

IF YOU CAN SEE, LOOK:
DOMESTIC PARTNERSHIPS
AND THE LAW

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1 Introduction

If you can see, look.
If you can look, observe.*

On 15 July 2009, the South African Constitutional Court decided that Fatima Gabie Hassam, the widow of Mr Ebrahim Hassam, should be entitled to receive maintenance from her late husband's estate.¹ As is so often the case in judicial determinations, this seemingly uncontroversial decision was mired in a deeply human story: After his death, it transpired that Mr Hassam had married a second wife, Mrs Mariam Hassam, in accordance with Muslim rites, and without the consent or knowledge of Mrs Fatima Hassam, the complainant in this case.² In his death certificate, Mr Hassam was described as 'never married'.³

The Court in this case had to decide whether a widow of a Muslim polygynous marriage is entitled to be considered an heir in the intestate estate of her deceased husband. The disputed legislation was section 1(4)(f) of the Intestate Succession Act (Act),⁴ which makes provision for a spouse of a marriage to inherit from the estate of the deceased spouse. The key question for the Court was: was Mrs Hassam a spouse?

In a moving and succinct judgment, the Court held that the exclusion of widows of Muslim polygynous marriages from the

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** From *Book of exhortations* as cited by José Saramago, *Blindness*, 1995 (English translation 1997, translated by G Pontiero).

¹ *Hassam v Jacobs NO & Others* 2009 11 BCLR 1148 (CC) (*Hassam*).

² *Hassam* (n 1 above) para 3.

³ As above.

⁴ 81 of 1987.

protection of the Act is ‘constitutionally unacceptable’⁵ and ‘constitutes unfair discrimination’.⁶ It concluded with a resounding confirmation that ‘the dignity of the parties to polygynous Muslim marriages is no less worthy of respect than the dignity of parties to civil marriages or African customary marriages’⁷ (both of which are protected under the Act).

This decision is to be welcomed as it enlarges the ambit of constitutional protection to include previously unprotected persons. Lurking in the shadows of this judgment, however, is a deeper level of contested law that is not expressly discussed in the Court’s decision, but is nonetheless affected by the Court’s reasoning. This is the area of law surrounding the rights of people who live in unregistered, long-term relationships in an intimate domestic setting. These are ‘domestic partnerships’, relationships which are as permanent or impermanent as a marital union and which mirror the intimacy and daily exigencies of relationships formalised through marriage, civil unions or customary law. Of course, there are key differences between domestic partnerships and registered marriages or civil unions: the legal registration of the relationship (domestic partnerships are not legally registered); a formal ceremony (domestic partners do not usually have a public ceremony, although, as I discuss below, there are circumstances where a customary law marriage will not yield a formal marriage and such a relationship constitutes a domestic partnership); and, finally, formally registered marriages are subject to matrimonial property regimes that determine the equitable distribution of assets accumulated during the currency of the relationship (no such regime applies to domestic partnerships).

There are, however, many similarities between domestic partnerships and marriage. These similarities, which I discuss below, should trigger legal protection. In South Africa today, legal protection has been extended to almost every form of marital relationship, including same-sex relationships, customary unions and polygynous marriages. Only one group remains unprotected: couples living together in permanent, intimate domestic relationships.

What type of protection do people in domestic partnerships require? The answer, quite simply, is that the same inequalities and economic difficulties that attract legislative intervention in marriages arise in domestic partnerships. The same realities of productive and reproductive work that led to the accrual system and attempts to attenuate the unequal distribution of wealth in marriage apply in domestic partnerships. The gender-pay gap that affects (and

⁵ *Hassam* (n 1 above) para 39.

⁶ *Hassam* (n 1 above) para 43.

⁷ *Hassam* (n 1 above) para 46.

prejudices) women in marriage affects (and prejudices) women in domestic partnerships. And the same intangible entanglement of pain, distrust, disappointment and paucity of resources that affects divorcees, affects people living in domestic partnerships. Finally, and most importantly for this discussion, the same complication of grief and financial demands that arises upon the death of a spouse is no less real and debilitating for survivors of a deceased domestic partner. Notwithstanding the uniformity of vulnerabilities, however, the law remains split, extending protection only to those who have passed through the hallowed halls of the marriage registrar's office.

The question of domestic partnerships is not new to South African law. It has come before the Constitutional Court in the case of *Volks v Robinson*,⁸ which I discuss below. It has also been considered by the South African Law Reform Commission⁹ and the legislature (in the Draft Domestic Partnerships Bill).¹⁰ But both the Court and the legislature have failed to give legal protection to the proprietary interests of parties in domestic partnerships. The result is a strange realisation in South Africa that legislation is necessary, but movement towards legislative change has stagnated. This stagnation is particularly odd, given that other types of legal protection *have* been extended to domestic partnerships and both the Constitutional Court and the legislature have extended the ambit of marriage to previously excluded peoples, such as same-sex couples¹¹ and Muslim marriages.¹² It is simply in the narrow, but extremely important, context of the financial consequences following the dissolution of domestic partnerships that the law remains limp. When it comes to the dissolution of a domestic partnership, cohabitant parties must rely on the clumsy and ill-suited law of contracts or undue enrichment to regulate the parting of their ways, no matter what the inequalities or hardships that pertain.

In this note, I consider the reasoning of the Constitutional Court in the *Hassam* case and compare it to the Court's reasoning in the 2005 case of *Volks*.¹³ In the latter case, the Constitutional Court held that cohabitants living in a long-term relationship, who have never married, could *not* qualify as spouses for the purposes of the

⁸ *Volks v Robinson* 2005 5 BCLR 446 (CC) (*Volks*).

