universal contract on behalf of the applicant is *Sepheri v Scanlan* 2008 1 SA 332 (C). In this case, the plaintiff and the defendant were involved in a lengthy relationship, which spanned almost a decade. In the evidence that was presented before the court, it was revealed that they became engaged in 1998, during which time they cohabited together abroad. During their relationship the defendant provided economically for the plaintiff, while discouraging her from seeking employment, although she was qualified to do so. In 2002, the defendant purchased property in Cape Town which he registered in his name only. Despite frequent requests by the applicant, the defendant refused to register her as a co-owner of the property. The plaintiff specifically claimed that he repeatedly told her that the property was “theirs”. Ultimately the defendant was able to evict the plaintiff on the basis of his property rights. This was in spite of the fact that they were involved in a lengthy relationship during which she made certain socio-economic sacrifices for the relationship. While this is not to say that he should be unreasonably burdened with fulfilling her socio-economic rights, given their lengthy relationship, her rights should at least be considered upon the termination of their relationship. The connection between his power to exclude and her socio-economic disadvantage should furthermore be given greater recognition. Even if it was ultimately decided to maintain that right of exclusion, the decision would then at least be made in full consciousness of the patterns of relationships (of power, responsibility and privilege) that the law is ultimately reinforcing in South Africa.

<sup>301</sup> Barratt (2015) *Stell LR* 117.

<sup>302</sup> 2008 4 SA 12 (D) [2008] ZAKZHC 10 (“Zulu”).

<sup>303</sup> *Zulu* page 6.

existence of the tacit partnership reveals problematic modes of reasoning.<sup>304</sup> Although the majority judgment was more progressive in this case, the minority judgment undermined the value of caring work and simultaneously approved the exploitation of caregivers.<sup>305</sup> This is illustrated through the minority judgment's statement that, when cohabitation occurs over a long period of time, it is likely that the principal breadwinner will contribute substantially to the needs of the family by providing accommodation, food, clothing, education, transport and healthcare.<sup>306</sup> The minority judgment of Judge Heher, Judge Cachalia concurring, went on to state that the other partner, who is usually female, will stay home and undertake the caring work of overseeing the needs of the family.<sup>307</sup>

According to the minority judgment, these are the natural incidents of cohabitation, just as they are of marriage. The minority went on to state that even though this arrangement happened in this case, it contributed nothing to the present enquiry (of whether there was a tacit agreement to enter into a universal partnership). This is due to the fact that this arrangement is supposedly "equivocal, absent some evidential feature that links them to the special intention that attaches to a universal partnership".<sup>308</sup> The minority judgment concluded by stating that if a cohabitee lays claim to a share of his or her partner's estate, it does not assist that person to argue that he or she will be left with nothing without such an order.<sup>309</sup> In the minority's opinion, the social context of power imbalances between cohabitants and how this shapes their feasible choices are irrelevant to determining whether the parties have entered into a tacit universal partnership. This reasoning by the minority also ignored how such rules and modes of reasoning continue to structure inequitable relations between men and women. In contrast to this approach, a relational feminist lens reveals how the "natural incidents" of cohabitation inevitably impact upon the choices and the contracts of the cohabiting partners. These patterns of relating are furthermore, not simply the natural incidents of our society. They require examination, particularly with regard to the need to give effect to the spirit, purport and objects of the Bill of Rights.<sup>310</sup>

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<sup>304</sup> *Butters* para 37.

<sup>305</sup> The minority judgment was decided by Judge Heher JA.

<sup>306</sup> *Butters* para 37.

<sup>307</sup> Para 37.

<sup>308</sup> Para 37.

<sup>309</sup> Para 37.

<sup>310</sup> *K v Minister of Safety and Security* 2005 6 SA 419 (CC); 2005 9 BCLR 835 (CC) para 17.

The reasoning in the minority judgment implies that the natural consequences of cohabitation entail one partner sacrificing their career to care for their family without any perceived entitlement to share in their partner's resources if their relationship ends. This reasoning illustrates how sexism can be so deeply entrenched within our society that it appears to be natural.<sup>311</sup> A relational feminist analysis foregrounds these underlying assumptions. Family law rules need to be further examined in terms of the gendered relational patterns they are either exacerbating or undermining. For example, these underlying assumptions render the contributions provided by caregivers as something that is simply to be expected, even if they end up with nothing once their relationship ends. The implication of this perspective is that exploiting women (or caregivers) is something that is socially acceptable and without human rights implications. This outlook is incorrect, as leaving cohabiting women unprotected often has serious consequences for their overall well-being and their survival. Choosing to leave women socio-economically vulnerable also has intergenerational reverberations that cannot be ignored.<sup>312</sup> While this was the minority judgment in *Butters*,<sup>313</sup> the patterns of reasoning adopted emphasise the persistent gender bias found within family law cases. While more progressive than the minority judgment, the majority judgment failed to address the need to foster substantive gender equality in our society. This case also reveals the need to question gendered assumptions within family law, particularly if we are to give effect to the Constitution's commitment to transform our society.

With regard to the remedy provided, after finding that the applicant was able to prove the elements of a tacit universal partnership, the majority awarded the applicant 30% of the defendant's net asset value as of the date when the partnership ended.<sup>314</sup> This decision to only award 30% of the net asset value has been criticised for essentially illustrating the inequitable value still accorded to caring work.<sup>315</sup> The majority judgment also contains no mention of the need to address how men and women relate to one another in relationships and the socio-economic impact of family

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<sup>311</sup> *Volks* para 163.

<sup>312</sup> F Wilson & V Cornell *Guide to Carnegie 3: Strategies to Overcome Poverty and Inequality: Conference Report* (2014) 78.

<sup>313</sup> *Butters* para 8.

<sup>314</sup> Para 3.

<sup>315</sup> Bonthuys (2015) *SALJ* 76.

dissolution. The *Butters* judgment further highlights how the socio-economic rights of women are consistently neglected within cases on divorce and cohabitation.

It is argued that *Butters* expands the remedies available to cohabitants.<sup>316</sup> However, basing the decision on contractual principles is criticised for causing a shift from protection based on status, to protection based on contractual principles.<sup>317</sup> The rules underlying the universal partnership as articulated by the Supreme Court of Appeal are, therefore, inferior to the familial status associated with traditional marriage.<sup>318</sup> A contractual approach also tends to be retrospective, asking what happened in the past and if intentions can be inferred from actual agreements or contributions. While this approach may aid a few cohabitants who have the means to approach the courts, it will not be sufficient in terms of the need to transform existing relations between men and women.

The manner in which the Court created somewhat of a fusion between commercial and domestic partnerships creates a legal mechanism through which the caring work of cohabitants receive greater recognition and protection. The individualistic, contractual framework informing the universal partnership is, however, inadequate in terms of recognising that people's relationship choices continue to be deeply influenced by patriarchal norms and gendered relations.<sup>319</sup> Bonthuys explains that:

“A purely contractual basis for property distribution represents a change in the law, but it does not actually challenge the social paradigms which expect women to provide unpaid family labour. Instead, it merely obscures gender inequality behind a smokescreen of formally equal partners concluding agreements at arms' length.”<sup>320</sup>

A purely contractual paradigm also exacerbates existing exploitative norms that shape how men and women relate to one another in our society. An individualistic approach is further problematic, as it allows courts to ignore the social context of power imbalances between cohabitants and how they shape women's choices.<sup>321</sup> The rhetoric within this judgement also reveals how traditional gender roles continue to be taken for granted, emphasising a failure to address underlying gendered inequalities

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<sup>316</sup> 76.

<sup>317</sup> 76.

<sup>318</sup> 76.

<sup>319</sup> 76.

<sup>320</sup> 76.

<sup>321</sup> S Fredman “Engendering Socio-Economic Rights” (2009) 25 *SAJHR* 410 411.



pervading our society. A predominant focus on contract law thus allows the court to evade engaging with the human rights issues pertaining to gender inequality and socio-economic deprivation prevalent in intimate relationships. It also allows the Court to ignore patterns of socio-economic exploitation that exist between cohabitants. In this regard, liberal conceptions of choice and gender neutrality will not safeguard against the influence of pervasive and enduring symbolic constructions of male and female sexuality and their “normalised hierarchical binary”.<sup>322</sup>

As a result of the developments underlying *Butters*, it has been argued that South Africa is moving towards more of a quasi-status approach in regulating cohabitation.<sup>323</sup> The underlying principles of this approach are expanded upon by Amanda Barrett and are emulated in certain American states. In accordance with this approach, the courts infer tacit agreements for property sharing in the context of certain long-term domestic partnerships,<sup>324</sup> primarily in relationships where one partner has undertaken the traditional caregiving role. According to the American scholar William Eskridge, in those cases the courts have created “a new default rule, where the partners...are presumed to share property”. He argues that this connotes a shift from contract to “(quasi)-status”.<sup>325</sup> Accordingly, Amanda Barratt states that the South African Supreme Court of Appeal’s approach in the decision of *Butters* creates a presumption of sharing family assets.<sup>326</sup>

One problem with the South African courts’ approach is the tendency to award these orders to couples who are engaged or to couples who strongly resemble the traditional conception of a civil marriage. Relationships that resemble traditional relationships are thus prioritised, while the need to address the socio-economic consequences of gendered relations in our society continues to be neglected. The law is, therefore, still not assisting women who are particularly vulnerable. In cases where the courts have extended the tacit universal partnership, the caregiving partner also never receives an equal share of the family property.

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<sup>322</sup> C Albertyn “Judicial Diversity” in C Hoexter & M Olivier (eds) *The Judiciary in South Africa* (2014) 201.

<sup>323</sup> Barratt (2015) *Stell LR* 129.

<sup>324</sup> WN Eskridge “Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules” (2012) 100 *Georgetown LJ* 1881 1929-1930.

<sup>325</sup> 1929-1930.

<sup>326</sup> Barratt (2015) *Stell LR* 129.

In addition, the contractual approach ignores underlying inequitable gendered relations, while the burden of proof remains on the caregiving partner to prove the existence of the tacit universal partnership agreement. In the meantime, while attempting to prove that they entered into this contract, many caregiving partners will be forced to leave the family home, often simultaneously being deprived of access to food, water and social security.

As emphasised through a relational feminist interpretation of the socio-economic rights of female cohabitants, there is a need for a more contextual, value-sensitive development of the common law in accordance with the human rights norms protected in the Constitution. Examining cohabitation cases through a relational feminist lens is necessary in order to expose and transform underlying gendered dynamics prevalent within family law.

#### 3 5 4 Unjustified enrichment

Unjustified enrichment essentially concerns itself with an obligation that arises when one person's estate has been increased at the expense of another's estate, without a sufficient cause for this enrichment.<sup>327</sup> This is a remedy that exists under Roman-Dutch law, although it has been subsequently amended over the years through *ad hoc* judicial pronouncements. This is a popular remedy under a number of commonwealth jurisdictions, with the Canadian courts referring to unjustified enrichment, the Australian courts discussing unconscionable conduct and New Zealand courts dealing with reasonable expectations.<sup>328</sup> The remedy of unjustified enrichment under Canadian family law is discussed further in chapter four of this study.<sup>329</sup> As far as claims based on unjustified enrichment beyond traditional *condictione* are concerned, our law has yet to recognise either a traditional enrichment action or any specific enrichment liability within the context of life partnerships.<sup>330</sup>

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<sup>327</sup> S Eiselen & G Pienaar *Unjustified Enrichment: A Casebook* (2008) 3.

<sup>328</sup> See A Barlow "Cohabitation, Changing Family Policies and Social Attitudes: A Discussion of Britain within Europe" (2004) 26 *Law and Policy* 57 57.

<sup>329</sup> See part 4 5 of chapter four of this study.

<sup>330</sup> See *Nortje v Pool* NO 1966 3 SA 96 (A) as qualified by *Kommissaris van Binnelandse Inkomste v Willers* 1994 3 SA 283 (A) at 333C-333D.

### 3 5 5 Proprietary estoppel and the constructive trust

These are remedies that are particularly popular under Canadian law. Traditionally, proprietary estoppel is available when a partner was led to believe that they had acquired an interest in property, when in fact they had not.<sup>331</sup> The remedy is used to estop the owner (or the executor of the estate) from relying on the truth and depriving the partner of their access to property. The remedy is, however, reliant on the applicant proving that the inference that they had relied upon was in fact reasonable under the circumstances of the case. The problem with utilising this remedy under South African law is that in our system estoppel does not give rise to a cause of action, but is instead a defence.<sup>332</sup> Cohabitants would therefore only be able to utilise this action in an attempt to avoid eviction. Utilising estoppel would not give rise to substantive rights to the family home, as it does not result in the transfer of ownership in property to the vulnerable party. This once again highlights the need to give substantive content to specific socio-economic rights, such as the right of access to adequate housing for cohabitants.

The constructive trust is another example of Canadian legal remedies developed for cohabitants. This remedy is discussed in more detail in chapter four of this study. With regard to South African cohabitants, this remedy has not been recognised or utilised in terms of cohabitants. This is primarily due to the fact that one of the requirements for the creation of a valid trust is that the founder must have intended to create the trust.<sup>333</sup>

### 3 5 6 The extension of the common law duty of support

In the *Volks* decision, the Court emphasised that there is no *ex lege* duty of support between unmarried cohabitants.<sup>334</sup> The legal regime has, however, been developed

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<sup>331</sup> *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897; BS Smith *The Development of South African Matrimonial Law with reference to the Need for and Application of a Domestic Partnership Rubric* (2009) 384 DPhil thesis, University of the Free State; and Smith “The Dissolution of a Domestic Partnership” in *Law of Divorce* 444.

<sup>332</sup> JC Sonnekus *The Law of Estoppel in South Africa* 2 (2000) 197; and Smith “The Dissolution of a Domestic Partnership” in *Law of Divorce* 444.

<sup>333</sup> F du Toit *South African Trust Law: Principles and Practices* (2007) 28; and Smith “The Dissolution of a Domestic Partnership” in *Law of Divorce* 445.

<sup>334</sup> *Volks* para 56.

in terms of the dependent's action at common law for loss of support due to the death of the breadwinner within the family.<sup>335</sup> Under the common law, this action allowed a breadwinner's widow and children to claim damages for loss of support from the person who wrongfully and culpably caused the breadwinner's injury or death.<sup>336</sup>

The Supreme Court of Appeal has held that this common law remedy includes participants in a permanent heterosexual life partnership entailing reciprocal duties of support.<sup>337</sup> In the decision of *Paixão v Road Accident Fund*, a unanimous court was prepared to find that the deceased had tacitly undertaken to support the female applicant and her daughters prior to his death. Part of this was deduced from the fact that the parties were engaged, after being romantically involved for a significant length of time. The Court highlighted that even though *Volks* established that no *ex lege* duty arose between unmarried cohabitants, this duty could arise contractually.<sup>338</sup> While this is a positive development, it has been criticised for essentially being based on a contractual paradigm.<sup>339</sup> The Supreme Court of Appeal also focused on the similarity between the relationship in dispute and traditional civil marriages. In addition, the Court managed to completely side-step the constitutional issue raised during the case. For example, the Court held that by finding that a duty of support had arisen contractually, there was no reason to examine whether it amounts to unfair discrimination to give protection to the duty of support arising from marriage, while not recognising a duty of support between cohabitants.<sup>340</sup>

Of particular interest is the reasoning that was adopted by the trial court. For example, the South Gauteng High Court refused to recognise a common law duty of support between cohabitants based on a tacit agreement. When referring to the facts of the case, it was pointed out that before his death the applicant had cared for the deceased after he had suffered a heart attack. During this time, the deceased moved in with the applicant and supported her and her children financially. When discussing this situation, the High Court simply held that the deceased had supported the appellants only out of "gratitude, sympathy and kindness" in exchange for their

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<sup>335</sup> Smith "The Dissolution of a Domestic Partnership" in *Law of Divorce* 462.

<sup>336</sup> 462.

<sup>337</sup> *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA) ("*Paixão*").

<sup>338</sup> *Volks* para 60.

<sup>339</sup> Bonthuys (2015) SALJ 76; and Smith "The Dissolution of a Domestic Partnership" in *Law of Divorce* 462.

<sup>340</sup> *Paixão* para 37.

assistance during his illness rather than from any legal duty.<sup>341</sup> The court also held that it “would be an affront to the fabric of our society ... and seriously erode the institution of marriage” if the dependants’ action were to be extended to the appellants.<sup>342</sup> The court did not consider how it would be an affront to the appellant’s human dignity for her relationship to be perceived as nothing more than a simple economic exchange, whereby her contribution was not valuable enough to justify socio-economic support after her partner had passed away. It has been pointed out that a legal regime that only protects civil and political rights only projects “an image of truncated humanity”.<sup>343</sup> Symbolically, but still inhumanely, ignoring the socio-economic rights of cohabitants excludes them from participating on an equitable basis in our society.<sup>344</sup> Within family law, the value of human dignity underlying socio-economic rights should be used to enhance the freedom and agency of caregivers, as opposed to ignoring how the law currently restricts their feasible options. It should also be utilised to recognise a minimal conception of distributive justice that would require satisfaction of the essential needs of all family members.

In sharp contrast to the judgment in the court *a quo*, the Supreme Court of Appeal stated that in determining whether the dependent’s action should be extended to cohabitants, one needs to have regard to the *boni mores* criterion or, the legal convictions of the community.<sup>345</sup> In this regard, the court held that in making this policy decision, it needs to give effect to recent social changes, as well as legal norms that encourage social responsibility.<sup>346</sup> While the outcome of this case was ultimately positive, it was also based on a contractual understanding of the domestic partnership. The Supreme Court of Appeal also failed to address the gendered dimensions of this case and particularly the need to foster substantive gender inequality in our society. In order to more effectively foster a relational conception of human dignity, it is necessary to further recognise existing socio-economic interconnection and responsibility between cohabitants.

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<sup>341</sup> *Paixão and Another v Road Accident Fund* JHC (05692/10) [2011] ZAGP 68 para 32.

<sup>342</sup> Para 40.

<sup>343</sup> C Scott & P Macklem “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution” (1992) 141 *Univ of Pennsylvania LR* 1 29. See also S Liebenberg “The Value of Human Dignity in Interpreting Socio-Economic Rights” (2005) 21 *SAJHR* 1 2.

<sup>344</sup> Liebenberg (2005) *SAJHR* 17.

<sup>345</sup> *Paixão* para 13.

<sup>346</sup> Para 13.

### 3 5 7 A summary of the applicable common law developments

While certain areas of the common law have been developed to provide protection to cohabitants, the biggest criticism against these developments is the Supreme Court of Appeal's preference for common law reasoning and the intertwined failure to engage fully with the interaction between the common law rules and the fundamental rights in the Bill of Rights.<sup>347</sup> In addition, the tendency to adopt a private law lens results in the prioritisation of individualistic values and a contractual paradigm. These liberal paradigms are inadequate in terms of effectively addressing the underlying gendered power imbalances within the private sphere which shape women's choices.

In order to tailor constitutional rights to be more responsive to women's specific needs, it is thus necessary for the judiciary and the legislature to more proactively address the existing gender dynamics prevalent in South African family law. The legal system does have substantial power to do so, through shaping social norms and behaviour, whether exploitative or empowering.<sup>348</sup>

Despite certain common law developments, women remain (disproportionately) the economically weaker spouse at the end of their marriage or domestic partnership. This is the outcome of prevailing social, cultural and economic conditions that need to be effectively addressed through innovative legal responses.<sup>349</sup> This gendered imbalance informing our family law regime emphasises the need for a more transformative response to family law issues, particularly for female cohabitants in South Africa.

### 3 6 Conclusion: An evaluation of the family law regime through a relational feminist lens

It is clear that the South African family law regime currently exacerbates the socio-economic vulnerability of many women. Given that there is currently no "law of life partnerships" regulating cohabitation,<sup>350</sup> vulnerable parties (usually women and

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<sup>347</sup> Bonthuys (2015) *SALJ* 76.

<sup>348</sup> J Nedelsky "The Gendered Division of Labour: An Issue of Constitutional Rights" in B Baines & D Barak-Erez (eds) *Feminist Constitutionalism: Global Perspectives* (2012) 15 15.

<sup>349</sup> Bonthuys (2015) *SALJ* 76.

<sup>350</sup> J Heaton "An Overview of the Current Legal Position regarding Heterosexual Life Partnerships" (2005) 68 *THRHR* 662 662.

children) are often exploited during these relationships. They are also often left impoverished upon the termination of the relationship.<sup>351</sup>

This chapter specifically identifies certain impediments that prevent the family law regime from adequately responding to gendered disadvantage in our society. In terms of the family law jurisprudence, the predominant focus on the right to equality and the neglect of the socio-economic rights of cohabiting women is particularly problematic. As a result of the failure to engage with the existing social context, there has also been a disproportionate emphasis on relationship formalities, liberal conceptions of choice and formal equality, all of which serve as significant obstacles to transforming the socio-economic disadvantages facing women. The fragmented and hierarchical state of our legislative framework further serves to entrench the vulnerability of many women who are most in need of protection.

Feminists have already pointed out the limitations of relying only on the law to challenge the systematic oppression of women.<sup>352</sup> While there are limits to the transformative potential of the law, this chapter analysed how South African family law rules currently exacerbate gender inequality in our society.<sup>353</sup> These rules should be developed to expand the range of socio-economic options available to women.

In terms of addressing the needs of cohabitants, the answer to this gendered issue does not lie in simply extending a formalised model of marriage to cohabitants. This formal extension is insufficient, as it runs the risk of simply extending the patriarchal and heteronormative social paradigms currently underlying our family law system. While domestic partnerships need to be recognised and regulated by the state,<sup>354</sup> substantive content must also be given to the socio-economic rights of women within the context of family law.

In addition to the lack of a coherent legal framework governing cohabitation, the courts have also not fully grappled with the need to address and transform the underlying gendered dynamics in our society. There is therefore, a need to further examine the socio-economic consequences of how men and women relate to one

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<sup>351</sup> Smith “The Dissolution of a Domestic Partnership” in *Law of Divorce* 394.

<sup>352</sup> See F Kaganas & C Murray “Law and Women’s Rights in South Africa: An Overview” (1994) *Acta Juridica* 1 5, where they highlight that between 1652 and the advent of democracy in 1994, the monogamous and heterosexual civil marriage was the only form of relationship that was officially recognised under South African law.

<sup>353</sup> Fredman (2009) *SAJHR* 411.

<sup>354</sup> Smith “The Dissolution of a Domestic Partnership” in *Law of Divorce* 394.

another in family relationships and how we can structure more constructive patterns of relating. Infusing our family law regime with the values and norms underlying socio-economic rights is thus necessary. In accordance with a relational feminist approach, this development necessarily entails examining the existing social context. Moreover, a relational feminist approach entails transposing human rights norms, such as substantive and relational conceptions of autonomy, freedom and equality, into our family law regime in a manner that empowers cohabiting women.

Given that socio-economic rights speak directly to the material needs of cohabitants, the socio-economic implications of family law rules clearly need to be given further consideration. Socio-economic interdependence is also predominantly a reality for most cohabitants. Sharing the family home, as well as caring work and other integral resources is often what characterises these relationships.

Socio-economic rights have the potential to reveal the material implications of gendered patterns of relating in our society. Socio-economic rights can also open up new remedies for vulnerable family members, while shifting moralistic debates regarding who is more deserving of protection. The complex relations between men and women also require an innovative approach that seeks to transform existing relations through addressing the socio-economic dimensions of gendered roles. The potential application of socio-economic rights within the context of terminated domestic partnerships is explored in detail in chapter five of this study.<sup>355</sup> Chapter five also examines the implications of utilising sections 8 and 39 of the Constitution to further develop the family law regime. While this chapter specifically analysed the applicable legal framework governing domestic partnerships under South African law, the following chapter examines the relevant jurisprudential and legislative developments under Canadian and Dutch family law through a relational feminist lens.

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<sup>355</sup> See chapter five of this study.



## Chapter 4: An examination of Canadian and Dutch family law through a relational feminist lens

### 4 1 Introduction

This chapter critically evaluates the strengths and weaknesses underlying the jurisprudential and legislative developments pertaining to cohabitants<sup>1</sup> under Canadian and Dutch family law.<sup>2</sup> These developments are examined against the relational feminist framework developed in chapter two of this study.<sup>3</sup> This comparative project is justified by section 39 of the Constitution, which provides that when interpreting the Bill of Rights, the courts “must consider international law” (section 39(1)(b)) and that they “may” consider foreign law (section 39(1)(c)).<sup>4</sup>

This chapter commences by setting out the justification for a comparative analysis of Canadian family law. After setting out the lessons provided by the Canadian legal system, the Dutch family law framework, as it pertains to domestic partnerships, is examined. Given that the Dutch legislature has played a more proactive role in developing the family law regime than the judiciary, the focus of this section is predominantly on relevant Dutch legislative developments.

The focus of this comparative chapter is to highlight positive foreign law developments pertaining to the protection of cohabitants. Simultaneously, this chapter seeks to identify potential shortcomings of jurisprudential and legislative trends within Canadian and Dutch family law. By evaluating these strengths and weaknesses, developments that enhance the socio-economic equality of female cohabitants can be emulated. Simultaneously, the features underlying Canadian and Dutch family law that have entrenched socio-economic disadvantage for female cohabitants can be noted and avoided. Once the comparative analysis is complete, conclusions will be drawn

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<sup>1</sup> In Canadian family law, reference is made to *de facto* partnerships. See C Rogerson “Canada: A Bold and Progressive Past but an Unclear Future” in E Sutherland (ed) *The Future of Child and Family Law: International Predictions* (2012) 77 77.

<sup>2</sup> The focus of this chapter is on Canadian law, due to the fact that Canadian family law is heralded for going further than most jurisdictions in terms of protecting unmarried cohabitants. See Rogerson “Canada” in *The Future of Child and Family law* 77. The justification for this focus is discussed in detail under part 4 2 of this chapter.

<sup>3</sup> J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2012) 19. See also chapter two of this study.

<sup>4</sup> S 39(1) (c) of the Constitution of the Republic of South Africa, 1996 (the “Constitution”).

concerning the potential lessons offered by these foreign law developments, as evaluated through the relational feminist approach developed in chapter two of this study.

## 4 2 Justification for a comparative study of Canadian family law

This chapter commences with an examination of relevant Canadian family law developments. One reason for this comparative analysis is that Canada has gone further than most jurisdictions in terms of protecting the socio-economic well-being of unmarried cohabitants.<sup>5</sup> While a significant number of foreign jurisdictions primarily rely on a contractual paradigm when it comes to regulating cohabitants, there have been certain Canadian developments that have adopted an inclusive and functional approach to family law that is congruent with South Africa's project of transformative constitutionalism.<sup>6</sup> As a result of these developments, the concepts of family, spouse and parent under Canadian law are amongst the broadest in the world.<sup>7</sup> A number of Canadian provinces have also adopted different legislative approaches to governing cohabitation, offering examples of a range of regulatory possibilities for South Africa.

Canadian scholars have also made significant contributions to the field of feminism and to theoretical conceptions of substantive equality as including important dimensions of positive socio-economic intervention.<sup>8</sup> Access to socio-economic resources has primarily been extended to vulnerable groups through conceptions of substantive equality. The judicial recognition of the "feminization of poverty" following relationship breakdown has also served to initiate a half century of family law legislative reform across Canada.<sup>9</sup> Progressive decisions in Canadian courts could, therefore, potentially spur the minds and imaginations of creative South African judges and law-makers.<sup>10</sup>

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<sup>5</sup> Rogerson "Canada" in *The Future of Child and Family law* 77.

<sup>6</sup> KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150.

<sup>7</sup> N Bala & RJ Bromwich "Context and Inclusivity in Canada's Evolving Definition of the Family" (2002) 16 *IJLPF* 145 146.

<sup>8</sup> G Brodsky & S Day "Denial of the Means of Subsistence as an Equality Violation" (2005) *Acta Juridica* 149-170.

<sup>9</sup> Canadian Women's Legal Education and Action Fund (LEAF) *Factum of the Intervener in Eric v Lola* (2012) 2. This is illustrated by the progressive decision in the case of *Moge v Moge* [1992] 3 SCR 813 ("*Moge*"), which is discussed in detail in part 4 5 3 of this chapter.

<sup>10</sup> R Leckey "Cohabitation and Comparative Method" (2009) 72 *Modern Law Review* 48- 72.

The positive impact of gender-sensitive family law jurisprudence is illustrated by the fact that in Canada, married women are now entitled to spousal support and property sharing in a manner that recognises the economic interdependency of their relationships. They are also entitled to be compensated for the disadvantages suffered by them during their marriage and the corresponding advantages conferred on men by their unpaid labour in the home. In terms of cohabitants, in every province except Québec, unmarried partners are entitled to make claims for spousal support.<sup>11</sup> While these developments include married spouses, they illustrate a gender-sensitive response to family dissolution.

Canadian courts have also grappled with similar policy issues surrounding the debate on whether to regulate cohabitation. One example is the liberal conception of choice as justification for leaving *de facto* partners unprotected. It is thus worth enquiring into how Canadian scholars and judges have challenged this concept of choice. It is also worth examining how certain areas of Canadian family law have been developed to achieve greater socio-economic equality for women.<sup>12</sup> In particular, certain judicial extensions of the rights of female cohabitants to the family home illustrate a tendency towards viewing the home in terms of socio-economic need and as a means to furthering social objectives in Canadian family law. These developments are thus analysed against the backdrop of the need to shift the current liberal paradigms underlying South African family law.

As noted in the introduction, while positive Canadian developments are examined, many of the shortcomings and challenges facing Canadian family law<sup>13</sup> will also be analysed. This is to determine the extent to which they reflect and highlight many of the limiting trends within the South African system governing cohabitation.<sup>14</sup> Retrogressive and formalistic elements within the Canadian jurisprudence and

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<sup>11</sup> Canadian Women's Legal Education and Action Fund (LEAF) *Factum of the Intervener in Eric v Lola* (2012) 2.

<sup>12</sup> R Murphy "Unstable Categories: Comparing the Politics of 'Gender' in the Early 1990s in Canada and South Africa" (2002) 14 *Canadian Journal on Women & Law* 300 302.

<sup>13</sup> For an analysis of some of these challenges, see Rogerson "Canada" in *The Future of Child and Family Law* (2012) 77; and C Young & SB Boyd "Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada" (2006) 10 *Feminist Legal Studies* 213 213. See also R Treloar & SB Boyd "Family Law Reform in (Neoliberal) Context: British Columbia's New Family Law Act" (2014) 14 *International Journal of Law, Policy and the Family* 1 24.

<sup>14</sup> JC Reitz "How to do Comparative Law" (1998) 46 *The American Journal of Comparative Law* 617 635.

legislation will be examined in terms of how they fall short of the standards of a relational feminist framework. For example, while Canadian family law has been praised for extending significant socio-economic protection to vulnerable family members, certain aspects of these developments are criticised for serving the government's neoliberal<sup>15</sup> agenda of privatising family responsibilities.<sup>16</sup> This critique should be kept in mind when considering law reform within South Africa, as the constitutional goal to establish a society based on fundamental human rights necessarily requires holding both public and private actors accountable for failing to protect and promote socio-economic rights. Certain Canadian developments may, therefore, serve as warnings for South Africa. In this manner, a comparative project has the potential to enrich South Africa's self-awareness, as well as the commitment to improving the socio-economic quality of life for everyone.<sup>17</sup>

Given the South African Constitution's receptiveness to foreign law and its goal to establish a society based on social justice,<sup>18</sup> it is worth examining whether Canadian law has succeeded in transforming the inequitable social paradigms underlying family law. While progressive Canadian rules and doctrines hold comparative value for South African law, a nuanced and balanced consideration of the differences between Canada and South Africa, is required. This is due to the unique factors that shape gender inequality within the Canadian family law regime.<sup>19</sup> The developments regarding the protection of socio-economic interests within the private sphere of Canada have also occurred along a very different trajectory.<sup>20</sup> Canadian developments thus need to be carefully examined while taking care to avoid uncritically transplanting Canadian interpretations and methods that do not fit into the South African legal context.