⁹ South African Law Reform Commission 'Project 118: Report on Domestic Partnerships' 2006, http://www.justice.gov.za/salrc/reports/r_prj118_2006_march.pdf (accessed 31 Marc 2011) 118.

¹⁰ Draft Domestic Partnerships Bill 30663, *Government Gazette* 14 January 2008 2. See, in general, B Goldblatt 'Regulating domestic partnerships - A necessary step in the development of South African family law' (2003) 120 *South African Law Journal* 610.

¹¹ Civil Union Act 17 of 2006.

¹² *Daniels v Campbell NO & Others* [2004] ZACC 14; 2004 7 BCLR 735 (CC); 2004 5 SA 331 (CC).

¹³ *Volks* (n 8 above).

Maintenance of Surviving Spouses Act.¹⁴ This case has been criticised for denying constitutional protection to individuals who live in long-term domestic partnerships and are financially vulnerable when the partnership is terminated either by death or another form of dissolution.

The purpose of this analysis is to demonstrate how the *Hassam* Court parts ways with the analytical framework of the *Volks* Court, thereby confirming that the marginalisation of intimate cohabitants by the *Volks* Court was an error in law and an error in logic.

Before engaging this comparative analysis, I turn briefly to consider the realities of domestic partnerships in South Africa.

2 Domestic partnerships in South Africa

2.1 General

A domestic partnership is generally understood to include two people living together in an intimate relationship without entering the institution of marriage.¹⁵ Records suggest that there are roughly 2,3 million South Africans living in such partnerships.¹⁶ Globally, domestic partnerships are increasingly becoming a preferred form of family unit.¹⁷ There are many reasons for this, including a rejection of the formality and expense of the traditional marital structure. In South Africa, the increase in the number of domestic partnerships also

¹⁴ The Maintenance of Surviving Spouses Act 27 of 1990 confers on surviving spouses the right to claim maintenance from the estates of their deceased spouses if they require additional financial support. See *Volks* (n 8 above) 1.

¹⁵ Goldblatt defines domestic partnerships as a 'permanent intimate partnership between two adults who live together.' Goldblatt (n 10 above) 611. Mokgoro and O'Regan in their dissent in *Volks* refer to a 'permanent and intimate life partnership' (*Volks* (n 8 above) 103. The UK Cohabitation Bill (clause 2) proposes that 'cohabitants' refer to any two people (whether of the same sex or the opposite sex) who live together as a couple and, *inter alia*, are parents of the same child or have lived together for a continuous period of two years and are not married to each other. See Cohabitation Bill (UK) 2009 <http://www.publications.parliament.uk/pa/ld200809/ldbills/008/09008.i-ii.html> (accessed 31 March 2011). Research undertaken by the Centre for Applied Legal Studies evidences the following types of domestic partnerships in South Africa: where a man has a rural wife and cohabits with a woman in an urban area in a long-term relationship; where urban cohabitants without other ties are in a committed relationship; where cohabitation is seen as an impermanent arrangement of convenience that arises from material and other needs. See Goldblatt (n 10 above) 613.

¹⁶ This is based on the 2001 census figures as cited by the Alliance for the Legal Recognition of Domestic Partnerships in its Submission to the Department of Home Affairs on the Draft Domestic Partnerships Bill, 2008 2. See, in general, Goldblatt (n 10 above).

¹⁷ See nn 92 to 99 below regarding foreign jurisdictions which are regulating this issue.

has its own peculiar history. Apartheid policy was associated with the separation of families through the migration of large numbers of men from the rural areas to urban centres. Sachs J, in his dissent in *Volks*, describes the migrant labour system as involving the ‘deliberate and targeted destruction of settled and sustainable African family life in rural areas so as to provide a flow of cheap labour to the mines and the towns’.¹⁸ One of the effects of this migration was that married men, finding themselves for long periods of time in urban centres, would form urban non-marital families in the cities.¹⁹

This historic arrangement has driven social trends, normalising a form of alternative family structure. When these partnerships dissolve, the distribution of wealth and assets is governed only by the consent of each party. Unlike marital relationships, inequities arising from this situation are currently not covered by any form of statutory regulation.

The absence of regulation to protect domestic partners has a particularly negative impact on poor, black South African women. Such women are generally poorer and have less access to meaningful income than (black and white) South African men.²⁰ In such situations, economic exigencies may be more important determinants of the form of relationship than mutual consent. Domestic partnerships also arise as a result of a misunderstanding of the law. Many people in South Africa believe that after they have cohabited for a period of time, they become common law husband and wife.²¹ In the case of customary marriages, too, if the couple fails to register the marriage and obtain the necessary certificate, their union is not considered a marriage and attracts no legal protection. Such cohabitants live in the erroneous belief that they are married and when their union dissolves, find that they have no protection at all.

When these relationships end, either through death or dissolution, it is disproportionately women and children who have to leave the united home with no claim of support against the partner’s estate.²² This is so irrespective of the duration of the cohabitation, the nature of the relationship and the extent of each party’s economic contribution to the joint home.²³

¹⁸ *Volks* (n 8 above) per Sachs J, 165.

¹⁹ See the Alliance for the Legal Recognition of Domestic Partnerships in its Submission to the Department of Home Affairs on the Draft Domestic Partnerships Bill, 2008, pg 2; Goldblatt (n 12 above) 610; Sachs J’s dissent in *Volks*, 165.

²⁰ Alliance (n 16 above) 2.

²¹ Goldblatt (n 10 above) 614.

²² Alliance (n 16 above) 2; Goldblatt (n 10 above) 610-629.

²³ Alliance (n 16 above) 2.

2.2 Domestic partnerships: *Hassam* and *Volks*

It is against this background that the *Hassam* case raises important questions: Has the Court contradicted itself in applying constitutional protection to women in Muslim polygynous marriages and not women in domestic partnerships? Do the survivors of domestic partnerships require comparable legal protection or are the differences between Muslim widows and survivors of domestic partnerships such as to warrant a different legal response? If there is no rational difference between these two categories of survivor, what does this say about the consistency of the Court's reasoning in equality cases?

Both cases consider the vulnerability of people traditionally excluded from the protection of matrimonial law in South Africa. While there are important differences between the two cases, there are fundamental similarities that demonstrate an inconsistency in the analytical framework adopted by the Court in these two cases. The Court in *Volks* applied a strict, black-letter law, definitional analysis rather than conducting a substantive inquiry. The *Hassam* Court, conversely, seeking to remedy past injustice, employs a correctional approach and an analysis that looks to South African history, where 'discrimination fuelled by prejudice was the norm'.²⁴ The similarities between the women in the two cases, which I discuss below, demonstrate, at best, an inconsistency between the two judgments and, at worst, a Constitutional Court that is sensitive to marginalisation based on race or religion, but not to marginalisation and vulnerability ensuing from economic need and gender discrimination.

I conclude that the recent decision in *Hassam* confirms that the Court's reasoning in *Volks* is flawed and unsustainable. This inconsistency in reasoning not only reveals a lapse in constitutional decision making by the *Volks* Court, but it also means that a segment of the South African population is living without legal protection. Alongside the constitutional success of *Hassam* stands a constitutional failure in *Volks*. This is a failure that privileges marriage, violating the right to equality based on sex and gender (by virtue of indirect discrimination) and marital status (by virtue of direct discrimination).²⁵ These concepts are discussed in greater detail below.

²⁴ *Hassam* (n 1 above) paras 24-25, citing *Daniels* (n 12 above) para 48.

²⁵ This is the conclusion reached by Mokgoro and O'Regan JJ in their dissenting judgment in *Volks* (n 8 above) para 131, that '[t]here is a significant difference, therefore, between the way in which the law regulates the rights of spouses who survive a marriage, and the manner in which it regulates the rights of partners who survive a cohabitation relationship'.

This discussion will consist of three parts. The first part considers the factual similarities and dissimilarities in the two cases. The second part examines the respective reasoning of the *Volks* and *Hassam* Courts, noting the two judgments' approaches to (i) substantive versus formal equality; (ii) definitional versus functional analysis; and (iii) the remedial role of the Court in relation to laws that fail to meet constitutional imperatives versus the need for deference to parliament. The final part considers the proposed framework the Court should adopt in ensuring constitutional protection for persons in domestic partnerships who are vulnerable as a result of the intersection between historical gender discrimination and poverty.

3 The curious cases of *Volks* and *Hassam*

The intuitive notion here is that this structure contains various social positions and that men [*sic*] born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances. In this way the institutions of society favour certain starting places over others. These are especially deep inequalities.²⁶

3.1 *Volks v Robinson*

The case of *Volks v Robinson* concerned a woman, Mrs Robinson, who had lived in a conjugal relationship with a man, Mr Shandling, for a period of 16 years. The relationship between Mrs Robinson and her partner, Mr Shandling, mirrored in many ways that of a married couple. They lived in the same residence, cared for each other in times of ill health and supported one another financially. Mrs Robinson was considered a dependent for the purposes of Mr Shandling's medical aid. Socially, they were perceived as a united and loving couple.

When Mr Shandling died, he left a will in which he made limited provision for Mrs Robinson. These provisions were insufficient to meet Mrs Robinson's needs and she applied for financial maintenance in terms of the Maintenance of Surviving Spouses Act.²⁷ The Maintenance of Surviving Spouses Act allows a widow or widower to claim maintenance from the estate of the deceased spouse, even where the deceased spouse has left a last will and testament identifying her or his wishes regarding the distribution of her or his estate.

²⁶ J Rawls *A theory of justice* (2003) 7.

²⁷ For a detailed description of the facts leading up to this case, see *Volks* (n 8 above) paras 3-11.

The majority of the Court held that Mrs Robinson and people in similarly dissolved domestic partnerships were not entitled to protection under the Maintenance of Surviving Spouses Act. Writing on behalf of the majority, Skweyiya J held that '[w]hile there is a reciprocal duty of support between married persons, no duty of support arises by operation of law in the case of unmarried cohabitants'.²⁸ According to the Court, the duty of support during marriage continues after death, which justifies the application of the Maintenance of Surviving Spouses Act to survivors of marriage, to protect them from financial hardship. Domestic partnerships, on the other hand, do not give rise to a duty of reciprocal support as a matter of law during the lifetime of the cohabitants and therefore there is no legal right that can be extended after death.²⁹

For this reason, according to the Court, it is justifiable to limit the freedom of testation of the deceased in cases of marriage. Testatory freedom could be limited legitimately by the Maintenance of Surviving Spouses Act because the deceased, during her or his life, had agreed to enter into a legal institution which imposes reciprocal rights and duties and 'freedom of testation ought not to result in the termination of the obligation upon death'.³⁰ Because no such duties arise in domestic partnerships, according to Skweyiya J, the deceased's freedom of testation may not be limited.³¹

In his dissent, Sachs J³² rejects the majority's focus on the legal entitlements of cohabitants during their lifetime on the basis that

[t]o do so is to employ a process of definitional reasoning which presupposes and eliminates the very issue which needs to be determined, namely, whether for the limited socially remedial purposes intended to be served by the [Maintenance of Surviving Spouses] Act, unmarried survivors could have a legally cognisable interest which funds a constitutional right to equal benefit of the law.³³

Sachs J's argument in brief is that the majority erroneously failed to take into account the hidden nature of the harm experienced by survivors of domestic partnerships;³⁴ the historical role differentiation between women and men which exacerbates this harm;³⁵ the disruptive nature of apartheid's migrant system;³⁶ and the reality of many 'bereaved, elderly, and poor women [who] find

²⁸ *Volks* (n 8 above) para 56.