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<sup>15</sup> Treloar & Boyd define neoliberalism as:

"Social, economic and political framework, underpinned by a philosophy of liberal individualism that centres on the free market and state withdrawal from responsibility for social well-being or welfare."

See Treloar & Boyd (2014) *International Journal of Law, Policy and the Family* 1.

<sup>16</sup> 1.

<sup>17</sup> Preamble to the Constitution.

<sup>18</sup> Preamble.

<sup>19</sup> This was pointed out by Justice Mohamed (as he then was) in the case of *Fraser v Children's Court, Pretoria North, and Others* 1997 2 SA 261 (CC); 1997 2 BCLR 153 (CC) ("*Fraser*"), para 44.

<sup>20</sup> M Jackman & B Porter "Socio-Economic Rights under the Canadian Charter" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 209.

In terms of developing the South African legal framework governing cohabitation, there needs to be an emphasis on utilising the law to structure constructive socio-economic relations, including both private and public relations. In order to do this, attention needs to be paid to the manner in which private gendered relations influence the capacity to exercise existing human rights. In the light of progressive Canadian legal developments, this chapter will commence with an overview of the Canadian Charter and its influence on the Canadian family law regime.

### 4 3 The Canadian Charter

#### 4 3 1 Introduction

In terms of its political and administrative makeup, Canada is described as a self-governing dominion, made up of a confederation of ten provinces and three territories with parliamentary democracy.<sup>21</sup> Nine out of the ten provinces are based on the English common law system,<sup>22</sup> while Québec is governed by the civil law system.<sup>23</sup> This means that Canada's family law system is fragmented in the sense that federal, provincial and territorial laws all come into play in the context of family dissolution. The family law regime is further influenced by the complex structure of the Canadian Charter, which requires an element of governmental action in order for it to be implicated in family law litigation.<sup>24</sup>

In terms of the social context of family life, the traditional Canadian family unit is centred on a monogamous and heterosexual conception of the family, primarily

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<sup>21</sup> South African Law Reform Commission (SALRC) *Project 118: Report on Domestic Partnerships* (2006).

<sup>22</sup> These provinces include; Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan.

<sup>23</sup> SALRC *Project 118: Report on Domestic Partnerships* (2006) 207.

<sup>24</sup> Art 32 of the Canadian Charter provides that it applies to:

“(1)(a) The Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”

See SB Boyd “The Impact of the Charter of Rights and Freedoms on Canadian Family Law” (2000) 17 *Canadian Journal of Family Law* 293 297.

concerned with procreation.<sup>25</sup> As highlighted in chapter three of this study, this traditional understanding of marriage similarly influenced South African family law and is criticised by feminists for its gendered and heteronormative implications.<sup>26</sup> This traditional conception of marriage has also resulted in women disproportionately bearing the socio-economic burdens of divorce and family dissolution. Certain progressive Canadian judgments, which are discussed in detail later,<sup>27</sup> have taken judicial notice of the feminisation of poverty associated with family dissolution.<sup>28</sup>

Despite these developments, Canadian women and children continue to bear the greatest socio-economic burdens upon the dissolution of their families.<sup>29</sup> Claire Young and Susan Boyd emphasise this contradiction. Despite certain progressive family law rules catalysed by gender-sensitive judgments, for example, gendered disadvantage continues to worsen in Canadian society.<sup>30</sup> Boyd and Young reveal that one of the primary causes of this inequality is that many family law remedies are limited to the sphere of private law. The effectiveness of these remedies is thus dependent upon the wealth of the woman's former partner and her ability to enforce existing rules and obtain an appropriate legal remedy.<sup>31</sup> Boyd and Young point out that feminist critiques of marriage, familial ideology, and the privatisation of economic responsibility, have

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<sup>25</sup> W Holland "Intimate relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000) 17 *The Canadian Journal on Family Law* 114 114. See also *Layland v Ontario (Minister of Consumer and Commercial Relations)* [1993] 14 OR (3d) 658 ("Layland").

<sup>26</sup> See for example F Kaganas & C Murray "Law and Women's Rights in South Africa: An Overview" (1994) *Acta Juridica* 1 1; J Sinclair "The Financial Consequences of Divorce in South Africa: Judicial Determination or Private Ordering?" (1983) 32 *ICLQ* 785 786; and J Heaton "Striving for Substantive Gender Equality in Family Law: Selected Issues" (2005) 21 *SAJHR* 547 547. In terms of the Canadian context, see S Gavigan & D Chunn "From Mother's Allowance to Mother's Need Not Apply: Canadian Welfare Law as Liberal and Neo-Liberal Reforms (2007) 45 *Osgoode Hall Law Journal* 733- 771; and SB Boyd & CFL Young "Feminism, Law and Public Policy: Family Feuds and Taxing Times" (2004) 42 *Osgoode Hall Law Journal* 545 556.

<sup>27</sup> See part 4 5 of this chapter.

<sup>28</sup> See part 4 5 3 of this chapter.

<sup>29</sup> See for example, C Williams "Statistics Canada, Economic Well-Being" in *Women in Canada: A Gender-based Statistical Report* (2010) 6; R Finnie "Women, Men, and the Economic Consequences of Divorce: Evidence from the Canadian Longitudinal Data" (1993) 30 *Canadian Review of Sociology and Anthropology* 205 205; and N Bakht "A v B and Attorney General of Quebec (*Eric v Lola*): The Implications for Cohabiting Couples Outside Quebec" (2014) *Working Paper Series* 262.

<sup>30</sup> Young & Boyd (2006) *Feminist Legal Studies* 219. See also Williams "Statistics Canada" in *Women in Canada* (2010) 17, which highlighted that Canadian women continue to earn less than men and that they continue to have primary responsibility for child care.

<sup>31</sup> Young & Boyd (2006) *Feminist Legal Studies* 219.

been marginalised in recent years.<sup>32</sup> This has resulted in “conservative and heteronormative discourses” on the family unit being reinforced, as well as socio-economic vulnerabilities.<sup>33</sup>

The lack of gender-sensitive judgments in the previous two decades, and the tendency to view these issues primarily through a private law lens, has the potential to offer useful insights when considering law reform within South Africa. One reason is that it highlights the need for relational socio-economic remedies that will assist the poorest members of our society. It also emphasises the need for a relational feminist framework that is responsive to gendered power imbalances and how they shape access to resources. The jurisprudential trends underlying Canadian family law are explored in further detail later.<sup>34</sup> It is necessary to commence with the relevant rights pertaining to family law that are protected under the Canadian Charter. These rights are important as they have been utilised to extend socio-economic protection to women.

#### 4 3 2 Social rights under the Canadian Charter

One crucial difference between the Canadian Charter and the South African Constitution is that the Charter does not include justiciable socio-economic rights. Developments pertaining to the protection of the material needs of women upon the dissolution of their families have therefore primarily been based upon the right to equality. The Canadian literature and debates on the socio-economic aspects of the right to equality have played a key role in emphasising the interdependent relationship between the right to equality and socio-economic well-being, particularly for women.<sup>35</sup> Developments that have enhanced the socio-economic well-being of Canadian women could thus potentially enrich the South African approach to cohabitation. For example, the interdependent nature of socio-economic rights and gender equality could inform legislative developments pertaining to cohabitants.

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<sup>32</sup> 219.

<sup>33</sup> 220.

<sup>34</sup> See part 4 5 of this chapter.

<sup>35</sup> G Brodsky & S Day “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty” (2002) 14 *Canadian Journal on Women and Law* 185 186.

The neglect of socio-economic rights in the Charter is surprising, given that Canada ratified the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”)<sup>36</sup> forty years ago, in 1976. The type of obligations prescribed by article 2 of the ICESCR, in terms of taking reasonable steps within the maximum available resources has become a familiar aspect of the Canadian approach to protecting human rights.<sup>37</sup> While the Canadian Charter does not include justiciable socio-economic rights, it does contain the section 23 right to publicly funded minority language education at primary and secondary levels, which is limited to “where numbers warrant”.<sup>38</sup> Other Charter rights that are particularly important in terms of social rights are the equality rights provided for in section 15 of the Charter and the right to “life, liberty and security of the person” in section 7.<sup>39</sup> While these rights are traditionally classified as civil and political rights in the Canadian context, they are understood and interpreted to include socio-economic dimensions.<sup>40</sup>

One of the explanations offered for the lack of socio-economic rights under the Charter is that most Canadian human rights experts emphasise the importance of framing rights, such as the right to equality, as broadly as possible.<sup>41</sup> This is done so that this right can be interpreted to require that the state take positive action to address the needs of vulnerable groups in a manner that addresses systemic inequality.<sup>42</sup> This right can also be used to require the Canadian state to maintain and improve existing socio-economic programmes providing for basic needs.<sup>43</sup>

An additional reason for the lack of socio-economic rights in the Charter is that Canada is an inherently affluent society. As a result, violations of social and economic rights are perceived as primarily violations of the right to equality. As elucidated by

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<sup>36</sup> International Covenant on Economic, Social, and Cultural Rights (1966), UN Doc A/6316 (“ICESCR”).

<sup>37</sup> Jackman & Porter “Socio-Economic Rights under the Canadian Charter” in *Social Rights Jurisprudence* 209.

<sup>38</sup> S 23(3) of the Charter. See also Jackman & Porter “Socio-Economic Rights under the Canadian Charter” in *Social Rights Jurisprudence* 209.

<sup>39</sup> S 7 of the Charter states that:

“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

<sup>40</sup> M Jackman & B Porter “Women’s Substantive Equality and the Protection of Social and Economic Rights under the Canadian Human Rights Act” in *Status of Women Canada, Women and the Canadian Human Rights Act* (1999) 43.

<sup>41</sup> Jackman & Porter “Socio-Economic Rights under the Canadian Charter” in *Social Rights Jurisprudence* 229.

<sup>42</sup> 211.

<sup>43</sup> 211.



Canadian scholars, the central issue is not a lack of resources,<sup>44</sup> but rather an infringement of the right to equally enjoy the existing rights under the Charter. This inequality is emphasised by the fact that in Canada, homelessness, hunger and poverty disproportionately affect aboriginal people, women,<sup>45</sup> people with disabilities and racial groups. These issues therefore constitute severe human rights failures, because they are unnecessary in a country experiencing high levels of economic prosperity.<sup>46</sup> These social crises are the aftermath of misdirected state funds, the rise in neoliberalism and an increasingly retrogressive approach to social rights.<sup>47</sup> This also reveals that even though Canada is known as a first world country, it suffers from patterns of poverty and inequality.

As a result of the wide formulation of the rights in the Charter, the Canadian Supreme Court developed a notion of substantive equality, which incorporates important dimensions of socio-economic rights, in its early jurisprudence on the Charter's right to equality (section 15). This interpretation placed positive obligations on governments to remedy disadvantage,<sup>48</sup> as illustrated in *Eldridge v Attorney General of British Columbia* ("Eldridge"),<sup>49</sup> where the Court held that substantive equality requires the provincial government to provide sign language interpreters for deaf patients.

Despite this promising development and existing socio-economic inequalities, the lower courts have rejected these challenges when approached to rule on socio-economic rights claims under section 7 of the Charter. The reasoning adopted by the courts is that economic rights are beyond the scope of section 7 of the Charter, as well

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<sup>44</sup> Jackman & Porter "Women's Substantive Equality" in *Status of Women in Canada* 112.

<sup>45</sup> See Nedelsky *Law's Relations* (2012) 19; and Brodsky & Day (2002) 14 *Canadian Journal on Women and Law* 186, where they specifically point out that:

"In recent years, governments in Canada have been withdrawing social and economic benefits and protections, leaving gaps in the programs and services that people need, and reducing benefits to inadequate levels."

<sup>46</sup> Jackman & Porter "Socio-Economic Rights under the Canadian Charter" in *Social Rights Jurisprudence* 211.

<sup>47</sup> 211.

<sup>48</sup> For a detailed elaboration of the courts' interpretative approach in this regard, see M Jackman "The Protection of Welfare Rights under the Charter" (1998) 30 *Ottawa Law Review* 257-338; B Porter "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 *Journal of Law and Social Policy* 117 117; and Jackman & Porter "Socio-Economic Rights under the Canadian Charter" in *Social Rights Jurisprudence* 215.

<sup>49</sup> (1997) 151 DLR (4th) 577 (SCC) ("*Eldridge*").

as the judiciary's legitimate powers of review.<sup>50</sup> Subsequent interpretations of the right to equality have also undermined the redistributive potential of this right.

At the Canadian Supreme Court level, however, the question of the status of the ICESCR under section 7 of the Charter was specifically left open in the case of *Irwin Toy Ltd v Québec (Attorney General)* ("Irwin").<sup>51</sup> Almost two decades later, in *Gosselin v Québec (Attorney General)* ("Gosselin"),<sup>52</sup> the Supreme Court considered a challenge to grossly inadequate levels of social assistance benefits being paid to individuals under 30 years of age, who were not participating in work experience employment programmes.<sup>53</sup>

In this case, Louise Gosselin attempted to challenge the reduction of her welfare entitlement to one third of the amount that had been established as necessary to satisfy basic human needs. Gosselin's case emphasises the vulnerability of cohabitants, as she was forced to live in an intimate relationship with a man she did not wish to live with, in exchange for accessing shelter and food. In spite of her dire situation, the majority of the Court dismissed her claim, stating that due to insufficient evidence before the court, they could not substitute the role of the legislature in determining how to give effect to social needs in accordance with the Charter.<sup>54</sup> In a significant dissenting judgment, which was supported by the honourable Justice L'Heureux-Dubé, Justice Arbour found that the section 7 right to "security of the person" clearly places positive obligations on governments to provide those in need with a minimal amount of social support.<sup>55</sup> This decision reveals how formalistic notions of judicial deference play a role in stunting the development of social rights jurisprudence in Canada.<sup>56</sup> The failure to engage with feminist arguments regarding gendered socio-economic disadvantage also resulted in an unresponsive judgment.

#### 4 3 3 Application of the Canadian Charter to family law

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<sup>50</sup> Jackman & Porter "Socio-Economic Rights under the Canadian Charter" in *Social Rights Jurisprudence* 211.

<sup>51</sup> *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927 ("Irwin").

<sup>52</sup> [2002] SCC 84; [2002] SCR 429 ("Gosselin").

<sup>53</sup> Paras 45 & 82.

<sup>54</sup> Para 264.

<sup>55</sup> Para 312.

<sup>56</sup> Jackman & Porter "Women's Substantive Equality" in *Status of Women Canada* 112.

The Charter does not include any specific provisions on the right to family or the right to privacy. As highlighted above, it contains a provision on equality. While marital status is not included as a listed ground within article 15 of the Charter,<sup>57</sup> the Supreme Court of Canada has expressly developed the law in order to recognise marital status as an analogous ground of prohibited discrimination.<sup>58</sup> One positive aspect of not having defined “family” within the Canadian Charter is that Canada has developed the traditional conception of marriage to recognise a broader range of families, including same-sex unions.<sup>59</sup> Much of this development has, however, been initiated by progressive judicial decisions, which have then prompted legislative reform.<sup>60</sup> Canadian scholars have consequently praised much of the family law jurisprudence for having “redrawn and redefined the legal vision of family itself”.<sup>61</sup>

The move to recognise same-sex marriages has, unfortunately, occurred in a manner that has had (unexpected) gendered implications.<sup>62</sup> As emphasised by Boyd, notwithstanding the importance of this development, much of the debate surrounding these unions took place within a paradigm that reinforced existing gendered

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<sup>57</sup> S 15 of the Charter provides that:

“(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Affirmative action programs; subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

<sup>58</sup> In the decision of *Miron v Trudel* [1995] 2 SCR 418; 23 OR (3d) 160 (“*Miron*”), a challenge was brought against the definition of “spouse” in the province of Ontario's Insurance Act RSO 1980 c 218 ss 231-233, which prevented an unmarried opposite-sex couple access to the benefits available to legally married couples. The Court found that marital status was an analogous protected ground of discrimination for the purposes of s 15(1) and the impugned definition of spouse was found to violate this section.

<sup>59</sup> With regard to Canada, after the progressive Supreme Court decision of *M v H* [1999] 2 SCR 3 (“*M v H*”), the Federal government legalised civil same-sex marriage across Canada in July of 2005.

<sup>60</sup> R Leckey “Family Law as Fundamental Private Law” (2007) 86 *La Revue Du Barreau Canadien* 86 72.

<sup>61</sup> Rogerson “Canada” in *The Future of Child and Family law* (2012) 77; Leckey (2007) *La Revue Du Barreau Canadien* 72; and SB Boyd “The Impact of the Charter of Rights and Freedoms on Canadian Family Law” (2000) 17 *Canadian Journal of Family Law* 293 297.

<sup>62</sup> Young & Boyd (2006) state that:

“The story of the legal recognition of same-sex relationships is less than fully positive, in the sense that it has proceeded in a way that has rendered invisible important feminist critiques of marriage, familial ideology and the domestication of lesbian and gay relationships.”

See Young & Boyd (2006) *Feminist Legal Studies* 217.

hierarchies while exacerbating socio-economic vulnerability.<sup>63</sup> This reinforces the need for a gender-sensitive approach to regulating the socio-economic consequences of terminated domestic partnerships, while retaining equal respect for different family forms.

The majority of Canadian family law developments are based on judicial interpretations of the right to equality, the rights to freedom of religion and freedom of expression (section 2), and the right to security of the person (section 7).<sup>64</sup> The rights and freedoms set out in the Charter are guaranteed “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.<sup>65</sup>

When examining how the Canadian Charter has influenced Canadian family law, Boyd explains its influence in three specific ways. The first is through Canadian governments reviewing and amending legislative provisions in order to ensure that statutory provisions comply with the Charter.<sup>66</sup> Direct constitutional challenges have also been brought against statutory provisions on the basis that they violate specific Charter guarantees, such as the right to equality. Finally, the Charter has been invoked indirectly to argue that, even in the absence of the required element of government or state action,<sup>67</sup> judges must nevertheless consider the fundamental values (such as equality) protected in the Charter.<sup>68</sup> It has also been pointed out that the introduction of the Charter into Canadian law led to an initial increased invocation of the language of rights and the use of contextually sensitive social science research in family law decisions.<sup>69</sup> In the previous two decades, judicial reliance on this gendered evidence has, however, decreased.

#### 4 3 4 Conclusion

Canada’s particular social and legal history has resulted in a unique framework of rights protected in the Charter. While one of the central differences between the

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<sup>63</sup> 213.

<sup>64</sup> Boyd (2000) *Canadian Journal of Family Law* 297.

<sup>65</sup> S 1 of the Charter.

<sup>66</sup> Boyd (2000) *Canadian Journal of Family Law* 295.

<sup>67</sup> S 32(1) of the Charter.

<sup>68</sup> Leckey (2007) *La Revue Du Barreau Canadien* 72.

<sup>69</sup> Boyd (2000) *Canadian Journal on Family Law* 295.

Canadian Charter and the South African Constitution is the lack of justiciable socio-economic rights in the Charter, Canadian courts have at times interpreted the equality rights under the Charter to require positive measures to address social disadvantage. Although these developments are vitally important, jurisprudence from the previous two decades reveals a rise in judicial deference, as well as neoliberalism, which has impeded much of this development. Debates surrounding private versus public obligations for social rights, and formal interpretations of equality, emphasise the need to give substantive content to the socio-economic rights of women.<sup>70</sup> Canadian scholars have thus emphasised the limitations of an equality framework, while urging the state to include social and economic rights in the Canadian Human Rights Act of 1985 (“CHRA”).<sup>71</sup> Within the context of this framework of Charter rights, it is necessary to examine relevant Canadian legislation that seeks to regulate cohabitation.

#### 4 4 Canadian legislation

##### 4 4 1 Introduction

While the courts have played an integral role in developing the family law regime in Canada, the legislature has also played a key role.<sup>72</sup> A legislative response to cohabitation is also required to ensure consistency, fairness and cost-effectiveness.<sup>73</sup> The substantial financial and psychological burden placed on those who have to approach the courts to make Charter-based claims was explicitly recognised by the Canadian Supreme Court in *M v H*.<sup>74</sup> A comprehensive and coherent legislative framework that clearly governs the rights of cohabitants is thus necessary.<sup>75</sup>

Canadian legislatures have predominantly introduced guiding principles to inform the family law regime, enabling Canadian courts to interpret and define how these

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<sup>70</sup> J Fudge “Substantive Equality, the Supreme Court of Canada and the Limits to Redistribution” (2007) 23 *SAJHR* 235 235.

<sup>71</sup> Canadian Human Rights Act RSC 1985 c H-6. See Jackman & Porter “Women’s Substantive Equality” in *Status of Women Canada* 112.

<sup>72</sup> In Canada, the Charter applies to both federal and provincial legislatures.

<sup>73</sup> N Bala “Alternatives for Extending Spousal Status in Canada” (2000) 17 *Canadian Journal of Family Law* 169 171.

<sup>74</sup> [1999] 2 RCS 3 (“*M v H*”).

<sup>75</sup> R Leckey “Contracting Claims and Family Law Feuds” (2007) 57 *University of Toronto Law Journal* 1 2.

principles should be applied in specific cases before them.<sup>76</sup> The legislative framework informing Canadian family law is complex in that both federal and provincial or territorial laws come into play in terms of regulating families.

The spectrum of protection within Canada runs from one extreme of according no matrimonial rights and duties to unmarried spouses, such as in the province of Québec, to total assimilation with married spouses, as exemplified by the approaches in the provinces of Manitoba and Saskatchewan.<sup>77</sup> In addition, despite many promising extensions of the family law regime to unmarried cohabitants, much of the family law legislation remains centred upon the traditional conception of a civil marriage.

#### 4 4 2 Provincial legislation: Ascription (status) versus contract

As noted above, certain elements of the progressive family law jurisprudence within Canada served as a catalyst for positive legislative developments regarding the protection of unmarried cohabitants. From an analysis of Canadian family law it can therefore be observed that over the previous three decades there have been incremental changes brought about by the different legislatures concerning the rights of heterosexual cohabitants in Canada.<sup>78</sup> Carol Rogerson highlights that these developments occurred after the abolition of illegitimacy, which nullified the necessity of formal marriage for parental status.<sup>79</sup> Following this development, many of the Canadian provinces imposed spousal support obligations on unmarried cohabitants, while also sometimes regulating cohabitation agreements in the seventies.<sup>80</sup>

The extension of support obligations in Canada was followed by the courts incrementally developing the private law principles of unjustified enrichment, and the rules underlying the constructive trust, to provide property rights to cohabitants in the eighties and nineties.<sup>81</sup> Statutory benefits were extended during this period too.<sup>82</sup>

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<sup>76</sup> MJ Mossman "Conversations about Families in Canadian Courts and Legislatures: Are there "Lessons" for the United States?" (2003) 32 *Hofstra Law Review* 171 172.

<sup>77</sup> R Leckey "Gimme Shelter" (2001) 34 *Dalhousie Law Journal* 198 198.

<sup>78</sup> Rogerson "Canada" in *Future of Child and Family law* 77.

<sup>79</sup> 77.

<sup>80</sup> Rogerson 77; Holland (2000) *The Canadian Journal on Family Law* 127. An example of this can be found in the Family Law Reform Act of 1978 SO 1978 c 2.

<sup>81</sup> Holland (2000) *The Canadian Journal on Family Law* 114.

<sup>82</sup> 114.

As a result, all of the Canadian provinces, except for Québec, currently recognise a duty of support between cohabitants. In doing so, the different provinces utilise different approaches and, at times, different terminologies in referring to cohabitants. For example, in the province of Alberta, unmarried cohabitants are expressly recognised as partaking in an “adult interdependent relationship” in the Adult Interdependent Relationship Act of 2002.<sup>83</sup> This Act expressly defines a “relationship of interdependence” as meaning a relationship outside of marriage, whereby two people (i) share in each other’s lives, (ii) are “emotionally committed” to each other and (iii) perform as an “economic and domestic unit”. In this regard, the method of acquiring rights and obligations is through ascription.<sup>84</sup> The Adult Interdependent Relationship Act also prohibits polygamous relationships.<sup>85</sup>

In Manitoba, the Family Maintenance Act states that spouses and common-law partners have the mutual obligation to contribute reasonably to each other's support and maintenance.<sup>86</sup> The Act defines common-law partners as cohabitants who have registered their relationship with the Vital Statistics Agency, cohabitants who have lived together for one year and have a child together, or cohabitants who have lived together for three years. Under New Brunswick’s Family Services Act,<sup>87</sup> spousal support<sup>88</sup> is also possible for what the Act refers to as “common-law couples”, who have lived together for a period of three years. Under Newfoundland and Labrador’s

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<sup>83</sup> SA 2002 c A-4.5

<sup>84</sup> The South African Law Reform Commission (SALRC) uses the term “ascription model” throughout its report on domestic partnerships. Ascription refers to certain rights and benefits automatically attaching to a relationship, once it fulfils certain minimum requirements. See A Barratt “Private Contract or Automatic Court Discretion? Current Trends in Legal Regulation of Permanent Life-partnerships (2015) 26 *Stell Law Review* 110 116.

<sup>85</sup> S 5(1) of the Act SA 2002 c A-4.5, states that:

“A person cannot at any one time have more than one adult interdependent partner.”

<sup>86</sup> S 4(1) of the Family Maintenance Act CCSM c F20.

<sup>87</sup> SNB 1980 c F22.

<sup>88</sup> S 112(1) of the Family Services Act provides that:

“Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so.

112(2) Every father of a child has an obligation, to the extent he is capable of doing so, to provide support, in accordance with need, to the mother of his child, where she is not his spouse, in relation to the birth of the child.

112(3) Two persons, not being married to each other, who have lived together;

(a) continuously for a period of not less than three years in a family relationship in which one person has been substantially dependent upon the other for support, or

(b) in a family relationship of some permanence where there is a child born of whom they are the natural parents, and have lived together in that relationship within the preceding year, have the same obligation as that set out in subsection (1).”

Family Law Act of 1990,<sup>89</sup> partners are entitled to support if they have cohabited for at least two years or for a period of one year, where they are, together, the biological or adoptive parents of a child.<sup>90</sup>

In Ontario, the Family Law Reform Act of 1990<sup>91</sup> provides rights through ascription, with a “dependant” defined as a person to whom another has a duty to provide support. A “spouse” is defined as either of two persons who are not married to each other, but who have lived together, (a) continuously for a period of not less than three years, or who are (b) in a relationship of some permanence, while also being the natural or adoptive parents of a child.<sup>92</sup>

Certain provinces and territories also include cohabitants in their regimes for the division of family property or for the equalisation of its value. These provinces include Manitoba,<sup>93</sup> Saskatchewan, British Columbia and the Northwest Territories, Nunavut and Yukon. Nova Scotia allows unmarried couples to opt into the property regime, but specifically through registration. The benefits and drawbacks of the opt-in system are discussed further in part 4 5 6 of this study.

The Province of Québec therefore stands out in sharp contrast to the other provinces and territories, as its civil code attaches no spousal rights and duties to unmarried cohabitants. Saskatchewan is on the opposite end of the legal spectrum, as it is one of three provinces and territories that have opened their matrimonial property regime to unmarried cohabitants without requiring *de facto* partners to register their relationship.

As highlighted above, these legislative developments were effectively prompted by judicial activity. This is evinced by the example of the Saskatchewan government amending and renaming the Matrimonial Property Act<sup>94</sup> following a decision of a Saskatchewan court.<sup>95</sup> In *Watch v Watch*,<sup>96</sup> the court found that the Matrimonial Property Act violated article 15(1) of the Charter. The Matrimonial Property Act was

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<sup>89</sup> Family Law Act RSNL 1990 c F2.

<sup>90</sup> Section 35 of the Family Law Act of 1990.

<sup>91</sup> RSO 990 c F3.

<sup>92</sup> S 1 of the Family Law Act RSO 1990.

<sup>93</sup> In Manitoba, the Family Maintenance Act of 1987 recognises a mutual obligation of support between spouses and *de facto* partners, providing that they have a mutual responsibility to reasonably contribute to each other's support.

<sup>94</sup> SS 1979 c M-61.

<sup>95</sup> *Watch v Watch* [1999]182 Sask R 237.

<sup>96</sup> [1999]182 Sask R 237.



subsequently renamed the Family Property Act<sup>97</sup> and was amended to include unmarried spouses that have cohabited together for a minimum of two years.<sup>98</sup> Section 20 of this Act states that its purpose is to recognise that the responsibility for child care and managing the home are the “joint and mutual responsibilities of spouses.” It goes on to state that the assumption of these responsibilities entitles each spouse to an equal distribution of the family property, subject to certain exceptions set out in the Act. Section 20 recognises the integral link between socio-economic contribution and entitlement and caring work. Recognition of this interconnection in family relationships is integral if we are to transform the manner in which men and women relate to one another in the private sphere.

Both Nunavut and the Northwest Territories have expanded their definition of spouse in their Family Law Act<sup>99</sup> to include unmarried cohabiting persons that have cohabited for a minimum of two years or, where there has been a relationship of some permanence coupled with being the natural or adoptive parents of a child. One of the most recent Canadian legislative amendments has been the new Family Law Act of British Columbia, which provides that unmarried cohabitants can now also share in family property and debts.<sup>100</sup>

With regard to polygamous relationships, one of the requirements of a valid marriage in British Columbian law is that both spouses must be unmarried at the time of their marriage.<sup>101</sup> Polygamous marriages are also a Criminal Code offence under Canadian law. However, British Columbian authorities have tended to not enforce the prohibition on polygamy on the basis that the legislation prohibiting it is regarded as unconstitutional.<sup>102</sup> Notably, the legislation that included domestic partnerships under the definition of spouse did not limit the status of “marriage-like” partners to those in monogamous relationships. Subsequently, British Columbia has gained a reputation as being a haven for polygamists.

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<sup>97</sup> SS 1997 c F-63.

<sup>98</sup> S 2 of the Family Property Act SS 1997 c F-63; A Mohs *Choice v Equality: The Legal Recognition of unmarried Cohabitation in Canada* LLM thesis the University of British Columbia (Vancouver) (2010) 1 27.

<sup>99</sup> SNWT 1997 (Nu) 1997 c 18.

<sup>100</sup> Family Law Act SBC 2011 c 25.

<sup>101</sup> South African Law Reform Commission (SALRC) *Project 118: Report on Domestic Partnerships* (2006) 7 <[http://www.justice.gov.za/salrc/reports/r\\_prj118\\_2006march.pdf](http://www.justice.gov.za/salrc/reports/r_prj118_2006march.pdf)> (accessed 20-10-2012) 94.

<sup>102</sup> 94.

#### 4 4 3 Conclusion: The debate between status and contract

In the twentieth century, a patchwork of legislative provisions was introduced across Canada to provide some legal recognition to unmarried couples. In many ways, the Canadian family law system mirrors the fragmentation found within the South African family law regime. Despite its patchy legislative framework, Canada has gone further than South Africa in terms of extending legislative protection to cohabitants. The debate between regulating domestic partnerships in terms of status or contract, or an approach based on both, is particularly evident within Canadian family law. This is evinced through certain Canadian provinces providing protection through ascription (status), while other provinces provide protection through registration. The province of Nova Scotia is also noteworthy for providing protection through both ascription and registration. In essence, the contract-based approaches rely on the partners to register their relationship or to conclude private contracts between themselves. The partners have the freedom to decide and agree on the specific economic consequences of their relationship. The ascription models, in contrast, are not based on agreement, with consequences arising through the automatic operation of law subject to certain minimum conditions being fulfilled.