²⁹ *As above*.

³⁰ *Volks* (n 8 above) para 57.

³¹ *Volks* (n 8 above) para 60.

³² *Volks* (n 8 above) para 151.

³³ *Volks* (n 8 above) para 151.

³⁴ *Volks* (n 8 above) para 163.

³⁵ *Volks* (n 8 above) *per* Sachs J, paras 164 & 219.

³⁶ *Volks* (n 8 above) *per* Sachs J, paras 165 & 195.

themselves with no assets or savings other than their clothing and cooking utensils, little chance of employment and only the prospect of a state old-age pension to keep them from penury'.³⁷ Mokgoro and O'Regan JJ similarly consider the discriminatory effect of the Maintenance of Surviving Spouses Act on survivors of domestic partnerships,³⁸ and conclude that the exclusion of survivors of such relationships is indefensibly unfair discrimination.³⁹

How similar, in fact, are these two cases and is there a sufficient overlap between them to allow for a comparison of the Court's approach?

3.2 The similarities and differences

There are key similarities in both cases. In each case, the complainant is a woman whose relationship, at some stage in South African history, did not receive social or legal sanction. In *Hassam*, Muslim marriages historically had not received legal recognition until the *Daniels* case and polygynous Muslim marriages are still not recognised by the legislature. Domestic partnerships, as discussed above, likewise receive no legal protection upon dissolution. In both cases, the absence of regulation left the complainant financially vulnerable. In both cases, the Constitutional Court was asked to extend legal protection to the complainant to protect her economic well-being.

There are also clear differences. Muslim marriages had already been given a form of recognition by the Constitutional Court in the case of *Daniels*, where the Court extended the Maintenance of Surviving Spouses Act to Muslim marriages (but left open the issue of polygynous Muslim marriages).⁴⁰ While polygamy may be contested as a concept, it still is a form of *marriage*, where the parties engage in a public ceremony, publicly proclaiming their intention to be bound by the relevant legal and religious precepts of marriage (although in the *Hassam* case the deceased's second marriage must have been less public because his first wife did not know about it). A final major difference is the form of succession in each case. In *Hassam*, the deceased had died intestate, whereas in the case of *Volks*, the deceased had left a will expressing his testamentary wishes. This is a red herring – the law already limits testatory freedom in cases of marriage. If we apply a functional rather than definitional analysis to marriage, then we must conclude that domestic partnerships provide

³⁷ *Volks* (n 8 above) para 225.

³⁸ *Volks* (n 8 above) paras 109-110.

³⁹ *Volks* (n 8 above) para 136.

⁴⁰ *Daniels* (n 12 above) para 48.

the same function as marriage. As such, the same limitation of testatory freedom should apply to domestic partnerships.

Do these differences justify the alternate reasoning in each case? This question requires an analysis of the reasoning in each case, to which I now turn.

4 The reasoning of the Constitutional Court in *Hassam* and *Volks*

We have to be clear on the nature of the ‘theory’ underlying the practice of extreme inequality, and be prepared to outline what justice may minimally demand.⁴¹

What theory underscored the *Hassam* and *Volks* inequalities and what, minimally, should justice have demanded in each case? There are three broad categories of analysis that arise in both the *Hassam* and the *Volks* cases. These are (i) a formal versus substantive approach to the right to equality; (ii) a definitional versus functional approach to remedying the effects of direct and indirect discrimination; and (iii) a remedial versus deferential role of the Court in excising inequality from South African law. I examine each category below to demonstrate that the *Hassam* Court’s reasoning (properly) parts ways with the *Volks* Court’s reasoning, revealing the erroneousness of the *Volks* judgment.

4.1 Formal versus substantive equality

There are broadly two different philosophical approaches to the eradication of inequality.⁴² There are those who understand the pursuit of equality as a formal concept, based on the principle that people in similar situations should be treated similarly. This approach requires the absolute equal treatment of individuals without differentiation (including positive differentiation) based on race, gender or any other category and without reference to any social or structural factors that historically may have disadvantaged such individuals or the group to which they belong.⁴³ Scholars began to refine this understanding of equality, noting that, without taking into account the structural causes of discrimination, meaningful equality

⁴¹ A Sen ‘Gender inequality and theories of justice’ in MC Nussbaum & J Glover (eds) *Women, culture and development: A study of human capabilities* (1995) 259 270.

⁴² See *Brink v Kitshoff NO* 1996 4 SA (CC) para 39.

⁴³ For a discussion of the distinction between formal and substantive equality in respect of violence against women, see B Meyersfeld *Domestic violence and international law* (2010) 105.

and *equivalency* amongst groups cannot be achieved.⁴⁴ This is the doctrine of substantive equality, which peels away layers of historical traditions and invisible assumptions, to identify the cause and effect of past inequality and thereby prevent the continuation of discrimination and disadvantage.⁴⁵

In past decisions, the Court has expressly adopted this doctrine. In *Brink v Kitshoff*,⁴⁶ for example, the Court confirmed that the eradication of inequality in South Africa must take cognisance of ‘patterns of group disadvantage and harm’ and requires ‘positive steps to redress the effects of such discrimination’.⁴⁷ The doctrine of substantive gender equality is in keeping with developments in international law theory, which has seen the questioning of a ‘purely gender-neutral approach’ that ‘ignores the inherited difficulties women have, *inter alia*, in accessing the criminal justice system or in earning equal pay for equal work’.⁴⁸