Canadian family law is currently in a state of flux, as legislators utilise a variety of approaches towards regulating cohabitation. This analysis does, however, highlight that Canadian legislatures have gone further than most jurisdictions in terms of ameliorating the economic hardships experienced by women after familial breakdowns.<sup>103</sup>

An examination of Canadian legislation emphasises the need for statutes that recognise and address the existing socio-economic context experienced by cohabiting women. Canadian legislative developments also reveal the need to eschew the liberal conception of choice and instead transpose a conception of substantive autonomy into regulatory mechanisms. Interconnected to a more substantive conception of autonomy is the need to recognise the state's particular duty to regulate these relationships and enforce private socio-economic obligations. Legislative provisions also need to address the exploitative norms that shape how men and women relate to

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<sup>103</sup> Rogerson "Canada" in *Future of Child and Family law* (2012) 77.

one another. While a number of Canadian provinces have recognised this positive duty through enacting regulatory legislation, they have failed to do so in a manner that is truly transformative. This is emphasised by feminist scholarship, which emphasises that the patriarchal and heteronormative paradigms underlying traditional marriage are simply being extended through these legislative provisions.<sup>104</sup> It is necessary to examine the underlying gendered dynamics within family law and to respond to these private power imbalances in a manner that transforms gendered relations. In this regard, it needs to be kept in mind that the normal rules for men and women are shaped by gendered norms and patriarchal exploitation.<sup>105</sup> This background reality should be kept in mind when determining how to regulate cohabitation in South Africa. The following section examines how the Canadian courts have interpreted the rights of cohabitants.

## 4 5 Canadian jurisprudence

### 4 5 1 Introduction

The Canadian government's approach to the regulation of cohabitation is similar to the South African approach in that the rights of cohabitants are currently comprised of a patchwork of private law rules and legislative remedies.<sup>106</sup> A further similarity is that the majority of the progressive changes that have occurred within Canadian family law have been catalysed by progressive Charter based-cases. Accordingly, legislatures in Canada tend to initiate legal change when judicial decisions compel them to do so.<sup>107</sup> As a result, the courts are heralded for primarily shaping and expanding the legal definition of "family" in Canada.<sup>108</sup>

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<sup>104</sup> Young & Boyd (2006) *Feminist Legal Studies* 216; Holland (2000) *Canadian Journal on Family Law* 127; and Fudge (2007) *SAJHR* 235.

<sup>105</sup> Bonthuys (2015) *SALJ* 76; C Albertyn "Judicial Diversity" in C Hoexter & Olivier (eds) *The Judiciary in South Africa* (2015) 284.

<sup>106</sup> H Conway & P Girard "No Place like Home: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain" (2005) 30 *Queen's Law Journal* 715 715.

<sup>107</sup> Mossman (2003) *Hofstra Law Review* 191.

<sup>108</sup> 191.

In spite of the importance of the legislature, the period of active and consistent legislative engagement with family law issues ended primarily in the 1990s.<sup>109</sup> Since then, Canadian society has entered into an era of fiscal constraint, polarised politics and decreased legislative activism in family law issues.<sup>110</sup> As a result of the importance of the jurisprudence, leading Canadian decisions will be analysed to determine their comparative value for South African case law. While certain progressive trends are able to offer guidance to the South African judiciary, problematic aspects identified in the Canadian jurisprudential approach also highlight issues that should be avoided by the South African courts. In this regard, a critical comparison can lead the South African courts to fundamentally re-assess previous judgments and initiate transformative legal change where necessary.<sup>111</sup>

#### 4 5 2 Gender-sensitive Canadian jurisprudence from the 1980s to the early 1990s

Within Canadian family law, the position of unmarried cohabitants is governed by a patchwork of legal rules. In accordance with this patchy framework, the courts have sometimes used the law of trusts, laws relating to contract or the law governing unjustified enrichment to address the vulnerability of unmarried cohabitants.<sup>112</sup> When it comes to obligations of support, most of the Canadian provinces have already imposed spousal support duties on un-married cohabitants through legislative amendments. As a result, much of the jurisprudence on cohabitation is focused on their rights relating to property division upon the dissolution of their relationship.

Two Supreme Court cases that offer examples of the judicial development of the private law mechanisms of unjustified enrichment and the constructive trust include *Pettkus v Becker*<sup>113</sup> (“*Pettkus*”) and *Peter v Beblow* (“*Peter*”).<sup>114</sup> While these cases are considered landmark decisions, the courts have unfortunately not always followed these decisions in subsequent cases.<sup>115</sup> In *Pettkus*, Mr Pettkus and his partner (Mrs

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<sup>109</sup> Rogerson “Canada” in *Future of Child and Family Law* 76.

<sup>110</sup> Young & Boyd (2006) *Feminist Legal Studies* 218.

<sup>111</sup> S Choudhry “Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation” (1999) 74 *Indiana LJ* 819 858.

<sup>112</sup> Mohs *Choice v Equality* (2010) 27.

<sup>113</sup> [1980] 2 SCR 834, 1980 CanLII 22 (SCC) (“*Pettkus*”).

<sup>114</sup> [1993] 1 SCR 980 (“*Peter*”).

<sup>115</sup> J Flood “Share the Wealth? *Kerr v Baranow* and the ‘Joint Family Venture’” (2011) 27 *Canadian Journal of Family Law* 361 362.

Becker) lived together for almost 20 years from 1955 to 1974. During the first five years of their relationship, Mrs Becker financially supported Mr Pettkus by paying for their living expenses, such as rent and food. Her support allowed Mr Pettkus to save his entire income, which he deposited in a bank account in his name. In 1961, he purchased a farm using this money, registering the property in his name only. Upon the dissolution of their relationship, the Supreme Court of Canada specifically awarded the respondent a one-half interest in the farm property. According to the Court, Mr Pettkus had been enriched as a result of her unpaid labour, while she had received almost nothing in return. The Court further found that the respondent had a reasonable expectation of receiving an interest in the property, while Mr Pettkus freely accepted the benefits of her labour and knew (or should have known) of these expectations.<sup>116</sup> The Court specifically pointed out that “it would be unjust to allow the recipient of the benefit to retain it”.<sup>117</sup> In *Pettkus* the Canadian Court was therefore able to recognise that simply leaving the property in Mr Pettkus’ name would result in the exploitation of the caregiving partner. While many elements of the *Pettkus* decision are progressive, Justice Dickson (as he then was) did not create an automatic presumption of equal sharing of the family property between *de facto* partners. In his decision, Dickson stressed that the respondent was awarded a share equivalent to her contribution, which in this case happened to be a one-half interest in the property. He further emphasised that in order for this remedy to be applicable, the contribution has to be substantial and directly related to the property.<sup>118</sup> The socio-economic implications of how men and women relate to one another and share the division of labour in relationships, was therefore not addressed by the Court. While recognising the property entitlements of the care-giving partner, the remedy provided was primarily based on an equitable division of economic resources rather than a gender-sensitive interpretation of human rights norms within the context of Canadian family law.

In the 1993 *Peter* case,<sup>119</sup> the Supreme Court of Appeal expanded the application of the constructive trust in terms of property claims between cohabitants by recognising the economic value of caring work. In this case, the applicant (Catherine Peter) had lived with the respondent (William Beblow) for twelve years, during which

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<sup>116</sup> [1980] 2 SCR 835.

<sup>117</sup> 834.

<sup>118</sup> *Mohs Choice v Equality: The Legal Recognition of unmarried Cohabitation in Canada* 1 40.

<sup>119</sup> *Peter v Beblow* [1993] 1 SCR 980.

time she had taken care of the domestic work, while also caring for their children. While this case did not concern Charter-based arguments, this judgment is noteworthy for recognising the socio-economic value of caring work as sufficient to make out a claim under the constructive trust. The Court emphasised that the applicant had unfairly undertaken the domestic work within this relationship without any compensation.<sup>120</sup> The Court, however, limited the remedial constructive trust by holding that it is only available if a monetary award would be inadequate and if there is a clear link between the caregiver's contributions and the family property.

Under Canadian law, unjustified enrichment and the constructive trust do not include an automatic presumption of equal sharing of the property. The actual share of property that is given to the claimant depends on judicial discretion. Furthermore, it has been pointed out that the constructive trust is generally more difficult to prove than the legislative remedy,<sup>121</sup> while proving that there is a connection between the property and traditional family contributions can be particularly difficult.<sup>122</sup> These cases therefore reveal that while the constructive trust can be used for unmarried cohabitants, as a remedy for the division of property at the breakdown of the relationship, cohabitants are still not being treated on an equal basis with married persons. Even if these relationships are not regulated in precisely the same manner, the gendered implications of these relationships need to be acknowledged and addressed. While recognising the value of caring work, the private law framework informing these cases reinforces the need for a greater focus on the human rights of vulnerable cohabitants, particularly a relational feminist interpretation of the socio-economic interests of female cohabitants.

An example of a Charter-based case initiated by unmarried cohabitants is the 1995 decision of *Miron v Trudel* ("Miron"),<sup>123</sup> which is considered a watershed case. Of

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<sup>120</sup> 980.

<sup>121</sup> For example, under British Columbia's Family Relations Act RSBC 1996, section 56 provides a spouse with the right to an equal share of family assets upon the breakdown of the marriage. Section 60 then provides that the onus rests on the spouse opposing a property claim, stating that this spouse must prove that the property in dispute is not used for traditional family purposes. See also: Mohs *Choice v Equality: The Legal Recognition of Unmarried Cohabitation in Canada* 32

<sup>122</sup> Mohs *Choice v Equality: The Legal Recognition of Unmarried Cohabitation in Canada* 32.

<sup>123</sup> Rogerson "Canada" in *The Future of Child and Family Law* 97. See also: The case of *Miron v Trudel* [1995] 2 SCR 418 in which the Supreme Court of Canada ruled that the right to equality within the Charter of Rights included protection from discrimination on the basis of marital status.

particular interest, is the manner in which the Supreme Court of Canada initially grappled with the choice argument. This element of the judgment provides a comparative basis for South African family law. In this case, unmarried cohabitants challenged their exclusion from the definition of “spouse” in a standard automobile insurance policy prescribed by provincial legislation. They claimed that their exclusion infringed upon the right to equality as protected in the Canadian Charter. The exclusion of cohabitants prevented John Miron, who was unable to work due to an automobile accident, from claiming accident benefits under his insurance policy. He was therefore unable to provide for his family, because he and his partner were not married. While marital status is not expressly recognised in section 15 of the Charter, in *Miron* the Supreme Court of Canada developed the law to recognise marital status as a prohibited analogous ground of discrimination.<sup>124</sup>

The Court recognised that both married and unmarried couples are involved in the kind of economically interdependent relationships that the legislation is intended to benefit.<sup>125</sup> The Court also recognised that cohabitants have historically suffered significant social disadvantage, including “social ostracism” and the denial of traditional marital benefits.<sup>126</sup> While these relationships have slowly become more accepted in Canadian society, the Court pointed out that the historical disadvantage associated with cohabitation should not be underestimated.<sup>127</sup>

In addition to recognising the need for social recognition of cohabitation, Madam Justice L'Heureux-Dubé proceeded to criticise the disproportionate focus on the choice argument by stating that the “decision of whether or not to marry is most definitely capable of being a very fundamental and personal choice”.<sup>128</sup> She went on to point out that for a significant number of persons in “non-traditional” relationships, the notion of “choice” may be completely illusory. She highlighted that it is inappropriate to condense the complex factors that shape personal choices into a simple dichotomy between “choice” or “no choice”.<sup>129</sup>

Her judgment also acknowledged the diversity within Canadian society, by recognising that family means very different things to different people. The failure to

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<sup>124</sup> Rogerson “Canada” in *The Future of Child and Family Law* (2012) 97.

<sup>125</sup> *Miron* para 44.

<sup>126</sup> Para 152.

<sup>127</sup> Para 152.

<sup>128</sup> Para 22.

<sup>129</sup> *Miron v Trudel* [1995] 2 SCR para 22.

adopt the traditional conception of a family may therefore be due to a range of reasons, all deserving of equal social recognition.<sup>130</sup> She noted that since the object of the legislation in question is to assist families when one of their members is injured in an accident, the focus should be on fulfilling this underlying purpose, as opposed to what their official marital status is.<sup>131</sup> The Court therefore adopted a context-sensitive analysis of how the law structures relations and how it intends to structure these social relations. This approach allowed the Court to recognise the social importance of cohabiting relationships and the need to extend socio-economic benefits to their participants.

In a subsequent decision by the Alberta Court of Appeal in *Taylor v Rossu* (“*Taylor*”),<sup>132</sup> the court specifically drew from the functional approach adopted in *Miron*. In the *Taylor* case, the Court held that it was a discriminatory violation of section 15 of the Charter to exclude unmarried cohabitants from the definition of “spouse” in Alberta’s family support statute.<sup>133</sup> Prompted by this decision, the province of Alberta became the last common law province to amend its legislation to include heterosexual cohabitants in a “marriage-like” relationship.

The *Miron* decision reveals that, in the earlier Supreme Court jurisprudence of the 1990s, the primary focus was initially on recognising a more functional conception of “family”.<sup>134</sup> While the focus on functional families is invaluable, much of this development is undermined through the state’s subsequent move towards privatising socio-economic needs. Mary Jane Mossman elucidates that, while these Canadian decisions clearly recognise economic need on the part of former spouses (mostly women), these decisions primarily place this need within the responsibility of (former) family members. This neoliberal approach effectively neglects the state’s duty to regulate the socio-economic consequences of these relationships, while also being required to provide adequate public services.<sup>135</sup> As a result, much of Canada’s recent family law development has been shaped by the neoliberal agenda of the government.<sup>136</sup> To the extent that feminist critiques of marriage, family law and the

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<sup>130</sup> Para 22.

<sup>131</sup> *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 355.

<sup>132</sup> [1998] ABCA 193 (“*Taylor v Rossu*”).

<sup>133</sup> Domestic Relations Amendment Act 1999 SA 1999 c 20 s 2.

<sup>134</sup> Rogerson “Canada” in *The Future of Child and Family law* 77.

<sup>135</sup> Mossman (2003) *Hofstra Law Review* 186.

<sup>136</sup> Treloar & Boyd (2014) *International Journal of Law, Policy and the Family* 1.



privatisation of economic responsibility are neglected, conservative and patriarchal discourses on marriage are further entrenched.<sup>137</sup> This neoliberal trend therefore raises the need to focus on the socio-economic consequences of family dissolution and the specific socio-economic needs of individuals in relation to one another, as opposed to primarily focusing on the form of a relationship. It also raises the need for gender-sensitive interpretations of family law rules that strengthen the state's duty to develop private accountability measures for human rights violations. Interconnected to the initial jurisprudential concern with a functional conception of family are certain watershed judgements relating to the economic impact of family dissolution on women.

#### 4 5 3 Feminist trends in Canadian family law in the 1990s

Both the Canadian courts and the South African courts are grappling with similar issues and debates when it comes to infusing family law rules with human rights norms.<sup>138</sup> In this regard, Canadian family law is worth examining, given the remarkable and progressive changes that have occurred in relation to spousal support in the previous two decades.<sup>139</sup> In particular, the manner in which feminist interpretations of human rights norms have expanded certain family law rules so as to be more responsive to the socio-economic impact of caring work, has the potential to offer useful insights.

In spite of the Charter's lack of socio-economic rights, certain progressive decisions on family law recognised the integral interconnection between socio-economic vulnerability and inadequate family law rules.<sup>140</sup> As further pointed out by Leckey, much of this transformation was due to scholars working within a feminist tradition.<sup>141</sup> Particular judgments that stand out are progressive decisions by the

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<sup>137</sup> Young & Boyd (2006) *Feminist Legal Studies* 216; and Mossman (2003) *Hofstra Law Review* 184.

<sup>138</sup> J Fudge "Substantive Equality, the Supreme Court of Canada and the limits to Redistribution" (2007) 23 *SAJHR* 235 235.

<sup>139</sup> S Gavigan "Something Old, Something New? Re-Theorizing Patriarchal Relations and Privatization from the Outskirts of Family Law" (2012) 12 *Theoretical Inquiries into Law* 271 271:

"Canada has an enviable record of relatively progressive and egalitarian legislation and policy in relation to Canadian family forms."

<sup>140</sup> S B Boyd & CFL Young "Feminism, Law and Public Policy: Family Feuds and Taxing Times" (2004) 42 *Osgoode Hall Law Journal* 545 556.

<sup>141</sup> Leckey (2007) *La Revue Du Barreau Canadien* 72. For an in-depth discussion on the role of the sociological concept of 'functional family' in developing Canadian family law, see J

Supreme Court of Canada (that took place in the early 1990's) relating to the recognition of gender inequality within family law. These decisions are noteworthy for providing fairly generous socio-economic relief to the spouse in the weaker socio-economic position upon the dissolution of their marriage. While this was primarily in terms of divorce, the Court's contextual approach was particularly responsive to existing patterns of vulnerability and disadvantage within Canadian society. The Court's mode of reasoning also facilitated an examination of the gendered nature of family law, as well as the need for transformation.

The decision of the famous case of *Moge v Moge*,<sup>142</sup> is thus considered a watershed case. In this decision, the Supreme Court of Canada took judicial notice of the unequal economic impact of divorce on women and how it entrenches the feminisation of poverty.<sup>143</sup> This case concerned an appeal against the decision to set aside a spousal support order, sixteen years after the divorce had been granted. The majority decision by Madam Justice L'Heureux-Dubé,<sup>144</sup> recognised that a former spouse had an obligation to provide support to a dependent spouse to compensate for disadvantages experienced both during the marriage and after marriage breakdown.<sup>145</sup> Her judgment is thus noteworthy for recognising the disproportionate impact of child care, marriage and divorce on women, while emphatically rejecting the self-sufficiency model of divorce, substituting it instead with a compensatory framework.<sup>146</sup>

Her judgment has been praised for acknowledging the social reality that even modern women tend to assume more responsibility than men for caring work and child care and that this often has negative socio-economic consequences.<sup>147</sup> She also recognised the integral link between this fact and women's inequality in the labour force.<sup>148</sup> This recognition is integral to a relational conception of rights, as developed by Jennifer Nedelsky and discussed in chapter two of this study. In terms of this

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Millbank "The Role of "Functional Family" in Same-Sex Family Recognition Trends" (2008) 20 *Child and Family Law Quarterly* 1 1.

<sup>142</sup> [1992] 3 SCR 813 (hereafter "*Moge*").

<sup>143</sup> *Moge* 873.

<sup>144</sup> *Moge v Moge* [1992] 3 SCR 813 pages 824-876.

<sup>145</sup> *Moge* pages 824-876.

<sup>146</sup> *Moge* page 829 paras d-f.

<sup>147</sup> Boyd & Young (2004) *Osgoode Hall Law Journal* 556.

<sup>148</sup> *Moge* page 829 paras i-j ; see also Boyd & Young (2004) *Osgoode Hall Law Journal* 557.

approach, a just structure of household relationships is crucial for the full and equal enjoyment of all human rights.<sup>149</sup>

The importance of questioning how the law is structuring gendered relations was further recognised by Justice L'Heureux-Dubé when she interpreted the Divorce Act through primarily analysing its underlying purpose. She pointed out that the purpose of this Act is to ensure a fair and equitable distribution of resources between ex-spouses so as to alleviate the detrimental socio-economic consequences of divorce. She went on to state that it would be: “perverse in the extreme to assume that Parliament’s intention in executing the Act was to penalise women”.<sup>150</sup> Her decision is therefore renowned for having transformed spousal support law in a manner that protected the socio-economic interests of vulnerable care-giving spouses. In terms of relational feminism, this judgment is noteworthy for effectively recognising the integral links between legal rights, core values and the manner through which private relations impact upon the capacity to exercise one’s rights.<sup>151</sup>

Justice L'Heureux-Dubé’s judgment has thus been praised by feminists for providing a context-sensitive and realistic perspective on the experiences of women, and for ensuring that legal rules pertaining to spousal support are responsive to women’s needs and realities. This relational feminist approach is in contrast to a neutral acceptance of the gendered assumptions underlying family roles that perpetuate the exploitation of women.<sup>152</sup> The decision of Justice L'Heureux-Dubé in *Moge* has thus been heralded for placing the individual within her gendered, familial context, at least in terms of her existing private law remedies against her ex-spouse.<sup>153</sup>

An analysis of *Moge* and certain subsequent family law decisions reveal an enduring tension between atomistic liberalism and socially contextualised feminism within Canadian family law.<sup>154</sup> As highlighted in chapter two,<sup>155</sup> liberalism assumes that citizens are simply autonomous beings with equal bargaining power.<sup>156</sup> In

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<sup>149</sup> J Nedelsky “The Gendered Division of Household Labour: An Issue of Constitutional Rights” in B Baines, D Barak-Erez & T Kahana (eds) *Feminist Constitutionalism: Global Perspectives* (2012) 15 16.

<sup>150</sup> *Moge* pages 824-876.

<sup>151</sup> Nedelsky “The Gendered Division of Household Labour” in *Feminist constitutionalism* 5.

<sup>152</sup> Boyd & Young (2004) *Osgoode Hall Law Journal* 556.

<sup>153</sup> 558.

<sup>154</sup> Leckey (2007) *University of Toronto Law Journal* 1 2. This can also be seen within certain South African decisions, such as the judgment of *Volks v Robinson* (2005) 5 BCLR 446 (CC).

<sup>155</sup> See part 2 4 of chapter two of this study.

<sup>156</sup> Leckey (2007) *University of Toronto Law Journal* 1.

contrast, relational feminism aims to recognise the complex manner in which individuals are enmeshed in relationships, with their capacity to exercise their rights constrained by ideology, gender, and broader socio-economic forces.<sup>157</sup> Canadian scholars working within the feminist tradition have adopted this contextually sensitive criticism of “autonomy” and “choice”, as a framework to analyse family law matters such as spousal support and child custody issues.<sup>158</sup> Given the extensive inequality found within South African society, as well as the reality that women are disproportionately affected by poverty, a relational feminist conception of family law rights is imperative.

Following the decision of *Moge*, in *Bracklow v Bracklow* (“*Bracklow*”),<sup>159</sup> the Supreme Court of Canada developed the divorce law further by stating that a former disabled spouse could apply for ongoing financial support based on financial need alone.<sup>160</sup> In this decision, the wife, who had worked for some time during the marriage while also contributing through providing caring work within the household, eventually, became physically and mentally disabled after her divorce. The severity of her disability ultimately prevented her from working. The Court held that there was a “basic social obligation”<sup>161</sup> between spouses, which meant that the husband in this relationship owed a duty of spousal support to his ex-wife. This was held to be the case even though it was not through his actions that his wife’s economic prospects had suffered a further decline after their divorce. The reasoning in *Bracklow*<sup>162</sup> has been criticised for focusing less on the gendered nature of economic disadvantage within marriage, and more on privatising the basic social obligations between marital partners.<sup>163</sup>

An analysis of these cases reveals that much of the earlier Canadian jurisprudence was shaped by the value of gender equality, as well as a concern for the caregiving partner upon the termination of the marriage. It is also clear, however, that there has been a subsequent shift towards the privatisation of familial responsibilities in Canada. The *Moge* decision provides an example of a relational and gender-sensitive analysis

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<sup>157</sup> 1.

<sup>158</sup> 2.

<sup>159</sup> [1999] 1 SCR 420.

<sup>160</sup> M J Mossman “Choices and Commitments for Women: Challenging the Supreme Court of Canada in the Context of Social Assistance” (2004) 42 *Osgoode Law Journal* 615 616.

<sup>161</sup> [1999] 1 SCR 421.

<sup>162</sup> [1999] 1 SCR 420.

<sup>163</sup> Mossman (2003) *Hofstra Law Review* 186.

of Canadian family law rules and the gendered socio-economic consequences flowing from family dissolution. It is, however, necessary to analyse how the Canadian courts have dealt with these issues in cases specifically dealing with unmarried cohabitants.

#### 4 5 4 Innovative judicial development in Québec in the 1990s

In the province of Québec, socio-economic rights are explicitly included under the Québec Charter of Human Rights and Freedoms (“QCHRF”).<sup>164</sup> With the adoption of the QCHRF, Québec provided for the protection of the right to free public education<sup>165</sup> and an acceptable standard of living.<sup>166</sup> It is, therefore, surprising that Québec is the Canadian province that provides the least amount of socio-economic protection to unmarried cohabitants in terms of its legislative framework. While certain courts have provided innovative legal remedies to female cohabitants, the civil law system underlying Québec is informed by a liberal conception of choice. This liberal approach undermines further developments regarding the legislative regulation of cohabitation.<sup>167</sup> Québec thus offers a particularly appropriate example of the danger, for a country committed to fundamental human rights,<sup>168</sup> of maintaining a liberal conception of choice when regulating cohabitation.

Québec is the only Canadian province that has not recognised a duty of support between cohabitants. In spite of these drawbacks, the Superior Court of Québec has made certain innovative decisions in cohabitation cases relating to access to the family home. Through doing so, the Court has extended socio-economic protection to female cohabitants upon the dissolution of their relationship. An example of this is provided by a Superior Court case which granted exclusive possession of the family home to a child and, by extension, to the female parent assuming care of that child.<sup>169</sup> This extension was based upon the “best interests of the child” principle. While this is an innovative approach by the court, it has been pointed out that this remedy is not found

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<sup>164</sup> Québec Charter of Human Rights and Freedoms 1976 CQLR C-12.

<sup>165</sup> S 41 of the Québec Charter of Human Rights and Freedoms CQLR C-12 (“QCHRF”).

<sup>166</sup> S 45.

<sup>167</sup> R Leckey “Family Outside the Book on the Family” (2009) 88 *Canadian Bar Review* 545-78.

<sup>168</sup> S 1(a) of the Constitution.

<sup>169</sup> *Droit de la famille* 579 [1988] RJQ 51 (CA); R Leckey “Family Outside the Book on the Family” (2009) 88 *Canadian Bar Review* 545 574; Canadian Women’s Legal Education and Action Fund (LEAF), *Factum of the Intervener in Eric v Lola* (2012) 2.

under the Civil Code of Québec.<sup>170</sup> It is also uncertain, and in every case requires the presence of children. This case is important in terms of recognising the interests of children in these families, and in terms of developing the civil law in accordance with the Charter's underlying values and norms. Protection was however, extended to the cohabitant in terms of her role as a mother. In spite of the limitations of this remedy, this case does emphasise the importance of the family home in pursuing social objectives and protecting vulnerable family members.<sup>171</sup> This is in contrast to the traditional approach of only recognising the family home through a property law lens.

#### 4 5 5 The danger of neoliberalism and the liberal choice argument: *Nova Scotia v Walsh*

One of the more interesting elements of the early Canadian family law jurisprudence is that the choice argument did not initially play a significant role in the family law jurisprudence. As pointed out above, the focus was initially on a more functional conception of relationships, with the emphasis on the socio-economic interdependence of the parties. This functional approach illustrated its responsiveness to the needs of women through catalysing progressive legislative developments pertaining to spousal support in Canada. In spite of this initial focus on functional families, an analysis of the jurisprudence illustrates that the choice argument has recently taken centre-stage within the Canadian family law discourse. Interconnected to this liberal trend is the increasing marginalisation of feminist voices within the family law jurisprudence. Adding to this issue, is the growing economic inequality within Canada, as well as the rise of neoliberalism.<sup>172</sup> The previous two decades have thus been characterised by an increasingly retrogressive trend in terms of the manner in which the Canadian government and courts are addressing violations of social rights.<sup>173</sup>

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<sup>170</sup> Canadian Women's Legal Education and Action Fund (LEAF), *Factum of the Intervener in Eric v Lola* (2012) 2.

<sup>171</sup> R Leckey "Gimme Shelter" (2001) 34 *The Dalhousie Law Journal* 220.

<sup>172</sup> Boyd & Young (2004) *Osgoode Hall Law Journal* 556.

<sup>173</sup> B Porter & M Jackman "Introduction: Advancing Social Rights in Canada" in Porter B & Jackman M (eds) *Advancing Social Rights in Canada* (2014) 1 1-3; and M Jackman and B Porter "Socio-Economic Rights Under the Canadian Charter" in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 209.

This shift towards a liberal conception of choice within family law is illustrated through the 2002 Supreme Court case of *Nova Scotia (Attorney General) v Walsh* (“*Walsh*”).<sup>174</sup> In this case Susan Walsh had lived with Wayne Bona for ten years during which time they had two children together. They also shared a home as joint tenants. At the time of separation Bona had assets with a net value of \$66,000. Upon their separation, Walsh claimed support for herself and their two children. In addition, she sought an equal division of “matrimonial assets”. Under the Nova Scotia Matrimonial Property Act, (the “NSMPA”)<sup>175</sup> matrimonial property is defined, with “spouses” entitled to an equal share of these assets, regardless of who owns them. The NSMPA also provides for spousal support, a right which was already extended to cohabitants at the time of the case. Nova Scotia courts are also given judicial discretion in terms of conferring on one spouse exclusive possession of a matrimonial home for life or for a short-term period.<sup>176</sup> In this case, Walsh argued that the exclusion of unmarried cohabitants from the definition of “spouse” in the NSMPA was a violation of the equality rights of *de facto* spouses under section 15 of the Charter.<sup>177</sup> Although successful in the Nova Scotia Court of Appeal, the Supreme Court of Canada held, however, that marriage is a relevant difference upon which justifiable distinctions may be drawn.<sup>178</sup> The Supreme Court went on to find that while inequality may exist in cohabiting relationships, resulting in unfairness between the parties on relationship breakdown, there was no Charter-based requirement that the NSMPA be extended to protect cohabitants.<sup>179</sup>

A major line of reasoning found within the judgment was that it is an individual choice regarding whether or not to marry, and that autonomy should be respected through not imposing the marital property regime on those who did not choose it. One judge, agreeing with the majority that excluding unmarried couples from a matrimonial property regime was permissible, distinguished between the respective legal bases for spousal support and matrimonial property.<sup>180</sup> For Justice Gonthier, spousal support

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<sup>174</sup> *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 325; [2002] SCC 83 (“*Walsh*”); J Flood “Share the Wealth? Kerr v Baranow and the ‘Joint Family Venture’” (2011) 27 *Canadian Journal of Family Law* 361.

<sup>175</sup> Matrimonial Property Act RSNS 1980 c9 (“MPA”).

<sup>176</sup> MPA, s 6(1), 8(1), 11(1)(a).

<sup>177</sup> *Walsh* paras 1-2.

<sup>178</sup> Para 62.

<sup>179</sup> Para 62.

<sup>180</sup> Para 191.

is legislatively imposed and needs-based. On the other hand, the division of matrimonial property is contractual, in that it arises from the free exchange of consent illustrated by entering into a marriage. In accordance with this, the aim of dividing assets is contractual, whether done directly in terms of an express contract or indirectly by the act of marriage. Spousal support, however, according to Gonthier, seeks to fulfil a social objective in that it is meant to satisfy the material needs of vulnerable ex-spouses and their children.<sup>181</sup>

In spite of Gonthier's distinction, the majority disagreed and primarily relied upon contract and property law as opposed to a more gender-sensitive analysis of the socio-economic needs of female cohabitants.<sup>182</sup> The majority decision in *Walsh* is therefore referred to as a surprising disappointment for many scholars, running counter to the quarter-century-long trend in Canada of reducing the hierarchical status of marriage.<sup>183</sup> Canadian scholars have extensively criticised this case, pointing out that the main focus should rather be on the protection of the weaker party.<sup>184</sup> The emphasis should therefore primarily be on promoting the rights of the socio-economically vulnerable party, in a manner that structures relations based on care and concern.

The decision in *Walsh*, therefore, not only reflected a gender imbalance, but also the traditional imbalance with regard to human rights (in terms of the tendency to focus on civil and political rights while ignoring their socio-economic dimensions). In contrast to the majority judgments, the dissenting judgment in this case clearly points out the complexity of choice in personal relationships. In doing so, the dissenting judgment specifically highlighted the problems of inequality in bargaining power, which have been well-documented in feminist analyses of family negotiations.<sup>185</sup> It was also argued that choice in the context of intimate relationships is often complicated by

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<sup>181</sup> Para 203.

<sup>182</sup> *Walsh* para 43; Conway & Girard (2005) *Queen's Law Journal* 721.

<sup>183</sup> M Bailey "Regulation of Cohabitation and Marriage in Canada" (2004) 26 *Law and Policy* 153 154; Rogerson "Canada" in *The Future of Child and Family law* 77; and Mohs *Choice v Equality: The Legal Recognition of Unmarried Cohabitation in Canada* 13.

<sup>184</sup> Bailey (2004) *Law and Policy* 154; Rogerson "Canada" in *The Future of Child and Family law* 77; A Mohs *Equality v Choice: The Legal Recognition of Unmarried Cohabitation in Canada* 13; Young & Boyd (2006) *Feminist Legal Studies* 216; and Mossman (2003) *Hofstra Law Review* 184.

<sup>185</sup> E Bonthuys "Family Contracts" (2004) 121 *SALJ* 879 897; Heaton (2005) *SAJHR* 552.



family loyalties, dependency and responsibility for child care.<sup>186</sup> A specific example of this is Justice L'Heureux-Dubé's dissenting opinion in *Walsh*<sup>187</sup> where she stated that:

“[T]he choice not to marry is not a matter belonging to each individual alone. The ability to marry is inhibited whenever one of the two partners' wishes to marry and the other does not. In this situation, it can hardly be said that the person who wishes to marry but must cohabit in order to obey the wishes of his or her partner chooses to cohabit. This results in a situation where one of the parties to the cohabitation relationship preserves his or her autonomy at the expense of the other ... Under these circumstances, stating that both members of the relationship chose to avoid the legal consequences of marriage is patently absurd.”<sup>188</sup>

It was further pointed out that many heterosexual unmarried cohabitants cohabit out of necessity. For many, choice is thus denied to them simply by virtue of the wishes of their partner.<sup>189</sup> She emphasised that married couples are often unaware of the legal consequences of marriage and thus cannot be said to consciously choose a specific form of matrimonial property division. Many unmarried cohabitants have also not made an informed decision to avoid the legal consequences of marriage.<sup>190</sup> Justice L'Heureux-Dubé expressly questioned the distinctive approaches between the division of property and spousal support. As she argued, both mechanisms help individuals to satisfy basic financial needs following the end of an intimate, economically interdependent relationship.<sup>191</sup>

Both property and support obligations can thus be conceived in terms of a relational feminist interpretation of socio-economic need. This is particularly necessary when it comes to property that is the shared home of dependents within the family. Determinations on how to divide family property should be informed by the broader socio-economic context, such as the availability of social assistance by the state. Simultaneously, the reality of gendered norms and their impact upon one's capacity to access spousal support and family property should be taken into account. The decision in *Walsh*, thus reinforced the need to focus on the socio-economic rights and needs of vulnerable family members.

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<sup>186</sup> *Walsh* para 153.

<sup>187</sup> Para 153.

<sup>188</sup> Para153.

<sup>189</sup> Para153.

<sup>190</sup> Bailey (2004) *Law and Policy* 156.

<sup>191</sup> *Walsh* paras153 & para 103; Leckey (2001) *The Dalhousie Law Journal* 198.

In *Walsh*, Justice L'Heureux-Dubé also examined the exclusion of cohabitants from the matrimonial property system in more detail pointing out that the section 15(1) analysis does not only entail the conferral of an economic benefit. As she further pointed out, without the legislative presumption in their favour, unmarried cohabitants are left with the burden of proving their entitlement to share in family property. This is an evidentiary burden that is not easily discharged without incurring litigation costs and expending time and energy.<sup>192</sup> This once again highlights the unfairness of completely excluding cohabitants from the matrimonial property system while failing to enact a statutory framework to regulate their status. Justice L'Heureux-Dubé therefore recognised the relational impact of excluding cohabitants from available matrimonial remedies, in that this denial facilitates exploitation while entrenching disadvantage.<sup>193</sup> It was pointed out by Justice L'Heureux-Dubé that even if research showed that cohabitants chose to avoid marriages so as to avoid the legal consequences of marriage, those findings would be irrelevant as the MPA seeks to address the consequences of a relationship at its termination and not the intentions prevalent at the beginning of a relationship. The above analysis of these cases clearly reveals the shift within Canadian family law from a functional conception of the family in the 1990s to a more liberal conception of choice in the previous two decades, with this retrogressive trend continuing.

#### 4 5 6 The retrogressive trend continues: *Kerr v Baranow* and *Eric v Lola*

In 2011, the Supreme Court of Canada handed down an important decision in the case of *Kerr v Baranow* (“*Kerr*”).<sup>194</sup> This case concerned, Margaret Patricia Kerr (“K”) and Nelson Dennis Baranow (“B”), a couple in their late 60s, who had parted ways after living together for more than 25 years. Both parties had worked during the relationship and they had both contributed to the family home. In the trial court in British Columbia, K claimed support and a share of property that was registered in B’s name, based on resulting trust and unjustified enrichment. B counterclaimed that K had been unjustly enriched by his housekeeping and personal assistance services he provided after K suffered a stroke. The trial judge in the court *a quo* awarded K \$315,000, which

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<sup>192</sup> Para 86.

<sup>193</sup> Para 86.

<sup>194</sup> *Kerr v Baranow* 2011 SCC 10, [2011] 1 SCR 26 (“*Kerr*”).

equated to a third of the value of the home in B's name that they had shared. The trial judge found that K had provided \$60,000 worth of equity and assets at the beginning of their relationship. K was also awarded \$1,739 per month in spousal support. B then appealed to the Appeal Court of British Columbia. The Appeal Court dismissed K's claim for support, resulting in K appealing to the Supreme Court of Canada.

In the Supreme Court of Canada, the Court allowed the appeal on the spousal support issue and restored the order of the trial judge's decision in terms of support. The appeal from the order dismissing K's unjust enrichment claim was also allowed and a new trial was ordered. The Supreme Court of Canada set out guidelines of what K must prove in order to succeed with her unjustified enrichment claim.<sup>195</sup>

The appeal from the order dismissing K's claim in resulting trust was also dismissed while the order for a new hearing of B's counterclaim was affirmed.<sup>196</sup> The most notable aspect of the Supreme Court decision is the manner in which the court discussed and developed the available remedies for an unjustified enrichment claim. Under Canadian law, the doctrine of unjustified enrichment imposes burdensome requirements on claimants, while simultaneously providing the courts with very broad discretionary powers. In this case however, the Court confirmed that a monetary award need not be calculated on a "fee-for-services basis", but may reflect a share of the wealth that was accumulated during the relationship proportionate to the claimant's caregiving contributions.<sup>197</sup> This remedy is however only available upon proof that the partners were engaged in what the court described as a joint family venture (a "JFV").

It has been pointed out that cohabitation with a partner does not automatically give rise to a presumption of a JFV, signifying a substantial difference from certain legislative provisions which automatically ascribe rights after cohabiting for a specific period of time.<sup>198</sup> In discussing the requirements of a JFV, the Court listed four criteria

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<sup>195</sup> On page 277 of *Kerr*, the Supreme Court of Canada held that K needs to:

"[E]stablish that B has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to the generation of wealth during the relationship. She would then have to show what proportion of the jointly accumulated wealth reflects her contributions."

<sup>196</sup> *Kerr* page 269.

<sup>197</sup> *Kerr* page 273.

<sup>198</sup> For example, in Ontario, the Family Law Reform Act of 1990 also provides rights through ascription, with a "dependant" defined as a person to whom another has an obligation to provide support and a "spouse" defined as either of two persons who are not officially married to each other but who have lived together, (a) "continuously for a period of not less than three years," or (b) in a relationship of some permanence and they are the "natural or adoptive parents of a child".

through which to analyse the relationship, including mutual effort, economic integration, actual intent, and priority of the family.<sup>199</sup> Missing from the JFV is an examination of the social context and the socio-economic consequences of how men and women relate to one another. The closest that the Court comes to this relational analysis under the JFV is in its analysis of the “priority of the family,” where the Court specifically looks at whether a partner sacrificed certain career prospects or educational advancement for the well-being of their family.<sup>200</sup> This factor is linked to recognising exploitative relations within families and the role of legal rights in either exacerbating or alleviating these inequitable relations. In this regard, the Canadian approach to the JFV is slightly more relational than the current construction of the tacit universal partnership under South African family law, which was discussed in detail in chapter three.<sup>201</sup> The JFV has however, also been criticised, given its uncertainty, particularly as none of the factors that the court listed are necessarily required for a finding of a JFV.<sup>202</sup> The JFV also places the legal analysis of cohabiting relationships within the contours of a private law paradigm.

Under the heading of “actual intent”, the Court emphasised the importance of autonomy in domestic relationships. As stated by the court, since partners may make a deliberate choice not to marry, their actual intent whether to be economically intertwined must be given considerable weight.<sup>203</sup> Relevant factors that a court will look at to determine this intention include acceptance that the relationship is equivalent to marriage, conduct indicating a desire to share wealth, and testamentary provisions made for each other in their wills.<sup>204</sup> Procedurally, making out a claim in unjustified enrichment remains a difficult exercise for cohabitants. Furthermore, such a monetary claim does nothing to address the needs for shelter and socio-economic stability, which is recognised in legislation governing married spouses.

Following the *Kerr* decision, in January 2013, the Supreme Court of Canada handed down its decision in the case commonly referred to as *Eric v Lola*.<sup>205</sup> In this case Eric and Lola met in 1992 when she was 17 and he was 32 years of age. After staying

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<sup>199</sup> *Kerr* page 271.

<sup>200</sup> Para 98.

<sup>201</sup> See part 3 5 3 of chapter three of this study.

<sup>202</sup> Flood (2011) *Canadian Journal of Family Law* 362.

<sup>203</sup> *Kerr* para 336.

<sup>204</sup> Para 96.

<sup>205</sup> *A v B and Attorney General of Quebec Quebec (AG) v A* 2013 SCC 5 [popularly known as *Eric v Lola*]. (“*Eric v Lola*”)

together for seven years, during which time Lola gave birth to three children, they separated. Given that they were never married, Lola claimed support, a lump sum of money, a share in the family property and the legal matrimonial regime of partnership of acquests. She also sought to reserve her right to claim a compensatory allowance. Her claim concerning the family home was later settled in a private agreement.

The Charter-based issue raised by the parties was whether the exclusion of *de facto* spouses in the province of Québec from property division and spousal support benefits violated the equality rights guaranteed by section 15 of the Canadian Charter. The Canadian Legal Education and Action Fund (“LEAF”) provided written submissions to the Court on behalf of Lola and cohabiting women in general. In its submission, LEAF stated that the total exclusion of *de facto* spouses from the spousal support provisions in the Civil Code of Québec (CCQ) violated the guarantee of substantive equality under section 15 of the Charter.<sup>206</sup> They also pointed out, that while spousal support is of vital importance, it remains insufficient when remedying constitutional violations.<sup>207</sup> They went on to recommend a general presumption of equal contributions and equal sharing of property upon relationship dissolution, in order to effectively recognise and redress the gendered contributions and roles in *de facto* unions.<sup>208</sup>

Unfortunately, in this case, the majority of the Court drew heavily on the majority decision in *Nova Scotia v Walsh*.<sup>209</sup> In deciding whether the Civil Code of Québec (“CCQ”) violated the right to equality, the discrimination analysis was posed as a two-part enquiry. The first question was whether the differential treatment between *de facto* partners and married couples found in certain articles of the CCQ<sup>210</sup> amounted to discrimination. The second question was whether this was justifiable in terms of section 1 of the Charter.

In the majority opinion of McLachlin, Deschamps, Abella, Cromwell and Karakatsanis, it was held that the differentiation did amount to discrimination. The separate opinion of LeBel, Fish, Rothstein and Moldaver found that the exclusion of

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<sup>206</sup> Canadian Women’s Legal Education and Action Fund (LEAF), *Factum of the Intervener in Eric v Lola* (2012) 2.

<sup>207</sup> 2.

<sup>208</sup> 2.

<sup>209</sup> *Walsh* [2002] 4 RCS 347.

<sup>210</sup> These included articles 401 to 430, 432, 433, 448 to 484 and 585 of the Civil Code of Quebec.

*de facto* partners from the operation of the Civil Code, did not create a disadvantage by expressing or perpetuating prejudice or through stereotyping. They accordingly found that these provisions did not violate the right to equality under the Canadian Charter.<sup>211</sup> Given that the differentiation did not infringe upon the right to equality, they held that it was unnecessary to consider whether the differentiation was justifiable under the Charter. While McLachlin, Deschamps, Cromwell and Karakatsanis found that the discrimination was ultimately justifiable, Justice Abella, found that the blanket exclusion of *de facto* spouses did violate the equality right and that it was not justified under the Charter.

The majority decision in *Eric v Lola* was primarily influenced by the liberal choice argument, much like the *Walsh* decision. As pointed out earlier, the *Walsh* decision has been criticised by scholars for its focus on a liberal conception of freedom of choice.<sup>212</sup> This is in spite of research which has revealed that when relationships end, women continue to bear the greatest socio-economic burden.<sup>213</sup>

Legislative schemes providing for property sharing and spousal support were primarily enacted to alleviate some of the socio-economic difficulties that arise for women and children upon the breakdown of their family. The reality remains however, that when entering into a long-term cohabiting relationship, *de facto* spouses may also be sacrificing economic advancement, opportunity or even self-support.<sup>214</sup> Where people in *de facto* relationships do not have access to the entire “economic readjustment” package<sup>215</sup> that is provided to ex-spouses, patterns of gender inequality are exacerbated.<sup>216</sup> The dissenting opinions in both *Walsh*<sup>217</sup> and *Eric v Lola* offered convincing reasons (such as equal need) as to why no legislative distinction ought to be maintained between married and *de facto* partners.

In the decision of *Eric v Lola*,<sup>218</sup> Justice Abella did furthermore, concede that legislative recognition of a mutual choice not to assume obligations in a *de facto*

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<sup>211</sup> *Walsh* [2002] 4 RCS 347.

<sup>212</sup> See for example, Bakht (2014) *Working Paper Series* 266; C Rogerson, “Developments in Family Law: The 2002-2003 Term” (2003) 22 *Sup Ct L Rev* 273 273; See also: Leckey (2011) *Dal LJ* 197-228, who prefers a narrow reading of *Walsh* so as to leave open the status of measures protecting the family home as shelter.

<sup>213</sup> Bakht (2014) *Working Paper Series* 266.

<sup>214</sup> 266.

<sup>215</sup> 266.

<sup>216</sup> 266.

<sup>217</sup> *Walsh* [2002] 4 RCS 347.

<sup>218</sup> *Eric v Lola* para 372.

partnership might be constitutionally permissible. In this regard she highlighted that a regulatory option could be the presumption in favour of inclusion, subject to a consensual (and express) opting out. Justice Abella went on to state that given the vulnerability and lack of legal information available to many unmarried cohabitants, the complete absence of any protective legislative framework, infringes upon the right to equality.<sup>219</sup> She went on to state that:

“[T]he needs of the economically vulnerable... require presumptive protection no less in *de facto* unions than in more formal ones. The evidence discloses that many *de facto* spouses simply do not turn their minds to the eventuality of separation. This lack of awareness speaks to the relative merit of a system of presumptive protection, under which they would be protected whether aware of their legal rights or not, while leaving *de facto* spouses who wish to do so, the freedom to choose not to be protected.”<sup>220</sup>

In discussing the benefits and the drawbacks of the opt-in system, Justice Abella went on to point out that the current opt-in protections may well be adequate for some *de facto* spouses who enter their unions with sufficient financial security, legal information, and the intention to avoid the consequences of a more formal union. The opt-in system is thus particularly suitable when parties are on equal terms, which is very rarely the case. While autonomy is important, there remains a need to protect vulnerable parties upon the termination of their relationship.

Additional weaknesses of this contractual opt-in approach include its inability to recognise that the choice to marry is often a complex relational decision, as already pointed out in the case of *Miron*.<sup>221</sup> Where one member of a couple refuses to marry or enter into a civil union, their partner is unable to derive the traditional socio-economic benefits that arise when these relationships end. The harmful effect of completely excluding all *de facto* spouses, who comprise a growing segment of the Canadian population,<sup>222</sup> from the protection of spousal support and division of matrimonial property systems, should not be taken lightly. Being excluded may require vulnerable *de facto* spouses, to expend time, energy and resources in attempting to obtain some form of socio-economic assistance. If a *de facto* spouse is unable to take

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<sup>219</sup> Para 445.

<sup>220</sup> Para 372.

<sup>221</sup> This case was discussed in part 4.5.2 of this chapter.

<sup>222</sup> Canadian Women's Legal Education and Action Fund (LEAF), *Factum of the Intervener in Eric v Lola* (2012) 2.

these steps, either through ignorance of the law or an uncooperative or abusive partner, he or she remains vulnerable. The opt-in system therefore neglects the human rights issues in family dissolution and retains a contractual approach. The opt-in system for cohabitants treats domestic partners differently to economically dependent spouses in formal marriages, by allowing former spouses automatic access to the possibility of socio-economic remedies, albeit through private law mechanisms.<sup>223</sup>

#### 4 5 7 Conclusion: Overview of the trends in Canadian jurisprudence

An analysis of the leading Canadian family law decisions through a relational feminist lens reveals that certain elements of the earlier jurisprudence provide useful insights for South African case law. For example, early Canadian jurisprudence illustrated a context-sensitive approach to gender issues within family law cases, emphasising the clear link between gender disadvantage and the negative socio-economic consequences of family dissolution. These judgements<sup>224</sup> were particularly responsive to the specific socio-economic needs of women and served to catalyse progressive family law legislative developments in a number of Canadian provinces. In particular, as a result of the decisions in *Moge* and *Bracklow*, Canada now has a broader approach to spousal support entitlement than any other jurisdiction, especially when compared to the United States, England and Australia.<sup>225</sup> This reveals that gender-sensitive and contextual judgments are more likely to foster legal developments conducive to structuring socio-economic equality between men and women. However, in recent years, there has been an increasing failure in Canadian law to sufficiently engage with the existing social context in terms of the gendered dynamics implicated within family law. Recent jurisprudential trends also reveal how feminist voices have become progressively marginalised over the years.

In terms of relational feminism's need for a value-sensitive approach to the regulation of cohabitation, earlier Canadian decisions illustrate the value of critically questioning the liberal choice argument. The court's initial substantive conception of autonomy thus catalysed legislatures to develop the family law regime so as to provide

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<sup>223</sup> Bakht (2014) *Working Paper Series* 266.

<sup>224</sup> *Miron v Trudel* [1995] 2 SCR 418; *Moge v Moge* [1992] 3 SCR 813.

<sup>225</sup> DA Thompson "Ideas of Spousal Support Entitlement" (2014) 34 *Canadian Family Law Quarterly* 1 3.



protection to a broader range of families. After certain progressive decisions in the 1990s, one can, however, detect a significant shift within the jurisprudence towards a liberal conception of choice that undermined much of the previous progress that had been achieved.<sup>226</sup> The divergent approaches towards spousal support and the division of family property between cohabitants also undermined much of the initial transformation that occurred. The policy debates concerning the protection of cohabitants (particularly relating to the division of the family home) have also revealed the inherent reluctance to grant cohabitants the same legal entitlements as spouses. These cases have furthermore, retained a private law lens.

These developments reveal that despite certain statutory and judicial developments in relation to occupation of the family property, ownership of the family home as between unmarried couples is predominantly determined through a private law paradigm. An example of this is the protection provided through the law of trusts, with its evidential difficulties, inherent gender bias and its unpredictable nature.<sup>227</sup> It is clear that human rights challenges pursuant to the Charter have succeeded in expanding the legal definition of families within Canada. The challenge of determining precisely how to protect the socio-economic well-being of *de facto* partners remains however, deeply contested.<sup>228</sup> Many of the developments that have occurred have also not been sufficiently transformative.

#### 4 5 8 Lessons from a comparative analysis of Canadian family law

This section sought to critically examine Canadian legislative and jurisprudential developments pertaining to cohabitants. An analysis of Canadian family law reveals some of the shared policy debates surrounding the regulation of cohabitation, such as the tendency to protect a negative conception of autonomy. In terms of the functional comparative analysis, certain Canadian provinces have extended protection to cohabitants through ascription and registration models provided for in legislation. While these approaches offer viable options for the regulation of cohabitation, they have been criticised for giving effect to a formal conception of equality.<sup>229</sup> They have

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<sup>226</sup> Treloar & Boyd (2014) *Journal of Law, Policy and the Family* 3.

<sup>227</sup> Bakht (2014) *Working Paper Series* 261 266.

<sup>228</sup> Mossman (2003) *Hofstra Law Review* 191.

<sup>229</sup> Fudge (2007) *SAJHR* 235; Canadian Women's Legal Education and Action Fund (LEAF), *Factum of the Intervener in Eric v Lola* (2012) 2.

also simply extended many of the patriarchal paradigms underlying marriage to cohabitants.

This reveals that extending legislative recognition without simultaneously dislodging the underlying relational gendered inequalities in family law, will not be sufficient to eradicate systemic gender inequality. It further underscores the need for a relational feminist approach to regulating cohabitation, particularly in terms of protecting the socio-economic well-being of female cohabitants.

In terms of the jurisprudence, in spite of the lack of justiciable socio-economic rights in the Canadian Charter, family law decisions on divorce and cohabitation in the 1980s and the 1990s were able to engage with the gendered nature of the socio-economic disadvantages flowing from family dissolution. The value of a gender-sensitive approach was specifically emphasised by the progressive legislative reform that was catalysed by these decisions. This reform emphasises that a relational feminist framework for interpreting cohabitants' rights is capable of structuring relations that improve access to socio-economic resources for women.

In spite of these early progressive trends, subsequent family law cases reveal a retrogressive movement characterised by a liberal conception of choice which coincided with the rise in neoliberalism. The danger of this approach is revealed in the manner in which it reinforced the traditional liberal conception of the public/private law divide. In particular, the increasing reliance on a negative conception of choice has led to debates on public versus private responsibility for vulnerable family members. A liberal approach does furthermore, prevent the judiciary and the legislature from engaging with the existing social context and the manner in which the state is reinforcing the socio-economic vulnerabilities of cohabiting women. As feminists have noted, the assumption that individuals should rely on their families for support is especially problematic for women, as they tend to have less income and wealth.<sup>230</sup>

The lack of justiciable socio-economic rights in the Canadian Charter has also resulted in complainants relying on the right to equality to challenge and develop private family law rules. The equality framework, which requires a comparison between the advantaged group and the disadvantaged group, tends to encourage claimants to adopt a formal equality approach.<sup>231</sup> This formalistic approach has been

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<sup>230</sup> Fudge (2007) *SAJHR* 235; Canadian Women's Legal Education and Action Fund (LEAF), *Factum of the Intervener in Eric v Lola* (2012) 2.

<sup>231</sup> Fudge (2007) *SAJHR* 235.

exacerbated by the lack of a relational feminist approach that recognises the existing social context and the gendered dynamics exacerbated by family law. The extent to which complex social relations structuring gendered inequality can be challenged under a formal equality framework is limited.<sup>232</sup> These limitations further highlight the transformative potential of giving substantive content to the socio-economic rights of cohabitants.<sup>233</sup>

Collectively, these Canadian trends illustrate that in spite of the legislative developments that have occurred, the Canadian state's regulation of cohabitation has been insufficiently transformative. This is due to heteronormative and patriarchal paradigms associated with marriage simply being extended to cohabiting relationships. The extent, to which the Canadian discourse of the last two decades has privatised socio-economic needs, while being informed by patriarchal ideology, also serves as a warning for the South African system. South Africa's commitment to social justice and fundamental human rights emphasises the need for a transformative response to cohabitation.<sup>234</sup> In the light of these lessons gained from an examination of Canadian family law, the following section examines relevant Dutch family law developments.

## 4 6 The Dutch family law system

### 4 6 1 Introduction

The South African legal system shares certain unique historical ties with the Netherlands. These similarities are evinced by our common law, which is based upon a mixture of Roman-Dutch law and English law.<sup>235</sup> There are however, a number of differences between South Africa and the Netherlands. One difference is that since 1815, the Dutch legal system has been based upon a constitutional monarchy. A

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<sup>232</sup> 235.

<sup>233</sup> *Symes v Canada* [1993] 4 SCR 695. See also: M Liu "Prophet with Honour": An Examination of the Gender Equality Jurisprudence of Madam Justice Claire L'Heureux-Dube of the Supreme Court of Canada" (2000) 25 *Queens Law Journal* 417 432.

<sup>234</sup> Gavigan (2012) *Theoretical Inquiries into Law* 275.

<sup>235</sup> Our unique common law system was founded upon the arrival of Jan van Riebeeck at the Cape of Good Hope and the English hegemony during the Napoleonic wars, which resulted in the British conquests of 1795 and 1806 at the Cape. See: T van der Merwe Stoop *Historical Foundations of South African Private Law* (2000) 3 7-8.

subsequent revision of the Constitution of the Kingdom of the Netherlands in 1848, allowed for the establishment of a system of Parliamentary democracy.

One significant difference between South Africa and the Netherlands is that the Dutch Constitution does not provide the judiciary with the power to review the rights protected in the Constitution. The social and economic rights contained in the Dutch Constitution cannot therefore, be utilised to test and challenge government legislation and policies in the courts.<sup>236</sup>

Socio-economically speaking, the Netherlands is a first-world country, with seemingly progressive policies espousing a commitment to fostering gender equality.<sup>237</sup> Given that the Netherlands has been given a high rating on the global gender inequality index,<sup>238</sup> it is worth examining the extent to which, existing gender policies have had a positive impact upon the Dutch family law system.

Certain South African scholars have described the Dutch family law regime pertaining to registered cohabitants as clearly demarcated and the product of “well-conceived and carefully considered Parliamentary procedures”.<sup>239</sup> In this regard, the Dutch legislature has played a more proactive role in reforming the family law rules regulating registered domestic partnerships, than the Dutch judiciary.<sup>240</sup> The focus of this comparative section is therefore, primarily on relevant Dutch legislation.

In spite of certain differences between South Africa and the Netherlands, as highlighted above, the Dutch family law regime is worth examining given the number of progressive developments that have occurred in this jurisdiction over recent decades.<sup>241</sup> For example, in the Netherlands, the legal incapacity of married women was abolished as early as 1957. While a provision that the husband was the “head of

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<sup>236</sup> In the first chapter of the Constitution of the Kingdom of the Netherlands, articles 19 to 23 contain provisions on employment, social security, education, the environment and public health. The practical meaning of these articles has, however, been very limited, because they have allegedly not had a significant influence on the government’s policy considerations. See H Reiding *The Netherlands and the Development of International Human Rights Instruments* LLD dissertation Utrecht University (2007) 131.

<sup>237</sup> S 2(3) of the Equal Treatment Act, 1994.

<sup>238</sup> United Nations Development Programme Human *Development Reports Gender Inequality Index* (2014) 1 1 <<http://hdr.undp.org/en/composite/GII>> accessed 12-02-2016.

<sup>239</sup> BS Smith & JA Robinson “The South African Civil Union Act 2006: Progressive Legislation with Regressive Implications?” (2008) *IJLPF* 376-377.

<sup>240</sup> Smith & Robinson (2010) *PELJ/PER* 35.

<sup>241</sup> P Vlaardingebroek “The Netherlands: The Growing Role of the Judge in Child and Family Law” in E Sutherland (ed) *The Future of Child and Family law: International Predictions* (2012) 235 235.

the household” was retained in the Dutch Civil Code (“DCC”) until 1970, this abolishment occurred before the marital power was abolished in South Africa.<sup>242</sup>

With regard to cohabitation, the Dutch government has adopted a unique approach to these relationships. For example, moral judgments against cohabitants disappeared during the 1970s.<sup>243</sup> The Netherlands is also noteworthy for officially recognising registered domestic partnerships in 1998. While this does constitute a progressive development, the DCC has only been extended to apply to registered domestic partnerships. Cohabitants are thus expected to register their relationship in accordance with the DCC or to enter into a formal cohabitation contract in order to protect their socio-economic interests.

In contrast to the position of registered domestic partners, the rights of Dutch partners in unregistered relationships are regulated in a piecemeal fashion, through different pieces of legislation and *ad hoc* judicial decisions. As a result, the existing legal framework regulating unregistered cohabiting relationships has been described as “haphazard”.<sup>244</sup> While there have been certain positive developments in Dutch law, the areas of family law, inheritance law, criminal law and criminal procedural law have remained unresponsive to the needs of unregistered cohabitants.<sup>245</sup>

In a similar manner to South African cohabitants therefore, vulnerable partners in unregistered relationships tend to fall through the gaps of the Dutch legal system. This lack of regulation is somewhat surprising, given the consistent rise in unregistered relationships in the Netherlands since 2000.<sup>246</sup> In spite of this increase, the Dutch family law system’s approach to cohabitants is primarily centred upon a contractual paradigm, as well as a liberal conception of autonomy.<sup>247</sup> The developments regarding the recognition of registered partnerships in the Netherlands was also initially aimed at addressing the needs of partners in same-sex relationships. Following the

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<sup>242</sup> See part 3 2 of chapter three of this study.

<sup>243</sup> W S Schrama “National Report: The Netherlands” *Informal Relationships- The Netherlands* (2015) 1 2. <<http://ceflonline.net/wp-content/uploads/The-Netherlands-IR.pdf>> (accessed 03-03-2016).

<sup>244</sup> Schrama “National Report: The Netherlands” (2015) 1 2.

<sup>245</sup> W M Schrama “The Dutch Approach to Informal Lifestyles: Family Function over Family Form?” (2008) 22 *International Journal of Law, Policy & the Family* 311 312.

<sup>246</sup> Schrama National Report: The Netherlands” (2015) 12.

<sup>247</sup> K Boele-Woelki & B Braat “Autonomy in the Netherlands” in J M Scherpe (ed) *Marital Agreements & Private Autonomy in Comparative Perspective* (2012) 230 230; Schrama “National Report: The Netherlands” (2015) 5.

recognition of registered partnerships in 1998, in April 2001 the Netherlands became the first country in the world to fully recognise same-sex marriages.<sup>248</sup>

While there have been promising developments in the Netherlands, certain limiting and retrogressive aspects of the Dutch family law system will also be analysed. For example, socio-economic inequality between Dutch men and women persists.<sup>249</sup> Research has revealed that this inequality is linked to the gendered division of labour and the subsequent impact upon women's participation in the labour market.<sup>250</sup> As a result of these inequitable relations, Dutch women continue to disproportionately bear the socio-economic burdens of divorce and family dissolution.<sup>251</sup> The Dutch approach to cohabitation is examined to determine the extent to which it protects the socio-economic interests of vulnerable cohabitants in unregistered domestic partnerships. This comparative analysis is informed by a relational feminist interpretation of the socio-economic rights of female cohabitants.