The *Hassam* Court aligns itself clearly with the doctrine of substantive equality, noting that ‘the nature of the discrimination must be analysed contextually and in the light of our history’.⁴⁹ The Court examines the history of South African law *vis-à-vis* Muslim marriages, the effect of this law on Muslim people in South Africa today and the need to rectify the legal and social structures that allow the continuation of discrimination in a manner that is inconsistent with South Africa’s commitment to dignity, equality and diversity.⁵⁰

This approach enabled the *Hassam* Court to make a distinction between direct and indirect discrimination, although it never states so explicitly. Direct discrimination is an express law or policy which is directed to differentiate between groups of persons. This clearly is not at issue in *Hassam*. The impugned legislation did not exclude

⁴⁴ For a discussion of the distinction between formal and substantive equality in the context of gender equality and the Convention on the Elimination of All Forms of Discrimination Against Women, see JL Southard ‘Protection of women’s human rights under the Convention on the Elimination of All Forms of Discrimination Against Women’ (1996) 8 *Pace International Law Review* 1 5-6.

⁴⁵ See C Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23 *South African Journal on Human Rights* 253; EJ Sirleaf ‘Liberia’s Gender-Based Violence National Action Plan’ (2007) 27 *Forced Migration Review* 34; CA MacKinnon *Toward a feminist theory of the state* (1989); H Charlesworth ‘What are women’s international human rights?’ in R Cook (ed) *Human rights of women: National and international perspectives* (1994) 58-84; MA Fineman *The neutered mother, the sexual family, and other twentieth century tragedies* (1995); R Coomaraswamy ‘Women, ethnicity and discourse of rights’ in Cook (above) 39 40; A Sen *Development as freedom* (2000) 3-12 189.

⁴⁶ *Brink v Kitshoff* (n 42 above) para 42.

⁴⁷ As above.

⁴⁸ Meyersfeld (n 43 above) 105.

⁴⁹ *Hassam* (n 1 above) paras 33 & 24.

⁵⁰ *Hassam* (n 1 above) para 35, discussing the substantive approach to equality in respect of religious diversity.

Muslim marriages specifically. Rather, the Act caused indirect discrimination in that, as a general policy, it had a disproportionately prejudicial effect on a particular group, notwithstanding that it was not specifically aimed at that group.⁵¹ Both Sachs J in his *Volks* dissent and the *Hassam* Court recognised that South African matrimonial law indirectly discriminated against people who fall outside the rubric of traditionally recognised marriages.

It is this indirect harm that the *Volks* Court failed to remedy. The Court was blind to the fact that a general policy was in place that, while facially neutral, has a negative and disproportionate effect on a segment of the population, namely, women. The *Volks* Court's formalism is evident in two aspects of the decision, namely, its approach to the facts of the case and its approach to the interpretation of the purpose and effect of the challenged legislation. I discuss each below.

4.1.1 *The Court's approach to the facts*

As regards the facts, the *Volks* Court held that, because there was no *legal* impediment to heterosexual couples marrying, Mrs Robinson and Mr Shandling had a free choice to marry and *chose* not to enter this formal and public institution. As a result of this presumed choice, according to the Court, the couple had decided not to benefit from the legislative framework governing marriage during life and therefore should not benefit from it after death.

While there was no legal impediment preventing Mrs Robinson and Mr Shandling from marrying (as there was, for example, in the case of same-sex couples at the time), this does not mean that there is always a real and meaningful choice for heterosexual couples to marry.⁵² The majority's analysis ignored the social realities which factually preclude marriage for many heterosexual couples. Many women in South Africa live in domestic partnerships either because they are forced economically to cohabit with a partner who may not want to marry, or because their partner may have a family in another part of the country. This is particularly common amongst migrant communities. Labour migration is a phenomenon which 'had a profoundly negative effect on family life' during apartheid.⁵³ The reality is that unregistered domestic partnerships involve a lack of

⁵¹ BC Meyersfeld '*Opuz v Turkey: Confirming the state obligation to combat domestic violence. A right to be free from domestic violence*' (2009) 5 *European Human Rights Law Review* 684. See also *Opuz v Turkey* ECHR (9 June 2009) 33401/02, 183, citing *DH v Czech Republic* (2007) 47 EHRR 3, para 175.

⁵² SALRC Project 118 (n 9 above) 24-33.

⁵³ *Volks* (n 8 above) *per* Sachs J, para 165.

choice which is not harmless and has negative affects predominantly for poor, black women in South Africa.⁵⁴

The Court did not recognise the seriousness of the intersectional disadvantage that occurs for people as a result of race, poverty and gender. The majority focused exclusively on the presumed ‘choice’ of the parties and the fact that there was no legal impediment preventing the parties from marrying. This reasoning is formalistic, focusing only on the legal framework and ignoring the imbalances between women and men in South Africa and the ‘desperate poverty’ that informs a range of decisions made by couples.⁵⁵

Is there some truth to the *Volks* Court’s emphasis on choice? Is there a stage at which the law should refrain from encroaching into people’s intimate choices? This libertarian argument is compelling but unsustainable. Decisions regarding personal relationships are not always made in a context of mutual respect and equality of arms. This is especially so in a context where historic gender arrangements and social and legal norms have led to an allocation of roles and responsibilities to women and men in their intimate relations based on their sex. Assumptions regarding women’s responsibilities for child care and domestic maintenance, coupled with a pay differential between men and women worldwide of 16 per cent,⁵⁶ are factors that often create inequality in the negotiating powers of partners when deciding whether or not to marry. Quite simply, poorer women are often dependent on men for support and are often (but not always) less able to insist on marriage.⁵⁷

But what about those who are empowered and *choose* not to marry? Should that choice, assuming it is truly consensual, preclude legal protection? Legal protection in our constitutional order has never required the consent of the individuals before bestowing rights – we have always maintained as a constitutional order that rights exist irrespective of one’s compliance with the mainstream. In fact, constitutional and human rights exist precisely to protect those who are alternative, vulnerable and excluded. Domestic partnerships are generated in part by choice, in part by a misunderstanding of the law and erroneous assumption that long-term cohabitants eventually become ‘customary’ husband and wife, and in part by a lack of choice

⁵⁴ See Goldblatt (n 10 above) 616; SALRC Project 118 (n 9 above).

⁵⁵ *Volks* (n 8 above) per Sachs J, para 165.

⁵⁶ For a discussion of global and regional gender pay gaps, see European Commission Employment, Social Affairs and Inclusion’s *Gender Pay Gap* <http://ec.europa.eu/social/main.jsp?langId=en&catId=681> (accessed 31 March 2011).

⁵⁷ For a full discussion of the libertarian view on marriage and choice, see Goldblatt (n 10 above) 616. It should be noted that these are also factors that exacerbate women’s lack of meaningful choice in cases of domestic violence, and one of the main reasons why survivors of domestic violence often do not leave the abusive context. See Meyersfeld (n 43 above).

as described earlier. One could similarly argue that the libertarian project is better served by affording couples in a domestic partnership the choice to opt out of a protective property regime, rather than demand that they opt in.

The Court was also erroneous in its conclusion that there are no laws that place rights and obligations on people who are partners within relationships of this kind during their lifetime.⁵⁸ This is in fact incorrect, as there are many laws which place rights and obligations on people in domestic partnerships. As Sachs J points out, there is a myriad of laws that protects women in domestic partnerships; laws that govern their rights and obligations.⁵⁹ For example, the legislature has extended to domestic partnerships protection in respect of domestic violence, insolvency, medical schemes, housing rights, and loss of support arising from occupational injuries or disease.⁶⁰ The extension of the Maintenance of Surviving Spouses Act to include domestic partnerships would have been in keeping with the different rights and obligations that already apply to such relationships. The existence of such laws – evidencing government policy to include outliers within the ambit of legal protection – was confirmed by the *Hassam* Court and by Sachs J in his dissent in *Volks*.

The *Hassam* Court approached the facts of that case in a contextual manner. The *Hassam* Court's decision was influenced by the fact that women in the position of Mrs Hassam 'often do not have any power over the decisions by their husbands whether to marry a second or a third wife' and that the 'constitutional goal of achieving substantive equality will not be fulfilled' by the exclusion of widows of Muslim polygynous marriages from the Intestate Succession Act.⁶¹

Therefore, while the *Hassam* Court correctly looked to the substance of the experience of women in South Africa to achieve the constitutional goal of equality, the *Volks* Court did not examine the reality of domestic partnerships beyond the four corners of the case before it. Or did it? In truth, the majority in the *Volks* Court did in fact note the hardship experienced by many South African women in domestic partnerships, but held that this was a matter for the

⁵⁸ *Volks* (n 8 above) para 65.

⁵⁹ Sachs J in *Volks* (n 8 above) para 175, fn 44.

⁶⁰ See the Prevention of Domestic Violence Act of 1998; the Insolvency Act 24 of 1936; the Medical Schemes Act of 1998; the Housing Act of 1997; and the Compensation for Occupational Injuries and Diseases Act of 1997. The extent of policy reform regarding marriage and domestic partnerships is discussed in details by Sachs J in *Volks* (n 8 above) para 175, fn 44 and in *Bhe & Others v Magistrate, Khayelitsha & Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole & Others*; *South African Human Rights Commission & Another v President of RSA & Another* [2004] ZACC 17; 2005 1 BCLR 1 (CC); 2005 1 SA 580 (CC) paras 116 & 136.

⁶¹ *Hassam* (n 1 above) para 38.

legislature to address. To date, the legislature has not passed legislation in this area.

This approach goes to the heart of the separation of powers and the role of the Court as a remedial institution that rectifies discriminatory laws and policies as opposed to a deferential institution that identifies discrimination but defers to the legislature to remedy such constitutional infractions. I discuss this below. What is clear is that the *Volks* Court's decision was limited to the assumption of choice and it refused to extend its judicial determination to the nuanced reality in which South African women live.

4.1.2 *Interpretation of the impugned legislation*

The formalism of the *Volks* Court versus the substantive approach of the *Hassam* Court is also evident in their respective approaches to the interpretation of the purpose and effect of the challenged legislation.

The central question for the *Hassam* Court was whether the proprietary consequences of a polygynous Muslim marriage should be the same as non-Muslim and monogamous marriages.⁶² The central question for the *Volks* Court was whether the proprietary consequences of domestic partnerships should be the same as marriage (whether protection which the Act affords to a 'survivor' of marriage should be withheld from survivors of 'permanent life partnerships').⁶³

The *Hassam* Court viewed the legislation through the lens of 'the founding values underlying our constitutional democracy, including human dignity and equality, in contrast to the rigidly exclusive approach that was based on the values and beliefs of a limited sector of society'.⁶⁴ This analytical structure led the Court to conclude that the purpose of the Interstate Succession Act was to protect surviving spouses from financial harm. This enabled the Court to determine that the 'effect of the failure to afford the benefits of the Act to widows of polygynous 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'.⁶⁵ The *Hassam* Court remedied this disadvantage by including such widows in the protection of the Interstate Succession Act.

⁶² *Hassam* (n 1 above) para 1.