#### 4 6 2 The Dutch Constitution

Over the centuries, the Dutch Constitution has undergone many amendments. With regard to family law, the latest version of the Dutch Constitution does not expressly protect marriage or married families.<sup>252</sup> By not protecting a right to marriage, the Dutch Constitution is said to have facilitated the legal recognition of non-marital relationships.<sup>253</sup>

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<sup>248</sup> Smith & Robinson (2010) *PELJ/PER* 35.

<sup>249</sup> In the field of family dissolution the Dutch Ministry of Security and Justice found in 2009 that approximately 20000 women with children suffer serious financial difficulties after a relationship breakdown. This was in terms of Dutch couples who were married under a separation of property regime without a duty to net income or capital. See Schrama "National Report: The Netherlands" (2015) 1 8, where she discussed the report by the Dutch Ministry of Security and Justice. See MV Antokolskaia, B Breederveld, JE Hulst, WD Kolkman, FR Salomons and LCA Verstappen "Koude uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan", WODC, Netherlands Institute for Law and Governance (2010). See also United Nations Development Programme Human *Development Reports Gender Inequality Index* (2014) 1 1 <<http://hdr.undp.org/en/composite/GII>> (accessed 12-02-2016.)

<sup>250</sup> Important policy issues that have been emphasised are the high part-time rate which translates in a relatively low participation rate in full time employment and the low number of women in top positions.

<sup>251</sup> H J Andreß & D Hummelsheim "Introduction" in HJ Andreß & D Hummelsheim (eds) *When Marriage Ends: Economic and Social Consequences of Partnership Dissolution* (2009) 1 5.

<sup>252</sup> The Constitution of the Kingdom of the Netherlands, 2008 ("Dutch Constitution").

<sup>253</sup> W M Schrama "The Dutch Approach to Informal Lifestyles: Family Function over Family Form?" (2008) 22 *International Journal of Law, Policy & the Family* 311 315.

The Dutch Constitution is also noteworthy for protecting a wide range of progressive civil and political and socio-economic rights. Initially these rights were spread out in different sections of the Constitution. After the amendments of 1983, the Bill of Rights was however, included in chapter one of the Constitution. This placement has been said to demonstrate the importance accorded to human rights within the Netherlands.<sup>254</sup> Examples of these rights include the right to be treated equally in equal circumstances, as provided for in article 1.<sup>255</sup> Article 1 also specifically prohibits discrimination on the grounds of race and sex. While the ground of gender is notably absent, article 1 is formulated rather broadly.<sup>256</sup> In order to give effect to these provisions and to expand upon article 1 of the Dutch Constitution, the Equal Treatment Act of 1994 was subsequently enacted. The Dutch Constitution goes on to provide that everyone has the right to have their privacy respected, without prejudice to restrictions laid down by an Act of Parliament.<sup>257</sup>

With regard to the development of social and economic rights, the right to relief for the indigent and the right to care for orphans were already incorporated into Dutch law in the eighteenth century.<sup>258</sup> One example of early socio-economic developments, is the Van Houten Act on Child Labour of 1874,<sup>259</sup> which is considered to be the starting point for the development process for protecting social and economic rights in the Netherlands.<sup>260</sup>

The Dutch government's official stance on socio-economic rights has been that these rights are, together with civil and political rights, indivisible, interdependent, and equally important.<sup>261</sup> The Dutch government also signed the ICESCR<sup>262</sup> and the International Covenant on Civil and Political Rights ("ICCPR")<sup>263</sup> on the same date.<sup>264</sup>

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<sup>254</sup> H Reiding "The Netherlands and Social and Economic Rights" in H Reiding (ed) *The Netherlands and the Development of International Human Rights Instruments* (2007) 131.

<sup>255</sup> A 1 of the Dutch Constitution.

<sup>256</sup> A 1 of the Dutch Constitution provides that:

"Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted."

<sup>257</sup> A 10 of the Dutch Constitution.

<sup>258</sup> Reiding "The Netherlands and Social and Economic Rights" in *The Netherlands* 131.

<sup>259</sup> The Kinderwetje- Van Houten (The Van Houten Child Labour Act of 1874) prohibited children younger than 12 from working in factories.

<sup>260</sup> Reiding "The Netherlands and Social and Economic Rights" in *The Netherlands* 131.

<sup>261</sup> Reiding "The Netherlands and Social and Economic Rights" in *The Netherlands* 131.

<sup>262</sup> International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3.

<sup>263</sup> International Covenant on Civil and Political Rights (1966) 999 UNTS 171.

<sup>264</sup> The Dutch government signed both the ICESCR and the ICCPR on the 25<sup>th</sup> of June 1969. See: United Nations Treaty Collection Status of ICESCR (2016)

When it comes to giving effect to these rights, however, the Dutch government's main argument has been that socio-economic rights and civil and political rights are in fact different in nature, and that they accordingly require dissimilar means of implementation.<sup>265</sup> The Dutch government has also, to date, not ratified the Optional Protocol to the ICESCR.<sup>266</sup>

Following the ratification of the ICESCR and the ICCPR in 1978, the Dutch Constitution was amended in 1983. Part of these amendments entailed incorporating a number of social and economic rights into the Constitution. These rights have nevertheless, been formulated differently from their ICSECR counterparts. For example, article 20 (1) of the Dutch Constitution provides that it shall be the "concern of the authorities" to secure the means of subsistence of the population and to achieve the distribution of wealth. Section 20(2) goes on to provide that rules concerning entitlement to social security shall be laid down by an Act of Parliament. Section 20(3) further states that Dutch nationals who are unable to provide for themselves, shall have a right to aid from the authorities. Article 21 is also noteworthy for containing a section protecting the environment, stating that it shall be the concern of the authorities to keep the country habitable and to protect and improve the environment. Article 22 goes on to provide that the Authorities shall take steps to promote the health of the population and article 23 states that education shall be the "constant concern of the government."

Given that there is no provision for the judicial review of these social and economic rights, it is clear that the Dutch Constitution has left the implementation of these rights to the legislature and the executive.<sup>267</sup> In contrast to the South African legal system, there is furthermore, no Constitutional Court in the Netherlands, with the task of adjudicating constitutional matters. The two highest national courts in the Dutch legal system are the *Hoge Raad der Nederlanden*, which is the Supreme Court of the

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<[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-)> (accessed 15-03-2016); United Nations Treaty Collection Status of ICCPR (2016)

<sup>265</sup> Ministry of Foreign Affairs of the Kingdom of the Netherlands, (1979) 96; H Reiding "The Netherlands and Social and Economic Rights" in H Reiding (ed) *The Netherlands and the Development of International Human Rights Instruments* (2007) 131.

<sup>266</sup> While the Netherlands signed the Optional Protocol on the 24<sup>th</sup> of September 2009, they have not ratified it. See: United Nations Treaty Collection (2009) <[https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=iv-3-a&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3-a&chapter=4&lang=en)> (accessed 15-03-2016).

<sup>267</sup> B Oomen "Giving Effect to Social Rights" in B Oomen *Rights for Others: The Slow Home-Coming of Human Rights in the Netherlands* (2013) 146.



Netherlands (“*Hoge Raad*”) and the *Afdeling bestuursrechtspraak van der Raad van State*, which is the Administrative Jurisdiction Division of the Council of State.<sup>268</sup> Furthermore, while the Dutch Constitution applies to all public authorities, any judicial review concerning the constitutionality of Dutch legislation is prohibited.<sup>269</sup> Accordingly, article 120 of the Constitution provides that the constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts. Although attempts have been made to amend the Constitution to provide for judicial review of legislation, these attempts have been unsuccessful.<sup>270</sup>

In contrast to the lack of provision for judicial review of constitutional provisions, international law enjoys prominence in the Dutch legal system. The importance accorded to international law is due to the Netherlands having a monist legal order.<sup>271</sup> Given that the doctrine of monism is deeply entrenched in the Dutch legal culture, all national law, including the Constitution, is perceived as inferior to international law.<sup>272</sup> For example, article 94 of the Constitution states that statutory regulations in force in the Netherlands shall not be applicable if their application is in conflict with “provisions of treaties or of resolutions by international institutions.” As a result, international law has had a significant impact on the Dutch family law regime, more so than the Dutch Constitution. In spite of the importance accorded to international law, at the time of the ratification of the ICESCR, the Netherlands’ government stated that the rights included in it, were not, directly applicable provisions, but rather policy objectives.<sup>273</sup> There has furthermore, been a noticeable imbalance in Dutch human rights policies, in that civil and political rights, tend to be prioritised over social and economic rights.<sup>274</sup>

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<sup>268</sup> E Mak “Globalisation of the National Judiciary and the Dutch Constitution” (2013) 9 *Utrecht Law Review* 36 37.

<sup>269</sup> C Mak *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (2008) 323.

<sup>270</sup> Mak *Fundamental Rights in European Contract Law* (2008) 323.

<sup>271</sup> Traditionally, there have been two theoretical approaches to international law. The first approach has been referred to as the monist approach, which perceives international law and municipal law as part of a single conception of law. The second approach has been referred to as the dualist approach which is based on the premise that international law and municipal law are separate entities. J Dugard “Sources of International Law” in *International Law: A South African Perspective* (2007) 27 29.

<sup>272</sup> G v d Schyff & A Meuwese “Dutch Constitutional Law in a Globalising World” (2013) 9 *Utrecht Law Review* 1 1.

<sup>273</sup> H Reiding *The Netherlands and the Development of International Human Rights Instruments* (2007) 131.

<sup>274</sup> Reiding “The Netherlands and Social and Economic Rights” in *The Netherlands* 132. While Reiding references earlier submissions made by the Dutch government, the Dutch National

Nevertheless, the Dutch government has made significant and progressive developments pertaining to advancing social and economic rights in accordance with international law.<sup>275</sup>

The influence of international law in Dutch family law is clear, in that in recent decades, Dutch judges have ranked international human rights and treaty obligations as superior to domestic law.<sup>276</sup> This has predominantly been in terms of children's rights and same-sex marriages.<sup>277</sup> Of particular importance is article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"),<sup>278</sup> which requires respect for private and family life.<sup>279</sup>

In the case of *Johnston and Others v Ireland*,<sup>280</sup> the European Court on Human Rights specifically interpreted section 8 of the European Convention as not only relating to family life on the basis of marriage. This case opened up the possibility for the regulation of a broader range of family relationships in Europe. In subsequent decisions by Dutch courts however, article 8 of the European Convention has been

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Action Plan on Human Rights of 2014, distinguishes between classical human rights and social rights.

<sup>275</sup> An example of this is provided by the approach to education. In the Netherlands, primary and secondary education are provided free of charge to all young people living in the Netherlands who are of compulsory school age. The obligation to remain in school terminates at the age of 18. Even if a minor alien is residing in the Netherlands unlawfully, he or she attends school under the same conditions as all other young people in the Netherlands: everyone has equal access to education. See page 56 of the Dutch National Action Plan on Human Rights: The protection and promotion of human rights within the Netherlands of 2014.

<sup>276</sup> Vlaardingerbroek "The Netherlands" in Sutherland *The Future of Child and Family Law* 235.

<sup>277</sup> Vlaardingerbroek 235; J M Scherpe "Introduction to European Family Law Volume iii: Family Law in a European Perspective" in *European Family Law Volume iii: Family Law in a European Perspective* (2015) 1 2.

<sup>278</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) (1950) 213 UNTS 222.

<sup>279</sup> A 8 of the European Convention provides that:

"1) Everyone has the right to respect for his private and family life, his home and his correspondence.

2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

<sup>280</sup> *Johnston and Others v Ireland* ECHR (1986) application no 112, para 156. This case concerned a cohabiting Irish couple who had a daughter together. They were unable to get married as they were still married to previous partners and the Irish Constitution did not at the time of the case permit divorce.

utilised as justification for distinguishing between married couples and domestic partnerships.<sup>281</sup>

Against this constitutional and international law background, the following section will examine the overarching framework of the Dutch family law regime. Given that the Dutch legislature has played a more proactive role in developing the family law regime, the following discussion will first examine the legislative developments that have occurred in the field of family law. This will be followed by an analysis of the Dutch jurisprudential developments.

#### 4 6 3 The Dutch family law regime

##### 4 6 3 1 *Introduction*

Given that the Dutch legal system does not have a strong constitutional law tradition, the family law regime is primarily rooted in a codified civil law system. As a result, the Dutch judiciary has played a less active role in developing the sphere of family law as it pertains to cohabitants. In contrast to this, the Dutch legislature has significantly paved the way for the expansion of Dutch family law. The rules on family law are found in Book 1 of the DCC, which dates back to 1838. The legislative developments pertaining to same-sex marriages and registered partnerships will be examined first. This legislative framework will then be followed by an examination of the piecemeal recognition that has been granted to unregistered partnerships.

##### 4 6 3 2 *The recognition of same-sex marriages and registered domestic partnerships*

In 1996, the Dutch Parliament passed a resolution demanding that civil marriage be extended to same-sex couples. The DCC was subsequently amended five years later so as to provide full legal recognition to gay and lesbian marriages.<sup>282</sup> While Book 1 of

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<sup>281</sup> An example of the Dutch decisions that adopted a restricted interpretation of article 8 of the ECHR is discussed in part 4 6 3 4 of this study.

<sup>282</sup> This was achieved by amending article 1:30 of the DCC to state “1. A marriage may be entered into by two persons of a different or of the same sex.” See: I Sumner & H Warendorf “Marriage” in *Family Law Legislation of the Netherlands: A Translation including Book 1 of the*

the DCC now recognises same-sex marriages, religious marriages are not recognised under Dutch law, if they are solemnised by way of a religious ceremony only.

In 1997, the Dutch Parliament approved two separate Acts relating to registered domestic partnerships.<sup>283</sup> These Acts came into effect on 1 January 1998 and amended the DCC, as well as a number of other Dutch statutes. Together, they established a system of registered domestic partnerships for same-sex couples and heterosexual couples. These two Acts provide that the provisions relating to civil marriages in the DCC are automatically applicable to registered partnerships. Article 1:80a of the DCC provides that all of the provisions relating to civil marriage are automatically applicable to registered partnerships. Article 80b of the DCC specifically states that titles 6, 7 and 8 of the DCC apply *mutatis mutandis* to registered partnerships. While the Netherlands recognises registered partnerships, the Dutch system does not recognise polygamous relationships, with article 1:80a and 2:80a stating that a person may not already be involved in a registered partnership when they register their relationship. A person may also not be married to someone else when they register a partnership.

The extension of the matrimonial system applies to a wide range of fields of law, including the areas of social security law, taxation law and criminal law. The Dutch approach of recognising registered partnerships has therefore created a legal status analogous to that of marriage. There is however, no separate regime specifically catering for registered partners.

In accordance with these developments, from 1 January 1998, parties of the same or opposite sex, who are 18 years of age, have been able to enter into a registered partnership with one another. The DCC provides that the partnership comes into existence as soon as the partners have signed and registered an “instrument of registration of partnership.”<sup>284</sup> Registered partners owe each other a duty of fidelity, support and assistance and must provide for each other’s needs.<sup>285</sup> Under the DCC,

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*Dutch Civil Code, Procedural and Transitional Provisions and Private International Law Legislation* (2003) 54 54.

<sup>283</sup> These two acts included the Registered Partnership Act 324 of 1997 and the Registered Partnership Adjustment Act 660 of 1997.

<sup>284</sup> A 80a 3 of the DCC.

<sup>285</sup> A 81 of the DCC.

a general community of property also exists between spouses and registered partners.<sup>286</sup>

While all of the consequences of a marriage attach to a registered partnership, there are differences that need to be mentioned. One difference is that terminating a registered partnership entails a very simple procedure, by way of mutual agreement. Another anomaly is that the automatic presumption of parentage does not apply *mutatis mutandis* to registered partners.<sup>287</sup> In a heterosexual partnership, the male partner is thus required to formally recognise his child.<sup>288</sup>

Collectively, these legislative developments provide same-sex and heterosexual couples with three choices when it comes to solemnising their unions. These options include entering into a civil marriage, a registered partnership or a cohabitation agreement.<sup>289</sup> While providing a clearly delineated system for registered cohabitants, the Dutch approach of assimilating registered partnerships into the existing matrimonial regime can be criticised. One reason for this is that the Dutch system embodies a contractual approach to domestic partnerships, as well as a liberal conception of choice. This contractual paradigm is evinced by the regime requiring cohabitants to regulate their own affairs, either through registration or through entering into a formal contract. If cohabitants do not register their relationship or enter into a contract, they are left socio-economically vulnerable.

Instead of examining whether the existing legal regime needs to be transformed, responsibility has been placed upon cohabitants to fulfil prescribed legal formalities, in order to access existing marital rights and responsibilities. The Dutch legal regime fails to actively interrogate the gendered socio-economic impact of existing family law rules on female cohabitants. In particular, the Dutch approach has failed to examine the Dutch family law regime in the light of existing human rights principles. While protecting the autonomy of cohabitants is important, it is nevertheless difficult for cohabitants to foresee all of the changes their relationship will undergo. A contractual

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<sup>286</sup> A 93: 1 of the DCC.

<sup>287</sup> Partners are able to adopt, regardless of whether they are married, but they must have been living together for three years and they must have cared for and educated the child for at least one year.

<sup>288</sup> Book 1, title 12 of the DCC provides the general framework for adoptions in the Netherlands. The Netherlands has also signed and ratified the Hague Convention on the Protection of Children and Co-Operation in Respect of Inter-Country Adoption but they have yet to join the European Convention on the Adoption of Children 1967 CETS 58.

<sup>289</sup> Smith & Robinson (2010) *PELJ/PER* 35.

paradigm is therefore not always able to provide adequate protection to cohabitants.<sup>290</sup> Given that Dutch women also continue to disproportionately bear the socio-economic burdens of divorce and family dissolution, the Dutch family law regime requires further examination and development.

The Dutch approach places a high value on the autonomy of cohabitants. Simply assimilating registered domestic partnerships into the existing private law marriage model is however, insufficient in terms of the need to transform the underlying dynamics that shape how men and women relate to one another in intimate relationships.

The Dutch method of assimilation thus embodies a formal approach to equality, with the risk of simply extending existing patriarchal paradigms within the family law regime. The Dutch approach fails to undertake a deeper interrogation of the patterns of gendered relationships that family law rules are either exacerbating or challenging.<sup>291</sup> Given that Dutch society also experiences patterns of gender inequality, this section emphasises the potential value of a relational feminist analysis of the socio-economic consequences of family law rules.

As mentioned above, if Dutch cohabitants do not register their relationship or if they do not enter into a cohabitation contract, they are forced to rely on various areas of private law in order to protect their interests. The following section examines the piecemeal developments that have occurred in relation to unregistered partnerships.

#### 4 6 3 3      *Unregistered partnerships: Legislative developments*

While the Dutch government officially recognised registered domestic partnerships in 1998, there have only been piecemeal developments with regard to unregistered partnerships since the 1970s.<sup>292</sup> The first area of significant development was in the field of maintenance law and was retrogressive in nature. The Dutch government's aim was to limit the maintenance rights of divorced parties who then entered into cohabiting relationships with new partners. In 1971, article 1:160 of the DCC was amended to provide that couples living together as if they were married resulted in the immediate loss of their right to maintenance from an ex-spouse. As this amendment

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<sup>290</sup> Schrama (2008) *International Journal of Law, Policy & the Family* 315.

<sup>291</sup> Nedelsky *Law's Relations* 251.

<sup>292</sup> Smith & Robinson (2010) *PELJ/PER* 34.

was made in the early seventies (1971), cohabiting relationships were referred to in a derogatory manner, as concubinage.<sup>293</sup>

In 1979, the legal position of cohabitants living together with a tenant was significantly improved. In accordance with these changes, article 7:267 of the DCC, provides that a person living in a “stable household” with a tenant for a minimum of two years is now entitled to certain rights in relation to the landlord.<sup>294</sup> In accordance with these changes, the tenant and their cohabiting partner are able to request the landlord treat him or her as a co-tenant. If the landlord refuses, the tenant and co-resident can apply to the courts.<sup>295</sup> Providing cohabitants with the status of co-tenant is important, since this allows them to take over the rental contract if the current tenant wishes to terminate the lease. Even more important is that in the case of separation, the co-tenant may request that the court decide who is entitled to occupy the family home.<sup>296</sup>

In 1982 the DCC was subsequently amended to provide that a life partner could apply to a court to have the property of their partner placed under administration. This was followed by the Dutch government providing cohabitants with certain tax concessions in the 1980s. Following this, there were progressive assimilations in terms of social security and pension provisions.<sup>297</sup> For example, under Dutch social security law, cohabiting couples now qualify as married couples if they share a joint household. The decisive criterion in the legislation turns on the actual needs and means of the applicant, so that marriage is no longer perceived as a prerequisite. Non-marital partners with a joint household are thus legally presumed to share economic and social responsibilities.<sup>298</sup>

Article 304 of the Dutch Criminal Code has also increased the maximum penalty for the infliction of domestic violence by a spouse by one third. According to article 304, since February 2006, this provision also applies to a “life companion”. Recognising cohabiting relationships in this manner is progressive, in that it illustrates the legislature giving more weight to the social function of relationships, as opposed to the

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<sup>293</sup> Schrama (2008) *International Journal of Law, Policy & the Family* 315.

<sup>294</sup> 316.

<sup>295</sup> 316.

<sup>296</sup> 316.

<sup>297</sup> D Bradley “Regulation of Unmarried Cohabitation in West-European Jurisdictions-Determinations of Legal Policy” (2001) 15 *International Journal of Law, Policy and the Family* 22 31.

<sup>298</sup> Schrama (2008) *International Journal of Law, Policy & the Family* 316.

legality principle in criminal law.<sup>299</sup> While these legislative developments have been significant, there have been certain changes brought about by judicial decisions. These developments are examined below.

#### 4 6 3 4 *Unregistered partnerships: Judicial developments*

In addition to piecemeal legislative changes, there have been a number of *ad hoc* judicial developments over the years. The advances pertaining to registered partnerships were initially driven by the need to recognise same-sex marriages. As a result, the debate informing much of these modifications lacked a distinctive feminist perspective. The Dutch courts were therefore, first approached on the issue of extending civil marriage to same-sex couples in 1990. Two arguments were raised before a District Court in Amsterdam and the *Hoge Raad*. The first argument was that due to Article 30 of the DCC not referring to gender, it could possibly be interpreted to include same-sex marriages. The District Court of Amsterdam agreed with the petitioners that the statutory language in Article 30, of Book 1 of the DCC did not limit marriage to heterosexual individuals. However, the court relied on the legislative history of the statute, and found that, at the time the law was enacted, marriage was only possible for heterosexual couples. Consequently, the district court held that it was the legislators' intention to limit marriage to heterosexual couples when they enacted the marriage laws.<sup>300</sup>

On appeal, the *Hoge Raad* relied upon a traditional conception of marriage and found that article 30 was enacted with a view to protecting heterosexual marriages. The second argument that was posed before the courts was that the limitation to heterosexual marriage infringed certain individual rights and discriminated against same-sex couples. This argument was rejected by the courts, with both courts deferring to the legislature, finding that it was the legislature's duty to address any differential treatment. The *Hoge Raad* thus found that while the limitation of matrimonial benefits to heterosexual couples could in principle be unjustifiable, it should be left to the legislature to rectify this situation.<sup>301</sup>

Following these decisions, over recent decades, the courts have at times come to the aid of vulnerable cohabitants. There is however, very little certainty in terms of how

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<sup>299</sup> 316.

<sup>300</sup> *Rb Amsterdam 13 Februari 1990*, NJCM-Bulletin 1990 p 456-460.

<sup>301</sup> *Hoge Raad 19 Oktober 1990*; Smith & Robinson (2010) *PELJ/PER* 34.



the courts will respond to these relationships.<sup>302</sup> According to the Dutch scholar van Burght, in certain cases, the courts have recognised the legal significance of the emotionally-based relational dynamics, while in some cases the courts have simply ignored it.<sup>303</sup> This haphazard approach is problematic though, as the emotional dynamics of the relationship often constitute the framework from which socio-economic decisions are made. This further reveals the need to proactively scrutinise the relational dynamics within cohabiting relationships. Although most women in the Netherlands substantially reduce or give up labour participation after having children, the question of whether a caregiving partner whose earning capacity has been considerably diminished should be compensated upon the termination of their relationship has not yet been raised in the courts.<sup>304</sup>

While the status of a spouse brings about important legal effects in both criminal and criminal procedural law, partners in unregistered cohabiting relationships are not protected in this sphere of law. In general terms, the nature of criminal law (such as the principle of legality) is often invoked as justification for drawing a clear line between registered and unregistered relationships. This is demonstrated by a decision of the *Hoge Raad* in which the principle of equality and the right to family life as contained in article 8 of the European Convention were both invoked by a partner who did not want to testify against her non-marital cohabiting partner. In this case, the Court held that it was justifiable to distinguish between registered cohabitants and unregistered cohabitants.<sup>305</sup> This decision was confirmed by the European Court on Human Rights.<sup>306</sup>

Under Dutch criminal procedural law, spouses and registered partners have a right to refuse to testify against their spouse or registered partner. In this case, the Dutch *Hoge Raad* refused however, to extend this provision to the unmarried cohabiting partner, who had lived with the accused man for over 15 years and with whom she had two children. The *Hoge Raad* invoked the principle of legal certainty and the nature of the provision as being an exception to the general principle of discovering the truth,

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<sup>302</sup> Schrama (2008) *International Journal of Law, Policy & the Family* 316.

<sup>303</sup> G van der Burght "Registered Partnerships in the Netherlands" (2000) 33 *De Jure* 76 78-79.

<sup>304</sup> Schrama (2008) *International Journal of Law, Policy & the Family* 316.

<sup>305</sup> *HR 31 May 2005* ECLI NL HR 2005 AS2748.

<sup>306</sup> *Van der Heijden v Netherlands* No. 42857/05 (ECHR Apr 3 2012).

which prevails over other interests.<sup>307</sup> This case is noteworthy as it undermines the argument that the functional nature of family relationships should be prioritised over its official form.

In spite of this retrogressive decision, the Dutch courts have at times come to the aid of unregistered partners. For example, in determining property claims, certain courts have assessed what the legal content of the relationship is, in a manner that borrows from existing rules on matrimonial property law. In doing so, the Dutch courts have however, been careful to emphasise and protect the autonomy of parties who deliberately avoid entering into a civil marriage.<sup>308</sup> Apart from that, a distinction has also been made between couples who have the option to marry and those who do not, emphasising the liberal choice argument.

When examining the nature of cohabiting relationships, the Dutch courts have at times found that even though there was no written contract, a tacit contractual relationship can be inferred based on the reasonable expectations of the parties and their conduct.<sup>309</sup> The courts then utilise this tacit contract to determine whether money or assets should be redistributed between the parties. The courts also sometimes recognise claims based on unjustified enrichment<sup>310</sup> or undue payments.<sup>311</sup> There is a great deal of legal uncertainty however, with the courts often providing divergent approaches and opinions.<sup>312</sup> While the *Hoge Raad* laid down certain legal norms concerning implicit contracts between cohabitants, legal uncertainty prevails.

It has been pointed out that, in general, the courts are reluctant to infer that a total community of property exists between unregistered cohabiting parties.<sup>313</sup> Depending on the degree of socio-economic interdependence, the courts may however, find that a limited community of property does exist. When the acting partner also acted on behalf of the other, he may be seen as a representative of his partner. On the other

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<sup>307</sup> *HR 31 May 2005* ECLI NL HR 2005 AS2748.

<sup>308</sup> Van der Burght (2000) *De Jure* 78-79; Schrama "National Report: The Netherlands" (2015) 4.

<sup>309</sup> Van der Burght 78-79; Schrama "National Report: The Netherlands" (2015) 4.

<sup>310</sup> Van der Burght (2000) *De Jure* 78-79, these decisions are based on A 6:212 of the DCC.

<sup>311</sup> A 6:203 of the DCC.

<sup>312</sup> For example, in *Rb Rotterdam 27 January 2010, LJN BM7429*, the court decided that upon the termination of a relationship that had lasted 22 years, the parties had entered into an implicit contract, which required one partner to pay the other € 35000.00. In contrast to this, in *Hof Den Haag 2 November 2010*, the Court ruled that the female partner who had stopped working after giving birth, had to pay almost € 50000.00 to her partner for the costs of the household.

<sup>313</sup> Van der Burght (2000) *De Jure* 78-79.

hand, the lack of evidence of private ownership could indicate that the asset involved is their common property, as provided for in article 1:131 of the DCC.

What is clear is that there remain considerable differences between the legal position of a registered cohabitant and an unregistered cohabitant, with potentially significant socio-economic implications. Reducing the gap between their legal positions has not been considered or discussed in the Dutch Parliament. The differences between registered cohabitants and unregistered cohabitants have also not been challenged in the courts as a possible infringement upon the principle of equality.<sup>314</sup>

#### 4 6 3 5      *Conclusion*

While the Dutch legislature has extended the existing matrimonial regime to registered domestic partnerships, Dutch law only provides piecemeal recognition to unregistered domestic partnerships.<sup>315</sup> Previously, this piecemeal recognition provided more protection to cohabitants than the South African system. This difference was due to the fact that previously, the existence of a tacit cohabitation contract was more readily inferred by the Dutch courts. Since the developments pertaining to the tacit universal partnership, under South African law, South African cohabitants can however, utilise this mechanism in an attempt to protect their interests.<sup>316</sup> Nevertheless, as pointed out by Smith, there is an important similarity between the position of unregistered cohabitants in the Netherlands and cohabitants in South Africa.<sup>317</sup> This parallel is that there is currently no specific legislation that caters for such unions. Consequently, unregistered cohabitants in the Netherlands and South African cohabitants face legal uncertainty and considerable socio-economic vulnerability. Even where Dutch parties have entered into a cohabitation contract, these contracts do not solve many of the problems faced by cohabitants, upon the termination of their relationship.<sup>318</sup> Many of the limitations underlying a contractual regime were discussed in detail in chapter three of this study.<sup>319</sup> While a contract can offer limited protection to a cohabiting couple, there is a need to further develop the

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<sup>314</sup> Schrama (2008) *International Journal of Law, Policy & the Family* 316.

<sup>315</sup> Smith & Robinson (2010) *PELJ* 40-45.

<sup>316</sup> See part 3 5 3 of chapter three of this study.

<sup>317</sup> Smith & Robinson (2010) *PELJ* 40-45.

<sup>318</sup> Schrama (2008) *International Journal of Law, Policy & the Family* 316.

<sup>319</sup> See part 3 5 2 of chapter 3 of this study.

family law regime. Part of the problem with a contractual paradigm is that the general rules governing Dutch private law are “primarily designed to regulate economically-based relations.”<sup>320</sup> These rules have therefore, not been shaped and interpreted in the light of the complex emotional and socio-economic dynamics that shape choices in family relationships.

An additional problem is that the Dutch courts have not been consistent in their approach towards regulating unregistered cohabiting relationships. It is also parties who undertake the caring work in these relationships who are predominantly left socio-economically vulnerable upon the termination of their relationship. As a result, the Dutch courts have had to grapple with a number of difficult legal issues, with divergent results. Examples of these legal challenges include determining which partner is entitled to which property, whether compensation is required for money invested in the other partner’s property or for non-financial contributions. The courts have also had to determine who will continue to occupy the family home, once the relationship ends and who is liable for debts incurred during the relationship.<sup>321</sup>

The above discussion reveals that the legal framework regulating unregistered partnerships under Dutch law is both complex and haphazard. There is furthermore, a distinction in the approach towards unregistered cohabitants who have undertaken the caring work in the family and care-givers in registered partnerships and marriages. Legal certainty for unregistered cohabitants is therefore at stake in these disputes, since no clear pattern of interpretation can be discerned, despite a growing body of Dutch case law.<sup>322</sup>

This comparative section reveals that the act of simply assimilating registered cohabitants into the legal framework governing marriages is not enough to transform the relational dynamics between men and women, particularly upon the breakdown of their relationship. The vulnerability of unregistered cohabitants under Dutch law further reveals the need to regulate informal relationships. Given the persistence of socio-economic inequalities between Dutch men and women, the Dutch family law system emphasises the need for a more proactive feminist response to remedying the socio-economic consequences of family dissolution. In order to do so, the relational

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<sup>320</sup> Schrama (2008) *International Journal of Law, Policy & the Family* 316.