⁶³ *Volks* (n 8 above) para 2.

⁶⁴ *Hassam* (n 1 above) para 27.

⁶⁵ *Hassam* (n 1 above) para 34.

The *Volks* Court's approach to legislative interpretation looked narrowly at the black letter of the Maintenance of Surviving Spouses Act, noting that the

purpose of the provision is plain. The challenged law is intended to provide for the reasonable maintenance needs of parties to a *marriage* that is dissolved by the death of one of them. The aim is to extend an invariable consequence of *marriage* beyond the death of one of the parties.⁶⁶

Marriage was the focal point for the Court, which limited itself to the language of the Act without considering that the purpose of the Act – to protect survivors of a marital relationship from financial hardship – may apply to domestic partnerships. Even though the same financial hardship is experienced by both survivors of marriage and survivors of domestic partnerships, the Court was deaf to this human need. Skweyiya J's summation is simply as follows:

I find that an interpretation of the Act that would include permanent life partnerships would be 'unduly strained' and manifestly inconsistent with the context of and structure of the text. The Act is incapable of being interpreted so as to include permanent life partners.⁶⁷

The *Volks* Court's formalistic approach is not simply an important theoretical consideration.⁶⁸ The Court's emphatic libertarianism reveals an intransigent insistence that, for the law, marriage is the only relevant structure. Those outside this institution may be left out in the cold. This is further evident in the two judgments' respective approaches to marriage: one definitional and the other functional.

4.2 Definitional versus functional approach

A definitional approach looks solely at the definition of marriage to determine whether two (or more) people should benefit from the legal consequences of marriage *qua* marriage. The functional approach looks to the function of marriage and asks whether the relationship in question fulfils the same *function* as marriage. According to the definitional view, only those who comply with the current legal definition of marriage are entitled to its rights and obligations and 'only a legally valid marriage can create a family worthy of legal protection'.⁶⁹

⁶⁶ *Volks* (n 8 above) para 39 (my emphasis).

⁶⁷ *Volks* (n 8 above) para 44.

⁶⁸ See Sachs J's dissent, para 163. For a discussion of the formalistic nature of this decision, see E Bonthuys & C Albertyn *Gender, law and justice* (2007) 212.

⁶⁹ SALRC Project 118 (n 9 above) 43.

The *Volks* Court used a definitional approach to the legal question before it. The *Volks* Court made the erroneous assumption that no one is hurt by the strict application of the Interstate Succession Act to married spouses and the exclusion from the Act of domestic partners. The application of legal and economic protection is not a ‘nice to have’; it is a constitutional right, the ongoing violation of which affects thousands of women in South Africa. The *Volks* Court had an opportunity to extend the constitutional protection afforded by this right and failed to do so. Its reasoning, when compared with the analysis of the *Hassam* case, is inconsistent with the objective of substantive equality.

Without examining the definition used in the Act within the context of past and current discrimination, the Constitutional Court blinded itself to the disadvantage experienced by people living outside the ambit of the Act. The definitional approach is neither consistent with the substantive approach to equality nor with the constitutional objective of eradicating unfairness and inequality. This is confirmed by Sachs J in his dissent in *Volks*, which emphasises ‘the importance of recognising patterns of systemic disadvantage in our society when endeavouring to achieve substantive and not just formal equality’.⁷⁰

The functional approach is expressly adopted by Sachs J. Influenced by the South African Law Reform Commission report, Sachs J argues that marriage serves a particular function, which can be fulfilled by non-traditional relationships. According to Sachs J, this approach ‘looks beyond biology and the legal requirements of marriage by considering the way in which a group of people function [*sic*]’.⁷¹ This category of people serves the same function as marriage, takes on the same risks and mutual responsibilities towards one another and, upon termination of the relationship, endures the same hardships as survivors of terminated marriages. The *Volks* Court pursued its reasoning in a silo of definition rather than in the ‘wider canvass of rights and responsibilities’ that include ‘all marriage-like, intimate and permanent family relationships’.⁷²

Perhaps ironically, this was the position taken by the South African Council of Churches (SACC) in its submission to the South African Law Reform Commission (SALRC) on the subject.⁷³ The SACC recognised that people living in domestic partnerships

⁷⁰ *Volks* (n 8 above) para 163.

⁷¹ *Volks* (n 8 above) para 173.

⁷² *Volks* (n 8 above) para 181.

⁷³ South African Council of Churches, Submission to the South African Law Reform Commission in response to Discussion Paper 104 (Domestic Partnerships) 5 December 2003, <http://www.sacc-ct.org.za/DomPart.html> (accessed 28 November 2010).

are unable to invoke any of the protective mechanisms available to spouses if disputes arise. Instead, they must rely on common law remedies, such as those dealing with property, contracts, unjustified enrichment, and estoppel. As communal property of such a partnership is often held in the man's name, these mechanisms typically afford women inadequate protection.⁷⁴

The SACC recommends that 'the public interest would be better served by developing additional options, other than marriage, for domestic relationships. Not only would this enable couples to select an arrangement that better 'fits' with their actual circumstances, but it would also allow the courts to apply more precise rules, appropriate to different types of relationship⁷⁵ and that 'a more desirable and appropriate way of addressing this problem would be to ensure that other legislation takes account of changing relationship patterns, where relevant'.⁷⁶

The *Hassam* Court adopted a 'functional' approach to the impugned legislation.⁷⁷ It focused on the function of marriage and the legal regime surrounding it. Looking beyond the strict definition of 'spouse' in the Marriage Act, the *Hassam* Court structures its judgment around the reality that the Marriage Act 'works to the detriment of Muslim women and not Muslim men'.⁷⁸ The *Hassam* Court noted that the legal status of polygynous marriages is uncertain, but insists that this cannot result 'in refusing appropriate protection to those women who are parties to such marriages'.⁷⁹

The result is a startling anomaly: In *Hassam*, a relationship (polygynous marriage), which affects a relatively small segment of South African women and is potentially unconstitutional, nonetheless demands state protection; in *Volks*, a relationship (domestic partnership), which is lawful and common in South Africa and about which there is no constitutional dispute, which is accepted by the legislature in other spheres of law making and which is linked in many ways to the apartheid era of forced migration, demands no protection. The *Volks* Court failed to see that true choice, unfettered equality and de-gendered roles and expectations remain an objective and not a reality. And in its blindness, it side-stepped a simple way of realising sex equality in South Africa.