<sup>321</sup> 316.

<sup>322</sup> 316.

dynamics between men and women need to be addressed. A relational feminist interpretation of socio-economic rights is thus necessary. In a similar vein to the Canadian developments, the Dutch developments pertaining to family law were primarily shaped by the need to recognise same-sex marriages in accordance with the principle of equality. While these developments were necessary, feminist voices have tended to be marginalised during this process, along with the need to regulate unregistered domestic partnerships. There has therefore, been an insufficient focus on the need to address gender inequality in Dutch family law.

#### 4 6 4 Conclusion: Lessons from a comparative analysis of Dutch family law

An examination of Dutch family law reveals the complex issues at stake in seeking to regulate cohabiting relationships. While substantive equality seeks to achieve equality of outcome, the Dutch approach of simply extending marital rights to cohabitants has only served to foster a formal approach to equality. An equality framework on its own in this context is insufficiently transformative. This is due to the reality that the feminisation of poverty is directly linked to how men and women relate to one another, particularly in intimate relationships. Unless these patterns of relating are effectively challenged and transformed, the equality approach will only serve to treat one of the symptoms of gender inequality. It is however, necessary to address and transform the underlying relational dynamics, as well as the ideological paradigms that inform socio-economic inequality between men and women.<sup>323</sup>

The persistence of gender inequality in the Netherlands, in spite of the legislative reform that has occurred, further underscores the need to effectively address relational dynamics in family law from a feminist perspective. Moreover, the Dutch approach to cohabitation demonstrates that simply extending the matrimonial system to cohabitants only serves to extend existing patriarchal paradigms currently underlying the family law system. Given that the Dutch legal system does not permit the courts to scrutinise the constitutionality of acts of Parliament, the Dutch Constitution has not played a role in developing this area of family law. With regard to the comparative value of this section, the need to utilise the socio-economic rights protected in the South African Constitution to develop the South African family law regime is emphasised. In particular, socio-economic rights have potential to highlight the socio-

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<sup>323</sup> Nedelsky *Law's Relations* 251.

economic implications of relational dynamics between men and women. These rights can also be utilised and interpreted in a manner that directly challenges and ultimately transforms these patterns of relating.

The Dutch comparative analysis thus reveals that the gendered socio-economic consequences of terminated domestic partnerships will not be transformed unless the relational dynamics in these relationships are proactively interrogated and addressed. This further reveals the need to effectively utilise socio-economic rights to further transform family law rules, as well as the relational dynamics between cohabiting men and women.

#### **4 7 Concluding remarks: Lessons from Canadian and Dutch family law**

A comparative analysis of Canadian and Dutch family law clearly reveals the panoply of issues that need to be considered when examining how to regulate cohabitation. An overview of both Canadian and Dutch family law illustrates the disadvantages associated with extending legislative recognition to cohabitants without adopting a relational feminist lens. Simply extending legislative recognition to cohabitants, without seeking to transform how men and women relate to one another in the context of family law, will therefore not be enough to transform the inequitable socio-economic consequences of family dissolution in South Africa. In addition, judicial interpretations of private law rights pertaining to cohabitants, which lack a relational feminist lens, will not be sufficient in terms of the need to address patterns of gender inequality.

In particular, this comparative study emphasises the need for a relational feminist engagement with family law issues pertaining to cohabitants. A relational feminist interpretation of the socio-economic rights of female cohabitants is required in both legislative and judicial developments, if we are to transform the inequitable relations that underlie many family law regimes. Drawing on the lessons offered by Canadian and Dutch family law, the following chapter examines the implications of a relational feminist interpretation of socio-economic rights for transforming the socio-economic consequences of terminated domestic partnerships in South Africa.

## Chapter 5: The implications of a relational feminist interpretation of socio-economic rights for South African cohabitants

### 5 1 Introduction

The previous chapters illustrated the need for a relational feminist interpretation of socio-economic rights in the context of cohabiting relationships, with the focus on female cohabitants. This chapter utilises the relational feminist framework developed in chapter two,<sup>1</sup> as well as lessons from Canadian and Dutch family law, to address South African legislative and jurisprudential shortcomings pertaining to cohabitation. One justification for transforming the current legal framework is that cohabitants make up a large and significant portion of the South African population.<sup>2</sup> The constitutional commitment to establish a society based on “fundamental human rights”,<sup>3</sup> along with the provision for the horizontal application of the Bill of Rights<sup>4</sup> also illustrates a commitment to addressing systemic inequality within the family unit. The inclusion of the right to equality in conjunction with the duty to “progressively realise”<sup>5</sup> socio-economic rights, further evinces a commitment to transforming the gendered nature of the socio-economic consequences of family dissolution.

The detrimental consequences of family dissolution cannot be avoided completely. This chapter does however, examine how the socio-economic consequences of terminated domestic partnerships could be ameliorated through a comprehensive legal response informed by a relational feminist interpretation of the socio-economic rights of female cohabitants. This examination commences with an investigation into the theoretical shift that is required in terms of the framework informing the regulation of domestic partnerships in South Africa. Following this, the necessary executive, legislative and jurisprudential developments that are required to give effect to the transformative aspirations of our Constitution, are set out in detail.

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<sup>1</sup> See chapter two of this study.

<sup>2</sup> B Smith “The Dissolution of a Life or Domestic Partnership” in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 389 392. See part 1 1 1 of chapter 1 of this study.

<sup>3</sup> S 1(a) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

<sup>4</sup> As contained in ss 8 and 39 of the Constitution.

<sup>5</sup> This duty is included in ss 26(2) and 27(2) of the Constitution.

## 5 2 Shifting the theoretical lens informing the regulation of cohabitation

Chapter two illustrated that classic legal liberalism provides an inadequate theoretical framework for conceptualising and responding to the needs of cohabiting women. For example, the liberal choice argument emphasises form over function. A liberal conception of choice also ignores the deeper relational factors that shape women's choices. As discussed in chapter three, the jurisprudential reasoning encouraged under a liberal framework tends to ignore the socio-economic implications of family dissolution for women. The socio-economic implications of private law rules do however, need to be more robustly interrogated in order to give effect to the socio-economic rights of women. In particular, a relational feminist interpretation of socio-economic rights is necessary in order to transcend the problematic liberal and patriarchal paradigms currently informing our family law regime.<sup>6</sup> It is necessary to transcend these liberal underpinnings and to re-shape our family law regime in accordance with the Bill of Rights.<sup>7</sup>

In debating how to reformulate the legal response to cohabitation, academics have discussed the contextualised choice model,<sup>8</sup> the function over form approach<sup>9</sup> and the putative marriage model<sup>10</sup> as developed by Bradley Smith.<sup>11</sup> While the contextualised choice model recognises that choices are rarely if ever completely free, it does not sufficiently recognise that family relationships are also socio-economic institutions, currently exacerbating inequitable gendered relations. The contextualised choice

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<sup>6</sup> C Albertyn "Substantive Equality and Transformation in South Africa" (2007) 23 *SAJHR* 253-273.

<sup>7</sup> D Bhana "The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract" (2015) 26 *Stell LR* 1-3.

<sup>8</sup> Smith BS "Rethinking *Volks v Robinson*: The Implications of Applying a 'Contextualised Choice Model' to Prospective South African Domestic Partnerships Legislation" 2010 *Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad* 238-300; Goldblatt B "Regulating Domestic Partnerships: A Necessary Step in the Development of South African Family Law" (2003) 120 *South African Law Journal* 610-629.

<sup>9</sup> Goldblatt (2003) *SALJ* 610-629.

<sup>10</sup> A putative marriage occurs when one or both of the spouses believe, mistakenly but in good faith, that a valid marriage exists between them. In this case, even if the marriage did not fulfil strict formal requirements, the spouses can be entitled to the protections offered by a civil marriage.

<sup>11</sup> BS Smith "The Interplay between Registered and Unregistered Domestic Partnerships under the Draft Domestic Partnerships Bill, 2008 and the Potential Role of the Putative Marriage Doctrine" (2011) 128 *SAJL* 560-593; B Coetzee Bester & A Lou "Domestic Partners and 'the Choice Argument: Quo Vadis?'" (2014) 17 *PER / PELJ* 2951-2958.



model also fails to adequately address the socio-economic consequences of how men and women relate to one another in intimate relationships.

The function over form approach has substantially developed certain areas of family law, in the Netherlands and Canada. However, the focus on the nature of family relationships, over their official form, does not sufficiently address the need to structure more equitable socio-economic relations between cohabiting men and women. In South Africa, the focus is predominantly on the form of a relationship. A functional approach to family relationships is needed. It is however, also necessary to address and transform how men and women relate to one another, as well as the ideological paradigms informing this behaviour. Giving effect to the socio-economic rights of women is furthermore, required in order to address these relations and foster substantive gender equality.

The putative marriage model as envisioned by Smith to regulate cohabitation has been positively received by certain academics.<sup>12</sup> The primary issue with this model is that it retains a predominantly private law paradigm in terms of regulating cohabitation. In contrast to this, a relational feminist interpretation of the socio-economic rights of female cohabitants allows for the infusion of our family law regime with the human rights norms and values underlying the Bill of Rights. A relational feminist interpretation of socio-economic rights also allows for the interrogation of family law rules in the light of socio-economic rights. The socio-economic consequences of how cohabiting men and women relate to one another is open to interrogation and potential transformation. The hierarchical nature of our family law regime and the manner in which this regime continues to exacerbate gender inequality emphasises the need for substantial transformation. Significant change within family law, is necessary in order to give effect to the constitutional goal to establish a society based on “democratic values, social justice and fundamental human rights”.<sup>13</sup>

The implications of a relational feminist framework as developed in chapter two, which focuses on the existing social context, a value-sensitive approach to the rights

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<sup>12</sup> The academics B Coetzee Bester & A Lou discuss Smith’s model as a viable alternative to challenging the choice argument prevalent in our family law jurisprudence: B Coetzee Bester & A Lou “Domestic Partners and “the Choice Argument: *Quo Vadis?*” (2014) 17 *PER / PELJ* 2951 2958. While they ultimately argue that the contextualised choice model is the most feasible response to regulating cohabitation, they provided an in-depth discussion of Smith’s model as a potential viable response.

<sup>13</sup> Preamble to the Constitution.

of cohabitants, a relational conception of responsibility and ultimately social transformation, is examined in detail in the following sections. This relational feminist framework is utilised, along with the lessons provided by Canadian and Dutch family law, to recommend executive, legislative and jurisprudential developments needed to give effect to the socio-economic rights of female cohabitants. These South African developments are aimed at transforming the socio-economic consequences of terminated domestic partnerships for female cohabitants.

### 5 3 Improved public provisioning of socio-economic rights

While the judicial interpretation of rights is an integral aspect of providing substantive content to the socio-economic rights of women,<sup>14</sup> the legislature and the executive also have an important role to play in translating socio-economic rights into meaningful individual entitlements.<sup>15</sup> In particular, the legislature and the executive have a duty to provide the structures and resources necessary for people to exercise their constitutional rights.<sup>16</sup> In accordance with this responsibility, one of the most evident ways of alleviating relational access to socio-economic resources would be through the state improving existing access to public services.<sup>17</sup> While direct access to quality public services needs to be improved, there are also gendered barriers<sup>18</sup> that need to be addressed when designing social programmes and delivering services. Simply extending private law remedies, without adequately considering the underlying gendered dimensions of poverty may therefore reinforce existing inequalities.<sup>19</sup> It is

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<sup>14</sup> KE Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 150.

<sup>15</sup> M Pieterse “Legislative and Executive Translation of the Right to Have Access to Health Care Services” (2010) 14 *Law, Democracy & Development* 1 2.

<sup>16</sup> Pieterse (2010) *Law, Democracy & Development* 2. See also: *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC) paras 40-41.

<sup>16</sup> Pieterse (2009) *SAJHR* 200.

<sup>17</sup> 205.

<sup>18</sup> Examples of gendered barriers to access to adequate housing include:

“Women’s greater vulnerability, when inadequately housed, to gender-based violence; their particular vulnerability to forced eviction; and the disproportionate burden they bear to provide childcare”

See L Chenwi & K McLean “A Woman’s Home is her Castle? Poor Women and Housing Inadequacy in South Africa” in B Goldblatt and K McLean (eds) *Women’s Social and Economic Rights* (2011) 105 107.

<sup>19</sup> B Goldblatt “Poverty and the Development of the Right to Social Security” (2014) 10 *IJLC* 460 460.

important to acknowledge that access to socio-economic resources is not only hindered though the denial of welfare responsibility.<sup>20</sup>

Designing programmes to address relational dynamics is necessary if we wish to infuse our family law system with the constitutional ethos of *Ubuntu* and equal concern for every individual. As underscored by the state's obligations to protect and fulfil socio-economic rights, in terms of section 7(2) of the Constitution, the law must recognise and respond to the often significant obstacles associated with relational access.<sup>21</sup> Removing these relational obstacles should be done while taking steps to progressively improve public provisioning of socio-economic resources. This is necessary as exclusive reliance on relationships for access to socio-economic resources may significantly “diminish, or even obstruct”, their enjoyment.<sup>22</sup> Improved provision of quality public services would diminish the pressure on private relationships to provide for the socio-economic needs of dependant family members. It would mitigate the need for economically vulnerable persons to enter into and sustain abusive private relationships in order to retain access to social goods and services.<sup>23</sup>

The need for sufficient and quality public services was underscored by the comparative study of Canadian family law undertaken in chapter four of this study. This was emphasised by the detrimental consequences of the Canadian state's recent neoliberal approach towards families, culminating in the privatisation of socio-economic responsibilities.<sup>24</sup> The retrogressive measures by the Canadian government emphasise the value and the importance of the express entrenchment of socio-economic rights in the South African Constitution.

Socio-economic programmes needs to be designed in a manner that ensures that they are comprehensive, coherent and capable of facilitating the realisation of socio-economic rights for female cohabitants.<sup>25</sup> As further underscored in the South African decision of *Government of the Republic of South Africa v Grootboom and Others*

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<sup>20</sup> Pieterse (2009) *SAJHR* 206.

<sup>21</sup> S Fredman “Engendering Socio-Economic Rights” (2009) 25 *SAJHR* 410 414; Pieterse (2009) *SAJHR* 215.

<sup>22</sup> Pieterse (2009) *SAJHR* 205.

<sup>23</sup> G Brodsky & S Day “Denial of the Means of Subsistence as an Equality Violation” (2005) *Acta Juridica* 149 162.

<sup>24</sup> S B Boyd & CFL Young “Feminism, Law and Public Policy: Family Feuds and Taxing Times” (2004) 42 *Osgoode Hall Law Journal* 545 556.

<sup>25</sup> *Grootboom* para 44.

(“*Grootboom*”),<sup>26</sup> retrogressive socio-economic measures by the state require particularly robust justification. This justification is required due to the specific obligation to “progressively realise”<sup>27</sup> the socio-economic rights as protected in the Constitution.<sup>28</sup> The South African state needs to take positive steps towards improving public services while simultaneously developing private accountability structures for socio-economic rights.

## 5 4 Towards a transformed legislative framework for cohabitation

### 5 4 1 Introduction

Traditionally, when it comes to the further development of private law, the focus has been on the role of the courts. While the judiciary has an integral role to play in mobilising social transformation, they cannot however, achieve this goal in isolation.<sup>29</sup> Potential legislative developments, under the overarching framework of relational feminism and the lessons provided by Canadian and Dutch family law will be examined first, before proceeding to examine the necessary jurisprudential developments.

### 5 4 2 Utilising a relational feminist framework to develop a legislative framework

As highlighted in chapter three, there is currently a significant *lacuna* within our family law regime, in that there is no comprehensive legislative framework governing the status of cohabitants.<sup>30</sup> There is the draft Domestic Partnerships Bill of 2008, which makes provision for registered domestic partnerships and unregistered domestic partnerships. In the SALRC’s report on domestic partnerships, they recommended two legislative options in dealing with unregistered domestic partnerships. The first option is referred to as the ascription model, which automatically ascribes certain rights and obligations during the existence of the relationship. The second option is referred to as the judicial discretion model. This option allows partners in former relationships to apply to the Court for a property division or maintenance order in the event that they

<sup>26</sup> 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC).

<sup>27</sup> S 26(2) and 27(2) of the Constitution.

<sup>28</sup> Para 45.

<sup>29</sup> S 8(1) of the Constitution states that the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state.

<sup>30</sup> Smith “The Dissolution of a Life or Domestic Partnership” in *The Law of Divorce and Dissolution of Life Partnerships in South Africa* 392.

cannot come to an agreement after the relationship has ended. The Domestic Partnerships Bill of 2008 includes the judicial discretion model for regulating unregistered domestic partnerships. This Bill has yet to be enacted.

While it remains the responsibility of the legislature to address the existing legislative gap, civil society and human rights organisations have the power to apply to the courts to determine whether the government and the legislature are fulfilling their obligations. This is in essence what occurred in the 2009 case of *Women's Legal Trust v President of the Republic of South Africa and Others*.<sup>31</sup> In this case, the Women's Legal Centre, working with a number of *amici curiae* applied to the Constitutional Court for an order declaring that the President and Parliament had failed to fulfil their obligations in terms of enacting and implementing a legislative framework for the recognition of Muslim marriages.<sup>32</sup> The Constitutional Court ruled on the jurisdictional issues raised by it being the court of first instance in this case. The Court did not therefore, decide on the substantive issues in this case. In spite of the Women's Legal Centre's admirable attempt to catalyse legislative change, the Bill on Muslim Marriages has yet to be enacted.

Given the absence of existing legislation governing cohabitation, civil society could bring an application for the legislature to enact legislation to coherently deal with the status of cohabitants. In terms of the state's responsibility to give effect to the Bill of Rights, the South African Constitutional Court has not yet found that a failure to take positive measures to ensure that disadvantaged groups enjoy the benefit of a law amounts to unfair discrimination. The Court has however, affirmed that such measures are integral to our understanding of equality. Thus, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,<sup>33</sup>(hereafter "*National Coalition*") Ackermann J stated that:

"Neither section 8 of the interim Constitution nor section 9 of the 1996 Constitution envisages a passive or purely negative concept of equality; quite the contrary."<sup>34</sup>

Intertwined with the need to give effect to a more substantive conception of equality, is the state's express constitutional duty to take "reasonable legislative and other

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<sup>31</sup> ZACC 20; 2009 6 SA 94 (CC) (22 July 2009).

<sup>32</sup> ZACC 20; 2009 6 SA 94 (CC) (22 July 2009).

<sup>33</sup> 1999 1 SA 6 (CC); 1998 12 BCLR 1517 (CC).

<sup>34</sup> Para 16.

measures”, within its available resources, to achieve the “progressive realisation” of the rights to adequate housing, health care services, sufficient food and water, and social security.<sup>35</sup> Furthermore, there is an important interconnection between the duties imposed by socio-economic rights on private parties and the state’s duty to protect these rights. This duty specifically requires the state to enact and enforce necessary legislation so as to enable private parties to fulfil their socio-economic duties.<sup>36</sup> The failure by the state to take such steps thus amounts to an infringement upon the duty to progressively realise the socio-economic rights for a significant number of South African women.<sup>37</sup>

In determining the most beneficial form of statutory regulation, Canadian family law offers examples of the alternative methods available to South Africa. Canadian legislatures have either relied on status (ascription) or contract (autonomy) to regulate cohabitation.<sup>38</sup> The comparative analysis of Canadian family law also revealed that simply enacting regulatory legislation without adopting an appropriate relational feminist approach, will not be sufficient to dislodge the systemic patterns of gender inequality underlying the family law regime.

While the Dutch family law system has been praised by South African scholars for offering a clearly delineated legislative framework,<sup>39</sup> this system also has its challenges. For example, the Dutch family law system revealed that simply extending the consequences of marriage to unmarried cohabitants, without seeking to transform the underlying gendered socio-economic relations in family law, will not be enough to transform inequitable relations between men and women. Through neglecting unregistered domestic partnerships, many cohabiting women fall through the gaps of the Dutch legal system, emphasising the need for an inclusive human-rights based response to all relationships.

In the light of the relational feminist framework developed in chapter two and the lessons from the comparative analysis in chapter four, the South African Domestic Partnerships Bill should be infused with a relational feminist approach, focusing on

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<sup>35</sup> Liebenberg & O’Sullivan (2001) *AJ* 75.

<sup>36</sup> Liebenberg *Socio-Economic Rights* 332; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC) para 35.

<sup>37</sup> Pieterse (2009) *SAJHR* 200.

<sup>38</sup> See chapter four, part 4.4 of this study.

<sup>39</sup> BS Smith & JA Robinson “The South African Civil Union Act 2006: Progressive Legislation with Regressive Implications?” (2008) *IJLPF* 376-377.

protecting the socio-economic rights of ex-cohabiting partners. The need for a transformative approach to family law is underscored by the high levels of gender inequality and domestic violence in South Africa.<sup>40</sup> While domestic violence is the most extreme manifestation of dysfunctional gendered relations in our society, socio-economic exploitation is also a symptom of dysfunctional patterns of relating. Every exercise of power, whether public or private, is now subject to the Constitution. Choosing to ignore inequitable private relations, based on a liberal conception of choice, also undermines the constitutional commitment to establish a society based on fundamental human rights.

In accordance with the state's responsibility to promote the rights in the Bill of Rights, the legislature is under a duty to enact a (revised)<sup>41</sup> Domestic Partnerships Bill, as informed by a relational feminist interpretation of the socio-economic rights of cohabitants. The need for revision is emphasised by the fact that the Bill is insufficiently responsive to the socio-economic vulnerabilities experienced by cohabitants. Examining the Bill through a relational feminist framework reveals additional issues that need to be addressed.

The first issue is the need for a relational feminist approach to cohabitation. Legislative recognition requires domestic partnerships to be addressed in terms of their social and historical context. It is important to examine the patterns of gendered relations that the Bill is either perpetuating or undermining. The Bill should therefore be informed by existing gendered hierarchies and dominant social norms that structure how men and women interact with one another. The socio-economic impact of these patterns of relating should also be addressed.<sup>42</sup> Any exercise of judicial discretion under the Bill should furthermore, be informed by the high prevalence of gender inequality within South Africa. While the preamble to the Bill<sup>43</sup> refers to section 9 of the

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<sup>40</sup> N Abrahams, S Mathews, R Jewkes, LJ Martin & C Lombard "Every Eight Hours: Intimate Femicide in South Africa 10 years later" (2012) *Medical Research Council Policy Brief 4*.

<sup>41</sup> The current version of the Domestic Partnerships Bill has been criticised for adopting a contractual paradigm to cohabitation, while failing to provide protection to the most vulnerable members of our society (who will most likely not enter into a contract). This Bill is analysed in detail in chapter three.

<sup>42</sup> Albertyn (2007) *SAJHR* 273.

<sup>43</sup> The Preamble to the Bill specifically states:

"Section 9(1) of the Constitution of the Republic of South Africa, 1996, provides that everyone is equal before the law and has the right to equal protection and benefit of the law; AND NOTING that there is no legal recognition or protection for opposite-sex couples in permanent domestic partnerships, BE IT ENACTED by the Parliament of the Republic of South Africa, as follows."

Constitution, it does not address the gendered dynamics prevalent within cohabiting relationships. Clause 2 provides that the objectives of the Bill include ensuring the rights of equality and dignity for domestic partners. It also states its objective to reform family law in accordance with the Bill of Rights. This development is sought through recognising cohabitation, regulating the rights and obligations of cohabitants and determining the financial consequences of a terminated partnership.<sup>44</sup>

Given the interconnection between patterns of socio-economic disadvantage and gender inequality, the objectives underlying the Bill should be amended. The objectives should include the underlying aim of seeking to ensure a more equitable distribution of socio-economic resources between ex-cohabiting partners. A central objective of the Bill should include seeking to structure more constructive relations between cohabiting men and women, in accordance with section 9 of the Constitution. The Bill should also be revised in the light of the need to design legislation that is reasonably capable of facilitating access to socio-economic rights.<sup>45</sup> Fostering substantive gender equality ought to be interlinked to this need to progressively realise the socio-economic rights of female cohabitants.

Closely interrelated to the need for a relational approach is the need to transcend the public/private law divide prevalent within the Bill.<sup>46</sup> For example, the Bill is primarily informed by a private law lens, with the language used referring to maintenance,<sup>47</sup> property law<sup>48</sup> and contract law.<sup>49</sup> The Bill is also predominantly shaped by a contractual paradigm, with the focus on registered domestic partnerships. The only

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<sup>44</sup> Clause 2(d) of the Bill.

<sup>45</sup> *Grootboom* para 44.

<sup>46</sup> Smith “The Dissolution of a Life or Domestic Partnership” in *The Law of Divorce and Dissolution of Life Partnerships in South Africa* 390-391.

<sup>47</sup> For example, clause 18 provides for the regulation of maintenance after termination of registered domestic partnership. Clause 18(2) states that when deciding whether to order the payment of maintenance and the amount and nature of such maintenance:

“the court must have regard to:

- (a) the respective contributions of each partner to the registered domestic partnership;
- (b) the existing and prospective means of each of the registered domestic partners;
- (c) the respective earning capacities,
- (d) future financial needs and obligations of each of the registered partners
- (e) the age of the registered partners;
- (f) the duration of the registered domestic partnership;
- (g) the standard of living of the registered domestic partners prior to the termination of the registered domestic partnership;
- (h) and any other factor which in the opinion of the court should be taken into account.”

<sup>48</sup> For example, clause 7 refers to the “property regime”.

<sup>49</sup> Clause 8 of the Bill refers to a registered domestic partnership agreement.



reference to the Constitution is the brief mention of the Bill of Rights in clause 3, with the focus on the constitutional rights to equality and dignity. In spite of the reference to the constitutional right to dignity, the Bill's failure to sufficiently recognise the constitutional rights of unregistered domestic partnerships runs the risk of exacerbating existing patterns of disadvantage for women in these relationships. Socio-economic rights are also completely omitted from the Bill.

The second issue underscored by a relational feminist framework is the need for a value-sensitive approach to regulating cohabitation. Examining the values at stake emphasises the Bill's problematic contractual paradigm. For example, the Bill fails to extend automatic rights, such as a right to occupy the family home, to unregistered domestic partnerships. While unregistered cohabitants are given the option to apply to a court to decide on property and maintenance rights, no automatic benefits ascribe to them. The onus will also be on the vulnerable party (which tend to be women) to approach the courts. Placing this onus on vulnerable women will only serve to reinforce inequitable gendered relations.

Through primarily protecting registered partnerships the Bill retains a predominantly contractual paradigm, in that only partners who expressly enter into an agreement or register their relationship, are given automatic benefits. Instead, the Bill should be reformulated in terms of seeking to structure relations that give effect to the constitutional values. In accordance with this transformative approach, the Bill should recognise and address the relational socio-economic impact of terminated cohabiting relationships. A relational feminist approach also recognises the broader relational impact of the failure to address cohabitation. A relational feminist lens reveals that sometimes, protecting vulnerable family members requires proactive state action, even if cohabiting parties have not formalised their relationship.

The Bill should be amended to automatically recognise and give effect to certain socio-economic rights for unregistered cohabiting partners once their relationship fulfils minimum requirements. Examples of this include automatically ascribing the right to occupy the family home after being involved in a relationship for a minimum of two years.<sup>50</sup> The primary focus should be on the contextual socio-economic nature of

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<sup>50</sup> Two or three years is the length of time relied upon in a number of foreign law statutes, such as the Canadian provinces discussed in chapter 4 of this study. A period of two years provides a minimum amount of time to allow for socio-economic interdependence and to demonstrate commitment. While the socio-economic consequences of the relationship will also depend on

the relationship. The prevalence of socio-economic interdependence and socio-economic need should thus be paramount in determining the socio-economic consequences of terminated domestic partnerships. Relationships characterised by substantial socio-economic interdependence, and severe socio-economic disadvantage upon dissolution, should furthermore, give rise to a general presumption of equal contributions and equal sharing of socio-economic resources, at relationship breakdown.<sup>51</sup> While parties could apply to a court to determine the patrimonial consequences of their relationship, the exercise of judicial discretion should be infused with “judicial realism”.<sup>52</sup> Specific consideration should be given to the socio-economic needs of caregivers with dependents. This is necessary in order to recognise and redress the gendered contributions and roles prevalent in domestic partnerships and in family law in general.<sup>53</sup>

In its current form, unregistered partnerships are regulated through judicial discretion under the Bill. In exercising this discretion, the courts are not guided to consider the socio-economic impact of gender inequality in these relationships. Judicial discretion is however, often influenced by gender bias against caregivers.<sup>54</sup> There is therefore, the need for an express obligation to foster substantive gender equality between cohabitants. As indicated by the SALRC’s report on domestic partnerships, the value of autonomy is paramount in the Domestic Partnership Bill. There is however, the need to give effect to a relational and substantive conception of autonomy and human dignity within the context of family law.

The private law emphasis is evident in the guidelines provided for determining the property and maintenance consequences of registered domestic partnerships. For example, when determining a property dispute, the Bill directs the court to focus on who owns the family property. While there is specific mention of the need to consider who undertakes the caring work within the domestic partnership, the right of access to adequate housing, access to health care, food, water or social security, is not included

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the context of the specific relationship, two years offers a minimal requirement for the enforcement of socio-economic responsibilities.

<sup>51</sup> Canadian Women’s Legal Education and Action Fund (LEAF), *Factum of the Intervener in Eric v Lola* (2012) 2.

<sup>52</sup> J Heaton “Striving for Substantive Gender Equality in Family Law: Selected Issues” (2005) 21 *SAJHR* 556.

<sup>53</sup> Canadian Women’s Legal Education and Action Fund (LEAF), *Factum of the Intervener in Eric v Lola* (2012) 2.

<sup>54</sup> E Bonthuys “Family Contracts” (2004) 121 *SALJ* 879 879.

under the list of factors<sup>55</sup> for the court to consider. The need to recognise and address the specific socio-economic consequences of a terminated domestic partnership is omitted.

The factors that a court must consider in accordance with clause 26, which concerns property division after the termination of an unregistered domestic partnership, should thus be amended as follows, with the insertion of (j), (k) and (l):

(a) the duration and nature of the relationship; (b) the nature and extent of common residence; (c) the degree of financial dependence or interdependence and any arrangements for financial support between the unregistered domestic partners; (d) the ownership, use and acquisition of property; (e) the degree of mutual commitment to a shared life; (f) the care and support of children of the unregistered domestic partnership; (g) the performance of household duties; (h) the reputation and public aspects of the relationship; (i) the relationship status of the unregistered domestic partners with third parties; (j) the relational dynamics between the cohabiting partners, including whether there is any evidence of domestic violence, or exploitation, (k) the socio-economic implications of the relationship for cohabitants and the need to progressively realise the right of access to adequate housing, the right of access to health care services, food, water and social security and (l) the need to protect vulnerable groups in our society, such as women and children and the duty to give effect to substantive gender equality.

In accordance with these amended factors, the need to promote and fulfil the socio-economic rights of cohabitants is interconnected with the need for the courts to address systemic patterns of gendered disadvantage within the family law regime. In exercising judicial discretion, the courts should consider the gendered nature of

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<sup>55</sup> When deciding on an applications for an order on property division under clause 26, a court must have regard to all the circumstances of the relationship, including the following:

- “the duration and nature of the relationship;
- (b) the nature and extent of common residence;
- (c) the degree of financial dependence or interdependence and any arrangements for financial support between the unregistered domestic partners;
- (d) the ownership, use and acquisition of property;
- (e) the degree of mutual commitment to a shared life;
- (f) the care and support of children of the unregistered domestic partnership;
- (g) the performance of household duties;
- (h) the reputation and public aspects of the relationship;
- (i) and the relationship status of the unregistered domestic partners with third parties.”

relationships, as well as the potential of socio-economic rights to foster substantive gender equality.<sup>56</sup>

The third issue underscored by a relational feminist interpretation of the socio-economic rights of female cohabitants, is the need to emphasise the state's positive duty to enforce private socio-economic responsibilities between cohabitants, whether registered or unregistered. Socio-economic equality should also be fostered in a manner that structures constructive relations between cohabiting men and women.

The final aspect underscored by a relational feminist interpretation of socio-economic rights is the need for innovative and transformative remedies that give effect to the socio-economic rights of cohabitants while seeking to transform the manner in which men and women relate to one another. The Bill therefore needs to be infused with transformative conceptions of autonomy, dignity, diversity, *Ubuntu* and gender equality. Through automatically ascribing certain rights to cohabitants, the Bill can shift existing relations between cohabitants.

The SALRC has pointed out that the ascription model could give rise to an increase in polygamous relationships, more so than under a registration system. An example of this is when a married individual enters into a domestic partnership with someone else, with socio-economic consequences. The fact remains however, that polygamous relationships are a reality in our society. The decision to not afford these relationships any recognition often results in socio-economic hardships for vulnerable women. A relational feminist interpretation of socio-economic rights emphasises the relational nature of equality, dignity and autonomy, highlighting the need to protect the fundamental rights of all parties involved in a cohabiting relationship. The focus should thus be on the human rights (and particularly the socio-economic rights) of the parties involved. While dealing with competing claims from different partners may be complicated and give rise to difficulties with enforcement, the rights of these partners do require protection and need to be addressed.

Under a relational feminist approach, the focus shifts to the relational socio-economic impact of each relationship. A relational feminist approach also questions the kinds of relations that we would like to structure between men and women and between women themselves. Women should not be encouraged to see each other as competition for survival. All of the parties should be treated in a manner that seeks to

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<sup>56</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011) 208.

protect and foster their human dignity and autonomy. While absolute equality is not possible, the legal system should seek to recognise and protect the socio-economic rights of all parties.

In the case of *Zulu v Zulu*<sup>57</sup> (“*Zulu*”), the High Court held that where a cohabiting party’s behaviour was *mala fide*, she would not be able to share in the property of her partner. Even though the Court found that the applicant’s behaviour in this case was in fact *bona fides*, the Court held that she and the deceased had not entered into a lawful partnership. The High Court’s reasoning was due to the fact that the deceased had already entered into a civil marriage before entering into a relationship with the applicant. Judicial discretion informed by a relational feminist interpretation of the socio-economic rights of female partners in polygamous cases could be utilised to provide a more balanced and fair outcome for all parties. The partner who suffers the greatest socio-economic impact and sacrifice should have access to a significant share in the family’s socio-economic resources. Attention should also be paid to the manner in which the relationship came into being, as well as the relational dynamics of the relationship. The emphasis should be on transformation as opposed to maintaining the status quo. Mediation in these cases would also be desirable, with the focus on ensuring a fair socio-economic outcome for all parties concerned.<sup>58</sup>

Automatically ascribing rights furthermore, does not prevent the parties from entering into a contract themselves. Partners could therefore, have the additional option of contracting out of certain obligations. However, the party seeking to opt out of the statutory obligations should bear the burden of proof in seeking to enforce this contract. Decisions on whether to enforce the contract should be guided by

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<sup>57</sup> 2008 4 SA 12 (D) [2008] ZAKZHC 10 (“*Zulu*”).

<sup>58</sup> The importance of seeking to mediate in legal disputes, so as to try and find a solution that balances the rights of all parties involved was emphasised by Justice Sachs in the case of *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC). This case concerned an eviction application brought under s 6 of PIE by the Port Elizabeth Municipality against 68 unlawful occupiers. In para 39, Justice Sachs pointed out that:

“In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.”

considering the kinds of relations we would like to foster between cohabiting men and women.<sup>59</sup>

Courts are empowered to make orders that are just and equitable in terms of maintenance or property disputes. The range of specific remedies should however be broadened. For example, the courts could be guided by the values underlying socio-economic rights, to set aside or approve settlement agreements or provide restraining orders, if necessary. Given the high levels of gender-based violence in South Africa, greater attention needs to be paid to the relational dynamics that exist within cohabiting relationships.

In conjunction with expanding the property and maintenance rights of women in unregistered partnerships, the prevalence of domestic violence therefore, also needs to be recognised as an important factor in determining the socio-economic consequences of these relationships.<sup>60</sup> The prevalence of domestic violence should be included as a factor to guide judicial discretion, while cohabiting women should be assisted in bringing evidence on this issue to the court. Further training of judicial officers on the impact of these relational dynamics, is necessary in order to appropriately determine the socio-economic consequences of domestic partnerships.<sup>61</sup>

#### 5 4 3 Conclusion

The Constitution clearly requires the state to take positive measures to protect, promote and fulfil the socio-economic rights.<sup>62</sup> This necessarily requires developing accountability structures for enforcing private socio-economic responsibilities between cohabitants. One avenue of fulfilling this duty is through infusing the Domestic Partnership Bill with a relational feminist approach. The need for this approach was emphasised through the comparative study on Canadian and Dutch family law. For example, Canadian and Dutch family law legislation revealed that simply extending legislative rights without adopting a relational feminist approach will not be sufficient

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<sup>59</sup> Nedelsky *Law's Relations* 2.

<sup>60</sup> E Bonthuys "Domestic Violence and Gendered Socio-Economic Rights: An Agenda for Research and Activism" (2014) 30 *SAJHR* 133.

<sup>61</sup> 133.

<sup>62</sup> S 7(2) of the Constitution states "the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

to transform existing patterns of gender disadvantage.<sup>63</sup> The Domestic Partnerships Bill thus needs to be suffused with transformative relational conceptions of autonomy, human dignity and equality. Ultimately, the Domestic Partnerships Bill needs to give effect to the transformative aspirations underlying our Constitution in terms of structuring more equitable socio-economic relations between cohabitants.

The Bill's current contractual paradigm should be transposed with a relational feminist interpretation of the socio-economic rights of cohabitants, through automatically ascribing certain socio-economic benefits to cohabitants whose relationships are characterised by socio-economic interdependence. For example, a couple that has lived together for at least two years, should obtain certain benefits, particularly for caregivers. The private law language that is used in the Bill ought to be amended so as to include a constitutional law focus, while the socio-economic rights should be explicitly referred to.

A single piece of legislation will not solve all of the problems within our family law regime. Amending and enacting the Domestic Partnerships Bill will however, provide increased legal certainty to a greater number of women. It is necessary to also examine the potential of jurisprudentially developing existing legislation and common law rules pertaining to cohabitants. Developing existing legal rules is required as currently, the common law rules are primarily structuring the socio-economic well-being of cohabiting women.

## **5 5 Jurisprudential developments to protect the rights of disadvantaged cohabitants**

### **5 5 1 Introduction**

The South African judiciary in its entirety is subject only to the Constitution and the law.<sup>64</sup> The South African courts consequently fulfil a significant function in the constitutionally mandated effort to effect societal transformation by interpreting and enforcing constitutional rights. The duty to transform our society does not rest on the

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<sup>63</sup> See part 4 6 of chapter four of this study.

<sup>64</sup> S 165 of the Constitution.

courts alone. As highlighted above, it is primarily the task of the state to implement laws and policies aimed at far-reaching transformation.

While the judiciary is not tasked with transforming our society in isolation, it has a significant role to play, particularly as the Constitution clearly requires human rights-inspired reforms of existing private law rules.<sup>65</sup> It also authorises an independent judiciary to test the validity of all law against the Constitution.<sup>66</sup> The responsibility of the judiciary is emphasised by the reality that the family law regime retains many archaic common law rules. In the face of recent legislative inactivity, the Supreme Court of Appeal has been particularly active in developing private law rules relating to tacit universal partnerships between cohabitants.<sup>67</sup>

In spite of certain positive developments in accordance with these decisions, clarity on the interaction between the Bill of Rights and private law rules has yet to emerge.<sup>68</sup> One reason for this lack of progress is a lack of concrete guidelines relating to how this change should be facilitated.<sup>69</sup> This chapter therefore examines the implications of a relational feminist framework for guiding the horizontal application of socio-economic rights between cohabitants.

## 5 5 2 Utilising a relational feminist lens to foster gender-sensitive family law decisions

An overview of the family law jurisprudence emphasises the need to construct a judicial response to cohabitation that is more caring, feminist and authentically reflective of the Constitution's transformative aspirations.<sup>70</sup> A relational feminist interpretation of socio-economic rights will not solve all of the problems within our family law regime. However, given that these rights are often accessed privately, highlighting the distributional consequences of family law rules may assist in

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<sup>65</sup> AJ van der Walt *Property and Constitution* (2012) 19.

<sup>66</sup> 19.

<sup>67</sup> Bonthuys (2015) *SAJHR* 380.

<sup>68</sup> E Bonthuys "The South African Bill of Rights and the Development of Family Law" (2002) 119 *SALJ* 748 781. While the family law regime is still primarily seen through a private law lens, on the occasions that the Bill of Rights has been applied to family law, the focus has traditionally been on the constitutional right to equality. While this right has great transformative potential, the high levels of poverty plaguing South Africa and the unique manner in which women experience poverty further justifies a shift in focus.

<sup>69</sup> D Bhana "The Development of a Basic Approach for the Constitutionalisation of Our Common Law of Contract" (2015) 26 *Stell LR* 1 3.

<sup>70</sup> G Brodsky, R Cox, S Day & K Stephenson "*Gosselin v Quebec (Attorney General)*" (2006) 18 *CJWL* 189 190.



developing interpretations of these rights that are more responsive to existing private gendered power imbalances.<sup>71</sup> Furthermore, raising the relational nature of these rights would reveal the need to develop relational feminist remedies that are sourced within the socio-economic rights. Socio-economic rights could also open up space for increased creativity within traditional private law arguments and remedies.<sup>72</sup> In addition, extending recognition and protection to cohabitants on the basis of their constitutionally entrenched socio-economic rights has the potential to protect a broader range of their human rights and interests. Socio-economic rights also have significant potential to empower women and to structure more constructive relations between men and women on a broader scale.<sup>73</sup>

Interrogating the socio-economic implications of cohabitation is further justified given South Africa's high levels of poverty and our insufficient social welfare system.<sup>74</sup> Increased socio-economic cooperation between family members is further defensible as research on poverty within families indicates that cooperation between generations and between family members facilitates the accumulation of resources. This has been described as a "potentially powerful avenue for economic empowerment within South Africa".<sup>75</sup> Utilising a relational feminist interpretation of socio-economic rights to develop the family law regime is also required in order to transition from the current liberal approach to cohabitation,<sup>76</sup> to a transformative approach that is more aligned with the progressive framework of rights in the Bill of Rights. It has been pointed out that in the context of structural inequalities, transformative adjudication should strive for the most effective and substantive vindication of the values and interests protected by socio-economic rights.<sup>77</sup> In this manner the law could re-shape cohabiting relations so as to foster socio-economic equity between cohabitants.

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<sup>71</sup> M Pieterse "Relational Socio-Economic Rights" (2009) 25 *SAJHR* 198 198.

<sup>72</sup> Bonthuys (2008) *SAJHR* 240.

<sup>73</sup> For example, gender-sensitive housing, such as state housing provided to survivors of domestic violence can significantly empower women to leave abusive relationships.

<sup>74</sup> Goldblatt (2003) *SALJ* 618.

<sup>75</sup> M Makwane & L Berry "Towards the Development of a Family Policy for South Africa" (2013) *Human Sciences Research Council Policy Brief* 1 4 <<http://www.hsrc.ac.za/uploads/pageContent/3337/2013febFamily%20Policy.pdf>> (accessed 24-07-2013).

<sup>76</sup> See part 3 3 of chapter three of this study.

<sup>77</sup> S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 58.

## 5 5 2 1 *Utilising relational feminism to inform the horizontal application of socio-economic rights*

One could utilise the facts of *Butters v Mncora*<sup>78</sup> as an example of how sections 8 and 39 of the Constitution could be utilised, through a relational feminist lens, to test and develop applicable private law rules and legislation against the socio-economic rights of vulnerable cohabitants. The facts of *Butters*<sup>79</sup> were discussed in detail in chapter three.<sup>80</sup> As is often the case, upon the termination of the domestic partnership, the respondent sought to evict the applicant. As the applicant had no right to occupy the family home,<sup>81</sup> she was ultimately forced to leave the family home.

In this regard a female cohabitant could use section 8(2) of the Constitution to argue that the non-recognition of her relationship infringed upon her right to have access to adequate housing, particularly as the law gave her partner the power to evict her (which is often what occurs).<sup>82</sup> She could also argue that the lack of a legislative framework to ensure the fulfilment of socio-economic obligations between cohabitants undermines her ability to access adequate housing,<sup>83</sup> health care, food and water<sup>84</sup> and social security, often for herself and any children born from the relationship. She could point out that the law's failure to regulate domestic partnerships has intersected

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<sup>78</sup> 2012 4 SA 1 (SCA); [2012] 2 All SA 485 (SCA).

<sup>79</sup> For example, as highlighted in chapter three, after twenty years of living together, the respondent had accumulated a significant amount of assets, while the applicant had primarily remained responsible for the maintenance of the family home and their children

<sup>80</sup> 2012 4 SA 1 (SCA); [2012] 2 All SA 485 (SCA) para 8.

<sup>81</sup> These are rights that are conferred under the common law definition of marriage, which excludes cohabitants.

<sup>82</sup> Meyersfeld (2010) *Constitutional Court Review* 275; The Alliance for the Legal Recognition of Domestic Partnerships "Submission to the Department of Home Affairs" (2008) 3.

<sup>83</sup> S 26(1) of the Constitution specifically provides that: "Everyone has the right to have access to adequate housing." S 26(3) goes on to state that

"No- one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances."

<sup>84</sup> S 27 of the Constitution specifically states that:

"(1) Everyone has the right to have access to  
 (a) health care services, including reproductive health care;  
 (b) sufficient food and water; and  
 (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment."

with existing relational patterns of gender inequality, resulting in many cohabiting women being denied access to vital socio-economic resources.<sup>85</sup>

In determining the extent to which the Bill of Rights is applicable to the applicant's situation, the court will need to recognise the historical and current social context governing cohabitation, as well as its gendered implications. This context-sensitive approach to domestic relations should be guided by section 8 of the Constitution. Examining the socio-economic consequences of cohabiting relations will assist in transcending traditional conceptions of the public/private law divide.<sup>86</sup> A realistic recognition of the current social context reveals how various areas of private law are located within existing social systems of inequality, domination and control for female cohabitants.<sup>87</sup> Given the constitutional requirement to progressively realise socio-economic rights and to foster substantive gender equality, the Bill of Rights is clearly applicable to this case.

In determining the exact scope of the applicant's right of access to adequate housing, the court would need to address the nature of her specific relationship and the intensity of the infringement.<sup>88</sup> The gendered norms and inequities that have been constructed by the relationship should also be addressed.

In this regard, the considerable means of the respondent, the caregiving work that was undertaken by the applicant and the significant length of their relationship, would justify a substantive engagement with sections 26(1) and 26(3) of the Constitution and their importance to female cohabitants. As held by the Constitutional Court, the right of access to adequate housing necessarily entails more than just "bricks and mortar".<sup>89</sup> In accordance with this statement, it needs to be recognised that the family home is of particular significance for dependant family members. The Court will thus need to acknowledge the rise in cohabitation and the fact that it is predominantly prevalent within poorer communities. This socio-economic vulnerability emphasises the need to give substantive content to the socio-economic rights of female cohabitants.

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<sup>85</sup> Meyersfeld (2010) *Constitutional Court Review* 275; The Alliance for the Legal Recognition of Domestic Partnerships "Submission to the Department of Home Affairs" (2008) 3.

<sup>86</sup> *Juma Musjid Primary School case, & Others v Essay N.O. and Other* [2011] ZACC 13; 2011 8 BCLR 761 (CC) ("*Juma*") para 54.

<sup>87</sup> Nedelsky *Law's Relations* 300.

<sup>88</sup> *Khumalo v Holomisa* 2002 5 SA 401; 2002 8 BCLR 771 para 33.

<sup>89</sup> *Grootboom* para 35.

In seeking to give substantive content to section 26, it is necessary to enquire whether legal rules that implicate this right are giving effect to a substantive and relational conception of autonomy, a relational understanding of human dignity and a commitment to substantive equality between cohabiting men and women. The court must examine whether the respondent's private property rights and the lack of legislative regulation are being utilised to perpetuate the marginalisation, material inequality, and subordination experienced by female cohabitants. Given the particular vulnerability of female cohabitants upon relationship breakdown, as underscored by empirical evidence,<sup>90</sup> greater effort must be made to give effect to the socio-economic rights of cohabitants.

Relational feminism emphasises that in order to develop the substantive content of socio-economic rights for female cohabitants, the reality of rights structuring relationships needs to become the central focus of the interpretive exercise.<sup>91</sup> Accordingly, interpretations of socio-economic rights will be more responsive to the needs of cohabiting women if we focus on the kinds of gendered relationships that we want to foster.<sup>92</sup>

Adopting this relational feminist approach would lead to a more relational balancing act between the applicant's right to have access to adequate housing and the respondent's property and contractual rights. In seeking to determine whether a negative infringement of section 26(1) is reasonable and justifiable, the court will also need to apply section 36 of the Constitution.<sup>93</sup> Section 36 requires the court to consider the founding constitutional values for cohabitants, the purpose of the limitation and

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<sup>90</sup> B Goldblatt, C Yose, & S Mills "Cohabitation and Gender in the South African Context: Implications for Law Reform" (2001) (research report prepared by the Gender Research Project of the Centre for Applied Legal Studies, University of the Witwatersrand); E Bonthuys "Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court" (2008) 20 *CJWL/RFD* 1 13-14. See also: The Women's Legal Centre Trust & The Centre for Applied Legal Studies "Written Submission on Behalf of the Amicus Curiae" (2005) <<http://www.constitutionalcourt.org.za/Archimages/3296.PDF>> (accessed 09-03-2011).

<sup>91</sup> Nedelsky *Law's Relations* 251.

<sup>92</sup> 251.

<sup>93</sup> S 36 of the Constitution states that:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

whether there are less restrictive means to achieve the purpose. Section 26(3) of the Constitution also requires that no-one may be evicted without an order of court made after considering all of the relevant circumstances.

In *Butters*<sup>94</sup> the majority judgment did point out that the respondent's claim that he had intended to accumulate all of the family assets for his sole benefit, was "remarkable".<sup>95</sup> The Court went on to elucidate that this approach would mean that the applicant intended to contribute her everything for almost twenty years to assist the defendant in acquiring assets for himself only.<sup>96</sup> This would have the inequitable result of leaving her entirely dependent in her old age on the generosity of the defendant, implicating her right of access to social security.<sup>97</sup> Allowing her to be left with no remedy would also contribute to existing patterns of exploitation that exist between cohabiting men and women. In accordance with the disadvantage experienced by the applicant, allowing her eviction without giving effect to her socio-economic rights would not be constitutionally reasonable and justifiable. Given that the Constitution is implicated within this case, the next step concerns determining the most effective means of giving effect to the Constitution.

#### 5 5 2 2 *Interpreting legislation*

In accordance with section 8(3)(a) of the Constitution, the courts are required to first rely on any applicable legislation when constitutional rights are horizontally applicable.<sup>98</sup> The potential of interpreting legislation to include cohabitants is first examined. While there is no legislation giving effect to the private socio-economic duties between cohabitants, one could argue that the closest piece of legislation falling under this category is the Maintenance Act 99 of 1998 ("the Maintenance Act"). Section 2(1) of the Maintenance Act provides that the provisions of the Act "shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship". The Maintenance Act therefore extends to include a

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<sup>94</sup> For example, as highlighted in chapter three, after twenty years of living together, the respondent had accumulated a significant amount of assets, while the applicant had primarily remained responsible for the maintenance of the family home and their children.

<sup>95</sup> *Butters v Mncora* 2012 (4) SA 1 (SCA); [2012] 2 All SA 485 (SCA) para 26.

<sup>96</sup> Para 26.

<sup>97</sup> Para 26.

<sup>98</sup> *Juma Masjid Primary School case, & Others v Essay N.O. and Other* [2011] ZACC 13; 2011 8 BCLR 761 (CC).

contractual duty of support between cohabitants who have agreed upon a duty of support, whether overtly or tacitly. The difficulty arises in proving that a duty of support has been tacitly agreed upon.<sup>99</sup> In determining whether there has been a decision to undertake a duty of support, the interpretive approach adopted by the lower courts should be informed by a relational feminist interpretation of the socio-economic rights of female cohabitants.

The applicant could therefore argue that her eviction and loss of access to household goods, infringes upon her rights to have access adequate housing, health care, food, water and social security. This exclusion further infringes upon her rights to equality and human dignity. The unfairness of leaving cohabitants vulnerable is highlighted through the decision of *Kahn v Kahn*,<sup>100</sup> where the Transvaal provincial division extended the application of section 2(1) of the Maintenance Act to women married under Muslim Personal Law.<sup>101</sup>

While one could argue that this piece of legislation should be extended to explicitly include cohabitants, the fact that it does not explicitly provide for private socio-economic obligations between cohabitants emphasises the need for the legislature to enact specific legislation regulating cohabitation. The Maintenance Act does also not address the need to examine and transform the socio-economic consequences of how men and women interact with one another. The court could however, also interpret existing family law legislation to include cohabitants.

Within Canada, the courts have adopted this incremental approach, through extending certain legislative provisions to include different family forms, including same-sex relationships and unmarried cohabitants. One benefit of this approach is that judicial decisions often prompt the legislature to enact progressive legislation. Incrementally developing areas of family law through strategic cases was also the approach adopted within Australia. As highlighted by Goldblatt, this approach allows

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<sup>99</sup> This is evinced by the decision in *Volks* para 58, where Justice Skewija stated that there was no automatic duty of support between cohabitants. He further pointed out that, to the extent that any obligation would arise between cohabitants during the subsistence of their relationship, this would only be in terms of an agreement and would only be within the limits of that agreement. As discussed in part 3 5 6 of chapter three of this study, the South African legal regime has, however, been developed in terms of the dependent's action at common law for loss of support due to the death of the breadwinner within the family. In the decision of *Paixão v Road Accident Fund*, a unanimous court was prepared to find that the deceased had tacitly undertaken to support the female applicant and her daughters prior to his death.

<sup>100</sup> 2005 2 SA 272 (T).

<sup>101</sup> *Kahn v Kahn* 2005 2 SA 272 (T) page 283.

for a comprehensive set of laws to be put into place, without being too politically contentious.<sup>102</sup> This approach has allowed legal reform to occur in Australia without an overwhelming degree of public debate or opposition.<sup>103</sup>

Within South Africa, this was also the strategy employed in seeking to extend legal protection to same-sex relationships. The strategic potential of this route was revealed through the success achieved by the National Coalition for Gay and Lesbian Equality (in terms of developing the law to protect same-sex partnerships). Bonthuys has pointed out that their strategy of focusing on incrementally developing the law, as opposed to expressly attacking the common law definition of marriage, was part of what led to their numerous judicial successes.<sup>104</sup>

While a coherent and comprehensive legislative framework governing cohabitation is preferable, in its absence, the courts can develop the law by interpreting family law legislation that confers socio-economic benefits, to include cohabitants. For example, interpreting the definition of “spouse” in the MSSA to include cohabitants, would extend a form of social support to cohabitants. Existing family law legislation can therefore be interpreted in a manner that gives greater effect to the socio-economic rights of cohabitants.

It must be pointed out however, that the Court in *Volks v Robinson* (“*Volks*”)<sup>105</sup> was reluctant to extend the MSSA to cohabitants, preferring to defer to the legislature as the appropriate authority to develop the law in this regard.<sup>106</sup> While the legislature has a constitutional obligation to give effect to the socio-economic rights of cohabitants, the courts are obliged to carefully interrogate current family law rules to determine whether they sufficiently protect the fundamental human rights protected in our Constitution.<sup>107</sup> The courts should accordingly examine how existing rights could be expanded so as to protect a broader range of families. A proactive judicial engagement with legislation would also assist the legislature in terms of developing the human

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<sup>102</sup> B Goldblatt “Different Routes to Relationship Recognition Reform: A Comparative Discussion Of South Africa And Australia” Law and Society Association Australia and New Zealand (LSAANZ) Conference (2008) 6 <<http://ses.library.usyd.edu.au/bitstream/2123/4043/1/LSAANZ%20Goldblatt%20Relationship%20Recognition%20LSAANZ%20final%20paper.pdf>> (accessed 04-07-2015).

<sup>103</sup> Goldblatt (2003) *SALJ* 610-629.

<sup>104</sup> Bonthuys (2002) *SALJ* 756.

<sup>105</sup> 2005 5 BCLR 446 (CC).

<sup>106</sup> *Volks* para 66.

<sup>107</sup> Liebenberg *Socio-Economic Rights* 71.

rights framework applicable to these relationships. Articulating this human rights framework could furthermore, guide the development of future legislation.

When a court is interpreting legislation, section 39(2) of the Constitution specifically states that the court must promote the spirit, purport and objects of the Bill of Rights.<sup>108</sup> Using the example of *Butters*,<sup>109</sup> the applicant could therefore argue that the MSSA should be interpreted and extended in accordance with a relational feminist interpretation of the socio-economic rights of cohabitants. While one could argue that the focus should rather be on developing the common law definition of marriage, it is important to examine the need to develop legislation and common law provisions.

While the MSSA could be interpreted in a manner that protects the socio-economic rights of female cohabitants, this would not be sufficient on its own, to transform our family law regime. One reason for this insufficiency is that the MSSA does not directly protect the socio-economic rights of vulnerable family members. The MSSA is furthermore, informed by a private law lens, indicating the need for a shift in our law towards protecting fundamental human rights norms and developing constitutionally-inspired transformative remedies. Given the lack of a legislative framework governing cohabitation, potential common law developments should also be considered.

### 5 5 2 3      *Developing the common law*

One potential avenue of development could be the extension of the common law definition of marriage, which was traditionally described as; “the union for life of one man and one woman to the exclusion of all others while it lasts.” This definition has been criticised for excluding a vast array of family forms, including cohabitants.<sup>110</sup> Developing the common law to recognise relational socio-economic obligations based on a more functional conception of family relationships, will not solve all of the problems facing cohabitants. It is however, necessary to examine and develop all areas of law in light of our multicultural society. Developing the common law while simultaneously developing a legislative framework would also foster a greater level of social transformation, as opposed to the current piecemeal approach to regulating relationships.

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<sup>108</sup> *K v Minister of Safety and Security* 2005 6 SA 419 (CC); 2005 9 BCLR 835 (CC) para 17.

<sup>109</sup> 2012 4 SA 1 (SCA); [2012] 2 All SA 485 (SCA).

<sup>110</sup> Pieterse (2009) *SAJHR* 212;



Section 8(3)(a) of the Constitution requires a court, when a provision of the Bill of Rights binds a natural or juristic person (and the legislative framework does not sufficiently protect this right) to develop the common law, where necessary, so as to fill gaps in the existing legislative framework. Section 8(3)(a) does raise “separation of powers” issues. Karl Klare and Dennis Davis point out however, that the courts regularly fill gaps in statutes and that they often do this in order to give effect to the legislature’s true goals and intentions.<sup>111</sup>

The courts often incrementally develop the common law within an overall duty of deference to the superior competence of the legislature.<sup>112</sup> In spite of the express mandate within section 8(3)(a) to develop the common law, the courts have been reluctant to develop the common law definition of marriage.<sup>113</sup> For example, in *National Coalition*,<sup>114</sup> which was discussed in chapter three,<sup>115</sup> the Court held that same-sex partners could establish all the elements of the *consortium omnis vitae*, which in terms of the common law define a family. The Court went on to state that they should therefore be afforded the same legal protection available to other families. The Court was however, careful to limit the implications of this for the validity of Muslim marriages and for the rights of cohabitants.<sup>116</sup> Instead of developing the common law definition of marriage, the Court held that the appropriate remedy was to read the words, “or partner in a permanent same-sex partnership” into the Aliens Control Act 96 of 1991.<sup>117</sup>

Amending the common law would not solve all of the problems facing female cohabitants in South Africa. It is however, necessary to highlight the gendered socio-economic challenges caused by existing rules, including common law rules. Through utilising section 8(2) to raise the distributional consequences of common law rules, the applicant would draw attention to the fact that the current legal framework governing cohabitation fails to protect the socio-economic rights of women. Even in cases when

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<sup>111</sup> D Davis and K Klare “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 *SAJHR* 403 422.

<sup>112</sup> Davis & Klare (2010) *SAJHR* 411.

<sup>113</sup> *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC), Counsel for the President also argued that the common-law definition of marriage, rather than the content of the Act, caused the discrimination in this instance and should have been the focus of attack. However, following the *Minister of Home Affairs* case, the court did not address this issue.

<sup>114</sup> 1999 1 SA 6; 1998 12 BCLR 1517.

<sup>115</sup> See part 3.3 of chapter three of this study.

<sup>116</sup> 1999 1 SA 6; 1998 12 BCLR 1517, paras 60 and 87.

<sup>117</sup> Para 87.

the specific socio-economic rights of cohabitants are not implicated, significant transformation of the common law may still be required in order to align our family law system with the “spirit, purport and objects” of the Constitution. This illustrates a potential overlapping between sections 8 and 39(2) of the Constitution. While both of these provisions have significant potential to transform the family law regime, substantive content needs to be given to the specific socio-economic rights of female cohabitants. Specific areas of the common law can also be further developed in accordance with socio-economic rights, as well as the broader ethos and values underlying the Constitution in accordance with section 39(2) of the Constitution.

One example of an area of law that requires significant development is contract law. Currently, cohabitants are free to sign contracts or cohabitation agreements. They can therefore agree on spousal support or the equal division of property after the breakdown of their relationship through an express agreement. These agreements can also be reviewed by the courts. In general, all contracts between cohabitants have to conform to the common law and statutory provisions that regulate the validity and enforceability of contracts. While family contracts have been heralded for ensuring legal certainty and for protecting the autonomy of cohabitants,<sup>118</sup> there are however, limitations to such contracts. Many of these limitations were highlighted in chapter three,<sup>119</sup> as well as in chapter four, under the discussion on Dutch family law.

The interpretation of family contracts is also subject to judicial discretion which is often influenced by sexism.<sup>120</sup> Goldblatt has echoed this criticism stating that instead of providing a way to extend the rights of members of non-traditional families, contract, as currently conceived, holds the potential of limiting rights and may also circumscribe the rights of members of families based on marriage.<sup>121</sup> The courts have already been criticised for inadequately responding to gendered power imbalances within relationships. This study pointed out that the courts have also failed to consider the socio-economic rights implicated in family contracts, particularly for women. The broader socio-economic relations (between men and women) that are perpetuated or undermined through exploitative family contracts have also not been examined. While contractual mechanisms do not offer the most ideal form of regulation, the

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<sup>118</sup> Barratt (2015) *Stel LR* 129.

<sup>119</sup> See part 3 5 of chapter three of this study.

<sup>120</sup> E Bonthuys “Family Contracts” (2004) 121 *SALJ* 879 879.

<sup>121</sup> 879.

“background legal rules” governing cohabitation within South Africa need to be further developed.

An example of a specific type of contract that requires development would be the rules relating to a tacit universal partnership, which was developed in the case of *Butters*. While the Supreme Court of Appeal did develop this contract, its approach was primarily informed by common law reasoning, with no mention of the Bill of Rights. As argued by Bonthuys, the imperative for social and legal transformation aimed at advancing substantive gender equality is however, a vital part of the constitutional project.<sup>122</sup> Given the gendered nature of cohabitation, consideration of the influence of the Bill of Rights is thus pivotal in a case like *Butters*. Legal development of contracts relating to families should take account of the gendered contexts in which these rules function. The socio-economic implications of these contracts should also be considered, in the light of the commitment to foster substantive gender equality.<sup>123</sup> Directing attention to the need to develop tacit universal partnerships in accordance with the applicant’s socio-economic rights would foster an analysis on how to develop these rules to give effect to the Constitution. Scrutinising family contracts is required in order to ensure that cohabiting parties truly have equal bargaining power, which requires access to sufficient socio-economic resources.

The rules relating to the evidentiary burden of proving the existence of a tacit universal partnership, should be developed to ease the burden on caregivers. For example, a caregiver who is facing eviction should only need to make out a *prima facie* case that a tacit universal partnership exists. The onus then shifts to the respondent seeking to infringe upon their partner’s socio-economic rights, to prove that there is no contract.

When deciding upon the extent of redistribution that is required, the court should consider the right of access to adequate housing for vulnerable family members. Access to health care services, food, water and social security should also be considered. Given that the applicant in *Butters* had undertaken the caring work in the relationship, building up the family home and caring for her partner’s children from another relationship, her right of access to adequate housing could have played a role in determining who should get what portion of the family home. A relational feminist

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<sup>122</sup> Bonthuys (2015) *SAJHR* 384.

<sup>123</sup> Bonthuys (2015) *SAJHR* 384.

interpretation of the socio-economic rights of female cohabitants requires the court to consider the values of autonomy, dignity and equality as it pertains to the socio-economic consequences of terminated domestic partnerships. The courts need to examine the kinds of relations that would best give effect to these values. Failing to recognise the sacrifice that went into the relationship would ultimately undermine the dignity of the applicant. It would also give effect to a negative conception of autonomy, while exacerbating gender inequality. The final transformative step underlying relational feminism requires redistributive and transformative interpretations of socio-economic rights that structure more constructive relations between cohabiting men and women.

In *Butters*, the court could have redistributed the family property on a more equitable basis, so as to give effect to the socio-economic rights of the applicant. At the very least, raising socio-economic rights within cohabitation cases would emphasise the need to further infuse the private law sphere with human rights norms. Analysing these rights and the values they protect is necessary to ensure that the normative influence of the Bill of Rights is felt “throughout the common law”.<sup>124</sup>

While the courts have yet to develop a coherent jurisprudence on how to develop the common law when it is deficient, they have at times proactively developed this area of law so as to extend obligations of support. For example, in *Petersen v Maintenance Officer, Simon's Town Maintenance Court (“Peterson”)*,<sup>125</sup> the Cape High Court declared that the common-law rule excluding paternal grandparents from the obligation to support extra-marital children is unconstitutional for infringing upon the child’s right to dignity, as well as the best interests of the child. While the court did not analyse the socio-economic rights of the children within this case, this case illustrates the potential to transform the common law to provide better protection to the material needs of vulnerable family members.

Developing the area of contract law does not mean that the sanctity of contract should be completely disregarded. The area of contract law should however, be evaluated in terms of a relational feminist interpretation of the socio-economic rights of family members. For example, deciding whether to give effect to a family contract should be balanced with the need to protect the socio-economic rights of vulnerable

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<sup>124</sup> *K v Minister of Safety and Security* 2005 6 SA 419 (CC); 2005 9 BCLR 835 (CC) para 17.

<sup>125</sup> [2003] ZAWCHC 61; [2004] 1 All SA 117 (C).

family members. A court should also consider whether the contract is structuring exploitative relations or if it is structuring relations based on substantive gender equality.<sup>126</sup> A relational feminist interpretation of socio-economic rights in the context of family contracts also requires courts to differentiate between familial contracts and commercial contracts between strangers who are competing with one another.<sup>127</sup> When interpreting family contracts, the courts need to exercise a measure of “judicial realism”.<sup>128</sup> The principles of public policy and fairness need to be informed by the normative framework underlying our Constitution, including the commitment to progressively realise the socio-economic rights. This is also necessary due to the fact that public regulation of these contractual relationships is absent. In this regard section 39(2) of the Constitution specifically requires the courts to align their application of the “normal” rules of contract law with the spirit, purport and objects of the Bill of Rights.<sup>129</sup>

#### 5 5 2 4      *Developing a new constitutional remedy*

Another potential strategy that a court could adopt is to rely directly on a specific constitutional right to craft a new constitutional remedy. This is in contrast to attempting to “manipulate”<sup>130</sup> the common law rules to give effect to the Constitution. There is nothing in the Constitution that excludes the courts from doing so. This direct approach may also be more conducive to fostering the transformative aspirations underlying our Constitution. An example of this kind of remedy is the award of constitutional damages which was granted by the Constitutional Court in the case of *President of the RSA v Modderklip Boerdery*,<sup>131</sup> as well as the case of *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality*.<sup>132</sup>

While direct application of the Constitution provides an attractive solution, it has been argued that leaving the common law “as is” can be problematic.<sup>133</sup> The common law does furthermore, require development if it is to give effect to the transformative

<sup>126</sup> Nedelsky *Law’s Relations* 17.

<sup>127</sup> E Bonthuys “Family Contracts” (2004) 121 *SALJ* 879 879; Nedelsky *Law’s Relations* 17.

<sup>128</sup> Heaton (2005) *SAJHR* 556.

<sup>129</sup> Pieterse (2009) *SAJHR* 208.

<sup>130</sup> Bhana (2015) *Stell LR* 3.

<sup>131</sup> 2005 5 SA 3 (CC); 2005 8 BCLR 786 (CC).

<sup>132</sup> [2007] ZASCA 70; [2007] SCA 70 (RSA); 2007 6 SA 511 (SCA) (30 May 2007).

<sup>133</sup> Liebenberg *Socio-Economic Rights* 336-341.

ethos of our Constitution.<sup>134</sup> The courts have not provided a coherent framework of factors to determine whether the Constitution should be applied indirectly or whether a new constitutional remedy should be developed,<sup>135</sup> making this remedy potentially difficult to utilise.

Even if a court decides to directly apply the Bill of Rights, the methodology followed under the subsidiarity principles illustrate that where there is a legislative and common law lacunae, the common law should be developed to provide a new constitutionally-inspired remedy. The court could for instance, interpret the right to have access to adequate housing so as to redistribute a portion of the family property to the vulnerable family member. In *Butters*<sup>136</sup> the Court did redistribute the family property (to a certain extent) through the use of the universal partnership. There does however, need to be more of a shift in terms of the burden of proof associated with these contracts, as well as the infusion of a constitutional perspective.

It is clear that the rules governing cohabitation can and should be developed to give effect to the socio-economic rights of female cohabitants. While the development of principles to guide the horizontal application of the Bill of Rights is necessary, it is not only the interpretive approach of the courts that requires development. These doctrinal developments need to be coupled with institutional changes to the judiciary. There is therefore, the need to further transform the composition and nature of the South African judiciary so as to better represent the diversity prevalent in our society. Specialised training of judicial officers regarding gender inequality in our society is particularly required if we are to foster more gender-sensitive approaches to family law issues. As further emphasised by Bonthuys:

“In a constitutional context which demands gender equality, all judges should as a matter of course commit themselves to furthering substantive equality on the basis of gender... [F]ailure to do so could be regarded as a failure to apply the law of the country fully and correctly. The gendered elements of a case dealing with tax, company law or contract may be less obvious, while family law concerns itself with the roles, duties and rights of husbands and wives, of mothers and fathers... [F]or this reason I believe that all family law cases should be approached in a manner that is mindful of their potential for reinforcing

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<sup>134</sup> 336-337.

<sup>135</sup> 336-337.

<sup>136</sup> 2012 4 SA 1 (SCA); [2012] 2 All SA 485 (SCA).

pervasive social and legal structures of gender inequality and that is committed to countering sexist stereotypes.”<sup>137</sup>

A relational feminist interpretation of the socio-economic rights of female cohabitants is best suited to promoting a transformative jurisprudence on the rights of female cohabitants. It is therefore necessary to infuse family law cases with a relational feminist lens, focusing on the socio-economic rights of female cohabitants.

### 5 5 3 Summary of the judicial interventions required

The above discussion underscored the lack of a gender-sensitive approach to family law issues in South Africa. There is therefore the need to further infuse this area of law with a constitutional perspective committed to substantive gender equality and justiciable socio-economic rights. A relational feminist interpretation of the socio-economic rights of female cohabitants is particularly conducive to developing the family law regime so as to structure more equitable relations between cohabitants.

In order to catalyse this change, the South African jurisprudence does however, need to be further engendered. The interpretive approach adopted by the lower courts should also be informed by a relational feminist framework. This relational feminist lens is particularly necessary when interpreting and developing rules governing the socio-economic consequences of terminated domestic partnerships. While the courts can utilise the Bill of Rights both directly and indirectly, the above analysis reveals that existing legislation and common law rules are the primary tools for giving effect to the horizontal application of socio-economic rights.<sup>138</sup> Specific legislation, such as the MSSA could be interpreted so as to apply to cohabitants. The legislature should also however, be compelled to amend and enact the Domestic Partnerships Bill.

The common law also requires further development. This is due to the fact that the current legislative framework fails to provide for the socio-economic rights of cohabitants, while being informed by a private law lens. The common law definition of marriage could be extended so as to include a more functional conception of family relationships. Another option is infusing the common law rules relating to a tacit universal partnership with the values and purposes underlying the socio-economic rights. The common law principles of “*boni mores*” and public policy underlying family

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<sup>137</sup> Bonthuys (2015) *SAJHR* 380.

<sup>138</sup> Liebenberg *Socio-Economic Rights* 323.

contracts should furthermore, be informed by the Constitution's normative value system, which includes a commitment to progressively realising the socio-economic rights, while fostering substantive gender equality.

If the most effective and expeditious form of relief can only be offered through the direct application of the specific constitutional rights, then the court should rely on a socio-economic right to provide a constitutional remedy to a cohabitant. For example, a court may order a more equitable distribution of the family home between the partners. However, the courts have not yet provided a coherent framework of considerations to guide when a direct remedy would be most appropriate. While direct access to quality public services needs to be improved, this needs to be coupled with the development of private law so as to foster a more equitable distribution of socio-economic responsibilities between cohabiting men and women.

## **5 6 Implications of a relational feminist framework for transforming the socio-economic consequences of cohabitation**

The purpose of South African family law is to protect vulnerable family members and to ensure fairness between the relevant parties within family law disputes.<sup>139</sup> In spite of this, the current legal framework governing cohabitation is reinforcing systemic patterns of gender inequality within our society.

This study revealed that the negative conception of autonomy underlying classic liberalism provides an inadequate framework for responding to the specific socio-economic rights of female cohabitants. The first significant shift that is required by the state is the reconceptualisation of the liberal elements shaping our response to cohabitation. A relational feminist framework has the potential to foster this shift, while being particularly consonant with the transformative aspirations underlying our Constitution. In accordance with transformative constitutionalism, a relational feminist interpretation of the socio-economic rights of female cohabitants, emphasises the need for greater recognition of the existing relational social context, a value-sensitive approach to the socio-economic rights of cohabitants and the need to develop the state's positive responsibility to regulate cohabitation in a manner that transforms gendered socio-economic inequality.

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<sup>139</sup> Goldblatt (2003) *SALJ* 611.



This relational feminist framework reveals that the answer to governing cohabitation does not lie in simply extending a formalised model of the private law rights underlying marriage to cohabitants. Instead the law needs to respond to the specific needs of cohabitants in a manner that challenges the patriarchal and hierarchal paradigms informing our family law framework. This hierarchical paradigm is evinced by the fact that the legislative system governing our family law regime is extremely fragmented,<sup>140</sup> with vulnerable family members continuing to fall through the gaps. The dominance of a liberal common law lens is further evinced by the provisions of the draft Domestic Partnerships Bill, which primarily focuses on protecting registered domestic partnerships.

In spite of the socio-economic disadvantage perpetuated by family law rules, none of the family law cases have considered that a specific family law provision deprives women of their ability to access socio-economic rights such as housing and social security. This infringement occurs either through preventing them from inheriting land or housing or through preventing them from being able to claim maintenance.<sup>141</sup> Raising relational socio-economic rights arguments within these cases is, therefore, more likely to induce a substantial shift within our family law regime. For example, focusing on the socio-economic needs of cohabitants opens up a different range of social and material facts for the court to consider. Examining how to foster more equitable socio-economic relations between cohabitants also undermines moral debates about which relationship form is more deserving of protection

Sections 8 and 39 of the Constitution have significant potential to advance socio-economic rights arguments within the private sphere. Cases that raise socio-economic rights arguments have the additional potential to compel the legislature to enact legislation so as to effectively govern the status of cohabitants. While this would contribute to legal certainty, in order to ensure that this legislation truly enriches the family law framework, it will need to challenge some of the underlying gendered norms informing the family unit. It is therefore imperative that the courts and the legislature engage with section 8 of the Constitution, as well as the socio-economic rights of

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<sup>140</sup> Smith *The Development of South African Matrimonial Law with Reference to the Need for and Application of a Domestic Partnership Rubric* (2009) 141.

<sup>141</sup> Liebenberg "Socio-Economic Rights" in Langford, Dugard & Madlingozi (eds) *Symbols or Substance?* (2014) 63 73.

cohabitants in a manner that ensures a more equitable distribution of socio-economic resources within families.

A relational feminist interpretation of the socio-economic rights of cohabitants requires the courts to consider the kinds of relations we are structuring and the kind of relations more likely to reflect the constitutional values. How these rights would be raised within particular cases is a strategic choice that will depend on the facts of the case. However, raising these rights would at the very least reveal the gendered distributional consequences of family law rules. These arguments underscore that the law's current failure to regulate cohabitation is entrenching the unequal status quo.

A fundamental shift is thus required, from the classical liberal conception of autonomy informing our regulation of cohabitation, to a relational feminist conception of socio-economic rights for female cohabitants.<sup>142</sup> A relational feminist interpretation of the socio-economic rights of cohabitants therefore enables the executive, the legislature and the judiciary to transform the law to be more responsive to the specific needs and experiences of cohabiting women

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<sup>142</sup> Bhana (2015) *Stell LR* 3.

## Chapter 6: Conclusion

### 6 1 Introduction

In South Africa, women continue to disproportionately bear the socio-economic burdens of divorce and family dissolution.<sup>1</sup> This study sought to examine the implications of a relational feminist interpretation of socio-economic rights, to transform the socio-economic consequences of terminated domestic partnerships for women. The need for this development is underscored by the fact that, in spite of certain progressive developments in recent years, social and economic equality remains an elusive aspiration for many women.<sup>2</sup> In particular, research has revealed the persistent prevalence of gender inequality in intimate relationships, often resulting in substantial socio-economic disadvantage for women.<sup>3</sup> While all relationships need to be regulated, cohabiting women remain particularly vulnerable to destitution. Given the constitutive power of the family unit, transforming the socio-economic consequences of family dissolution is necessary in order to give effect to the socio-economic rights of women.

During the course of this study, it became clear that certain features of our legal system constrain the transformative potential of the Constitution to respond to the specific needs of female cohabitants.<sup>4</sup> This is evinced by the liberal conception of choice, as well as the traditional conception of a public/private law divide and individualism.

As a result of these limiting paradigms, the status of cohabitants continues to be regulated through a patchwork of private law rules that fail to recognise and regulate existing relational dynamics between cohabiting men and women. A private law lens, in particular, often ignores the existing social context, while maintaining the unequal

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<sup>1</sup> B Goldblatt "Regulating Domestic Partnerships: A Necessary Step in the Development of South African Family Law" (2003) 120 *SALJ* 610 611.

<sup>2</sup> E Bonthuys "Developing the Common Law of Breach of Promise and Universal Partnerships: Rights to Property Sharing for all Cohabitants?"(2015) 132 *SALJ* 76 97.

<sup>3</sup> 97.

<sup>4</sup> See chapters two and three of this study.

status quo.<sup>5</sup> This approach has perpetuated the disconnection between the law and the lived realities of cohabiting women.

After highlighting the particular vulnerability of cohabitants, and the manner in which the current legal framework exacerbates this disadvantage, this dissertation examined how these rules could be transformed so as to be more responsive to the needs and circumstances of female cohabitants. This undertaking should be informed by the constitutional project of seeking to foster social justice<sup>6</sup> and substantive gender equality.<sup>7</sup>

Using the normative relational feminist framework developed in chapter two and the lessons gained from Canadian and Dutch family law, it became clear that the executive, the legislature and the judiciary can and must take steps to develop this area of law so as to bridge the disconnection between the family law regime and women's lived realities. The purpose of this concluding chapter is to highlight some of the important recommendations and reflections as to the nature of the positive steps that are required in terms of developing the private law rules regulating cohabitation to give effect to the Constitution's progressive values and human rights norms.

## **6 2 Synthesis of study's recommendations**

In this section I summarise some of the emerging conclusions and recommendations that arose from the various chapters in this dissertation. One of the preliminary conclusions of this study is that classic legal liberalism provides an ineffective framework for recognising and responding to the specific socio-economic needs of cohabiting women. This indicates the need for a transition towards a relational feminist framework for regulating the socio-economic consequences of terminated domestic partnerships.

### **6 2 1 Value of a relational feminist framework**

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<sup>5</sup> Bonthuys (2015) *SALJ* 76.

<sup>6</sup> Preamble to the Constitution of the Republic of South Africa, 1996 ("the Constitution").

<sup>7</sup> S 9(2) of the Constitution.

The South African Constitution has been recognised for its transformative potential. Realising the socio-economic rights and empowering women lies at the heart of this transformative endeavour. In order to foster the transformative aspirations underlying our Constitution, there is a need for a shift in terms of our mode of thinking about cohabitation. The need for transformation is emphasised by the fact that the current liberal choice argument, underlying our family law system, obscures the relational complicity prevalent in poverty and gender inequality. A liberal conception of choice also silences feminist voices in a particularly gendered area of law. This traditional liberal framework fails to address the full panoply of applicable legal, social and material issues that need to be considered in determining how to regulate cohabitation. Moreover, these liberal underpinnings prevent the courts from engaging with the values and purposes underlying the socio-economic rights, through maintaining a formal equality approach to relationship recognition. While the right to equality has the potential to be transformative, liberal interpretations of this right, in the context of family law, have tended to conflate equality and human dignity considerations, while failing to recognise and address the existing relational context governing cohabitation.<sup>8</sup> In order to transform existing gender inequality, the current liberal approach needs to be replaced with a relational feminist interpretation of the socio-economic rights of cohabitants.

Accordingly, this study revealed that a relational feminist interpretation of the socio-economic rights of female cohabitants has significant potential to transform the socio-economic consequences of terminated partnerships so as to empower female cohabitants. A relational feminist lens, with its focus on the social context in terms of how men and women are relating to one another in our society, a value-sensitive conception of rights, a relational notion of the state's responsibility and the need to transform gendered relations, is necessary to shift private cohabiting relations. A relational feminist interpretation of socio-economic rights, can foster this transformation, as it recognises the nuances surrounding choice, while being responsive to the socio-economic rights of women. Utilising a relational feminist framework to examine how existing rules are structuring socio-economic relations between cohabitants also indicates potential avenues for developing the law so as to

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<sup>8</sup> See part 3.3 of chapter three of this study.

structure more equitable socio-economic relations between cohabiting men and women.

## 6 2 2 Need to transform the South African legal framework

As highlighted in chapter three, the South African family law framework is both fragmented and hierarchical. It is also insufficiently responsive to women's specific needs, with women disproportionately bearing the socio-economic disadvantages of divorce and family dissolution. In addition, the piecemeal approach adopted by the legislature towards recognising relationships, results in a number of vulnerable women, falling through the gaps of our legal system.<sup>9</sup> While all family forms need to be protected, it is clear that cohabiting women remain disproportionately vulnerable to homelessness and destitution.<sup>10</sup>

A further problem with this system is that it continues to be regulated through a private law lens, predominantly informed by pre-constitutional common law reasoning that lacks a constitutional and feminist perspective.<sup>11</sup> An example of this is provided by recent developments on the tacit universal partnership, as it pertains to cohabitants. These developments were catalysed by the Supreme Court of Appeal. While the recognition of universal partnerships between cohabitants entails a positive development, the court's use of a contractual paradigm tends to hide existing patterns of gender inequality prevalent in our society.<sup>12</sup> A contractual lens also allows the courts to ignore the dysfunctional patterns of relating between cohabiting men and women. The tendency of the courts to avoid engaging with constitutional issues in family law also undermines the further development of family law rules in accordance with the Constitution. In contrast to this, a commitment to fostering substantive gender equality requires examining the gendered socio-economic disadvantages of family dissolution. This gender-sensitive response is necessitated by the entrenched socio-economic inequalities tied to women's reproductive role and the "deeply gendered opportunities and burdens" that emanate from this.<sup>13</sup> As the Constitution is committed to establishing

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<sup>9</sup> See part 3 4 5 of chapter three of this study.

<sup>10</sup> J Heaton "An Overview of the Current Legal Position regarding Heterosexual Life Partnerships" (2005) 68 *THRHR* 662 662.

<sup>11</sup> See chapter three, part 3 3.

<sup>12</sup> Bonthuys (2015) *SALJ* 76.

<sup>13</sup> C Albertyn "Judicial Diversity" in C Hoexter & Olivier (eds) *The Judiciary in South Africa* (2015) 284.

a society where everyone is able to reach their full human potential, it is essential to recognise these inequalities and to utilise the law to transform them.

The answer to this gendered issue does not however, lie in simply extending a formalised model of marriage to domestic partners. While domestic partnerships need to be recognised and regulated,<sup>14</sup> this recognition needs to be informed by a relational feminist interpretation of the socio-economic rights of female cohabitants. The legal response to cohabitation should thus shift from a moralistic private law debate towards a relational feminist framework focused on giving effect to the socio-economic rights of female cohabitants.

In terms of this relational feminist shift, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) offers significant potential in assisting female cohabitants. While this is in terms of unfair discrimination, there is scope for challenging the private exploitative and discriminatory behaviour of cohabiting partners under PEPUDA. This is in terms of the grounds of gender, marital status and (potentially) family responsibility and socio-economic status under PEPDUA. This Act also provides for a broad range of remedies, with the Equality Courts empowered to provide settlement agreements, restraining orders and damages. Utilising PEPUDA would therefore shift the focus from the traditional private law remedies to a broader range of remedies based on the constitutional goal of fostering substantive gender equality.

### 6 2 3 Value of a comparative study

In terms of foreign law developments, there have been certain progressive advances pertaining to the protection of cohabitants, in the United States, the United Kingdom, the Netherlands and Australia. Canada has however, been heralded for going further in terms of providing protection to unmarried cohabitants. Under Canadian family law, there have also been substantial developments that have adopted an inclusive and functional approach to family law.<sup>15</sup> In terms of the functional comparative approach, Canadian provinces have extended protection to cohabitants, either through the ascription model or the registration model (with some provinces using a combination of both measures). In spite of these developments, Canadian

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<sup>14</sup> Smith "The Dissolution of a Domestic Partnership" in Heaton (ed) *The Law of Divorce* 394.

<sup>15</sup> N Bala & R J Bromwich "Context and Inclusivity in Canada's Evolving Definition of the Family" (2002) 16 *IJLPF* 145 146.

women and children continue to bear the socio-economic burdens of family dissolution disproportionately. This has been partially attributed to the rise in neoliberalism, an increased reliance upon liberal conceptions of choice and debates concerning public versus private responsibility for the socio-economic well-being of families.<sup>16</sup>

Dutch family law has also been recognised for being both progressive and trend-setting. While Dutch law has recognised registered domestic partnerships since 1998, there is no formal recognition of unregistered relationships. In addition to this, inequality between Dutch men and women persists. While the number of Dutch women in the labour market has steadily increased in recent decades, there is still a socio-economic imbalance between divorced and separated Dutch men and women. A comparative perspective on the Dutch system highlights that in order to transform gendered relations, gendered socio-economic inequalities in the private sphere, need to be recognised and addressed from a relational feminist perspective.

The comparative analysis in this study revealed that simply extending legislative recognition to cohabitants without adopting a relational and gender-sensitive approach to cohabitation will not be sufficient to transform underlying patterns of gender inequality in our society. As a result of the marginalisation of feminist voices within Canadian and Dutch family law, the Canadian and Dutch courts have also tended to adopt a formalistic approach to equality. The limitations of an equality framework, as evinced by Canadian jurisprudence, further underscores the significant and unexplored potential of adopting a relational feminist interpretation of the socio-economic rights of female cohabitants, to address gender inequality in intimate relationships. Within the formal equality framework, the limiting paradigms underlying traditional marriages have been extended to Canadian cohabitants, as well as Dutch registered partnerships while offering them less protection than married couples.

In spite of the formal equality approach underlying Canadian legislation, there have been certain progressive family law judgments that have recognised the link between gendered disadvantage and the detrimental socio-economic consequences of family dissolution. The value of these gender-sensitive judgments was emphasised in the significant legislative developments that followed these decisions. The retrogressive trends within Canadian law, characterised by the rise in neoliberalism and the

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<sup>16</sup> S B Boyd & CFL Young "Feminism, Law and Public Policy: Family Feuds and Taxing Times" (2004) 42 *Osgoode Hall Law Journal* 545 556.



marginalisation of feminist voices within family law, however, also serve as warnings for South Africa. This is in terms of the dangers of adopting a liberal approach to interpreting the rights of cohabitants, as well as the danger of marginalising feminist voices within a particularly gendered area of law. The express inclusion of justiciable socio-economic rights in the South African Constitution further emphasises the obligation on the South African government to progressively realise the socio-economic rights of female cohabitants.

#### 6 2 4 Positive developments required

This study ultimately revealed that the state has the power to address and transform the negative consequences of terminated domestic partnerships for women. In order to do so, the executive, the legislature and the judiciary collectively need to undertake a range of positive policy, legislative and jurisprudential steps in order to empower cohabiting women.

The executive and the legislature have a particular responsibility in this regard, in that state-provided public services need to be improved, in a manner that is responsive to the specific needs and experiences of women. This includes improving access to existing services through removing gendered barriers, while improving the quality of services. Coupled with adopting targeted socio-economic programmes, is the need for a comprehensive legislative framework regulating the status of cohabitants.

The legislature therefore needs to amend and enact the Domestic Partnerships Bill in accordance with a relational feminist framework. The Bill should be amended to recognise the link between systemic gender inequality and the potential of socio-economic rights to address gender inequality in intimate relationships. In addition to recognising and addressing the existing social context, the Bill should aim to give effect to a more substantive conception of autonomy, a relational understanding of human dignity and substantive gender equality.

Accordingly, the Domestic Partnerships Bill should be infused with a relational feminist interpretation of socio-economic rights, extended to vulnerable cohabitants who fulfil certain basic requirements. While the ascription model has been criticised for undermining respect for autonomy, in a country with extreme levels of poverty and gender inequality, an automatic presumption of equal sharing in socio-economic resources, with priority given to caregiving partners, would more effectively assist the

most vulnerable women in our society. A presumption of equal sharing is furthermore, more likely to shift relations between cohabiting men and women in an egalitarian and dignity enhancing direction. Amendments to the language used in the Bill are also necessary, with reference to the socio-economic rights and the socio-economic consequences of terminated domestic partnerships required.

Given that the judiciary is tasked with the duty to protect and fulfil the rights in the Bill of Rights, the judicial interpretation of common law rules and legislative provisions governing cohabitation need to be informed by the need to give effect to the socio-economic rights of female cohabitants. Sections 8 and 39 of the Constitution have significant potential to serve as the primary vehicles for developing South African family law. While it is true that the socio-economic rights are not able to solve all of the problems within this area of the law, highlighting the distributional consequences of family law rules will assist in developing interpretations of these rights that are more responsive to relational power imbalances.<sup>17</sup> Furthermore, raising these rights would reveal the need to develop remedies that are sourced within these specific rights, thus facilitating an approach that is more responsive to the specific socio-economic needs of cohabiting women. The courts could thus utilise sections 8 and 39 of the Constitution to develop the private law rules that are being utilised to regulate cohabitants in accordance with the Bill of Rights. In addition, the courts could develop more transformative remedies, such as ordering a more equitable distribution of the family property.

A fundamental shift from the classical liberal notion of family law issues, to a relational feminist conception of family law, grounded in human rights principles, is thus required.<sup>18</sup> A transformative approach will enable lawmakers and judges to pay additional attention to the contextual factors shaping women's choices and their access to resources.<sup>19</sup>

### **6 3 Concluding remarks**

Given the progressive framework of rights protected in the South African Constitution, the state is not powerless to address the socio-economic inequality facing female cohabitants. For example, the constitutional instruction to "protect,

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<sup>17</sup> M Pieterse "Relational Socio-Economic Rights" (2009) 25 *SAJHR* 198 198.

<sup>18</sup> Bhana (2015) *Stell LR* 3.

<sup>19</sup> Bhana (2015) *Stell LR* 3.

promote and fulfil” the rights in the Bill of Rights,<sup>20</sup> specifically empowers the state to proactively address this issue. The Constitution is also the supreme law of the Republic, with all areas of law subject to its provisions.<sup>21</sup>

In accordance with this study, a transformative approach to cohabitation needs to illustrate an understanding of cohabiting women’s socio-economic disadvantage, while seeking to dismantle the systemic inequalities emanating from family roles.<sup>22</sup> Social and economic transformation is accordingly possible through innovative interpretations of socio-economic rights between cohabitants, as informed by a relational feminist framework. In this manner, family law legislation and common law rules could be interpreted to enhance women’s feasible options. Innovative remedies based upon the socio-economic rights of cohabitant could also be crafted to ensure a more equitable distribution of the socio-economic consequences of family dissolution between men and women.

A context-sensitive approach which seeks to reflect the constitutional values would also shape a more responsive and transformative family law framework. A relational feminist interpretation of socio-economic rights can therefore be utilised to structure more egalitarian family relations, while dislodging many of the underlying norms and paradigms that exacerbate inequality.<sup>23</sup> A relational feminist interpretation of the socio-economic rights of female cohabitants is thus more likely to give effect to one of the key messages underlying our Constitution, which is the need to eradicate all forms of gender inequality in our society.<sup>24</sup>

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<sup>20</sup> S 7 of the Constitution.

<sup>21</sup> S 8 of the Constitution.

<sup>22</sup> C Albertyn “Substantive Equality and Transformation in South Africa” (2007) 23 *SAJHR* 253 253.

<sup>23</sup> Bhana (2015) *Stell LR* 3.

<sup>24</sup> See *Brink v Kitshoff* NO 1996 4 SA 197 (CC); 1996 6 BCLR 752 (CC) para 44. C Albertyn “Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court” (2012) 22 *Stell LR* 591 600; L Chenwi & K McLean “A Woman’s Home is her Castle? - Poor Women and Housing Inadequacy in South Africa” in B Goldblatt & K McLean (eds) *Women’s Social and Economic Rights* (2011) 105 110.

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