⁷⁴ n 73 above, para 16.

⁷⁵ n 73 above, para 17.

⁷⁶ n 73 above, para 25.

⁷⁷ This is the terminology of the South African Law Reform Commission. SALRC Project 118 (n 9 above) 165 para 7.1.17.

⁷⁸ *Hassam* (n 1 above) para 31.

⁷⁹ *Hassam* (n 1 above) para 35.

The reality is that both the *Volks* and *Hassam* Courts place marriage on a pedestal. While many people in South Africa view marriage as a sanctified institution that should be protected and respected, it is neither reasonable nor justifiable to take the view that the institution of marriage warrants greater protection than non-marital relationships.⁸⁰ This is so partly because of the economic and social exigencies that preclude women and men from marrying (including many South Africans who cannot get married because they cannot afford the *lobola* payments).⁸¹ But it is also an unconstitutional approach even where a couple has all the choice in the world. Marriage is sacred and sanctified amongst some people; amongst others it is an institution in which they do not wish to engage for any number of reasons. The choice to reject the institution of marriage is not necessarily a choice to reject the protection of the law.

What exactly could the *Volks* Court have done? How could its decision have benefited women in domestic partnerships and why did the Court refuse to take this step? In answering these questions, we see quite how deferential the Court is to the legislature in *Volks*, but *not* in *Hassam* and similar decisions pertaining to the rights and duties that arise in cohabiting relationships. This evinces yet again the distortion of the Court's analysis in *Volks*.

4.3 The role of the Court as remedial or deferential

As mentioned above, the *Volks* Court did acknowledge that the absence of legal protection for cohabitants in domestic partnerships disadvantages poor black women disproportionately to men and women in other relationships and men and women in all relationships of different racial groups.⁸² The Court's view, however, was that this gap should be remedied by the legislature and not by a 'strained' interpretation of the Maintenance of Surviving Spouses Act.⁸³

The *Volks* decision was handed down in 2005 and in 2011 there is still no legislation governing domestic partnerships in place or any indication that this is on the parliamentary agenda. This is so notwithstanding the SALRC report, a draft Bill and strong lobbying

⁸⁰ The *Hassam* Court noted that polygynous marriages may be contentious but that this cannot result in refusing appropriate protection to vulnerable people. See *Hassam* (n 1 above) para 35.

⁸¹ See Goldblatt (n 10 above) 614.

⁸² *Volks* (n 8 above) *per* Ngcobo J 65-66 68 95.

⁸³ *Volks* (n 8 above) para 44.

from the non-governmental sector to have legislation protecting the proprietary interests of cohabitants in domestic partnerships.⁸⁴

Mokgoro and O'Regan JJ in their dissent did exactly what the *Volks* majority should and could have done. They, too, were of the view that the matter should be regulated by the legislature, but put a timeframe to the period in which the legislature could act. If their judgment had been adopted by the majority, after a period of two years, if the legislature had still failed to adopt legislation, the term 'spouse' in the Maintenance of Surviving Spouses Act would have been read to include survivors of domestic partnerships.⁸⁵

This dissent offers a logical and effective approach. It also operates in a manner that is deferential to the policy-making role of the elected arm of government, while simultaneously putting in place a framework to uphold basic rights when there is a gross failure by the legislature and executive to do so.⁸⁶

A similarly remedial approach was adopted by the *Hassam* Court. Recognising that there may be room for the government to make policy decisions regarding polygynous relationships, the Court nonetheless held that the existing inequality and unfairness had to be remedied. It therefore held that the Interstate Succession Act should be read 'through the prism of the Constitution' to include surviving spouses of Muslim polygynous marriages.⁸⁷

The *Volks* Court founded its decision on the principle of judicial restraint and deference to the legislature. But the Court did *not* do this in its decisions regarding Muslim marriages.⁸⁸ In the same year as the *Volks* decision, the Court was less deferential to parliament in the case of *Fourie*, where the Court's direction to the legislature was clear and unequivocal: same-sex marriage had to be legalised.⁸⁹ It seems that the *Volks* Court's deference to parliament was less about the separation of powers and more, much more, about the refusal to

⁸⁴ See the Domestic Partnerships Bill 2008, <http://www.info.gov.za/view/DownloadFileAction?id=76707> (accessed 28 November 2010); SALRC Project 118 (n 9 above); and the Submission to the Department of Home Affairs on the Draft Domestic Partnerships Bill, 2008 by the Alliance for the Legal Recognition of Domestic Partnerships, 15 February 2008. NGO lobbying was led by the Alliance for the Legal Recognition of Domestic Partnerships.

⁸⁵ *Volks* (n 8 above) *per* Mokgoro & O'Regan JJ paras 137-138.

⁸⁶ For a discussion of the role of the judiciary in respect of women's rights, see Meyersfeld (n 43 above) 249-50.

⁸⁷ *Hassam* (n 1 above) para 45.

⁸⁸ *Daniels* (n 12 above).

⁸⁹ *Minister of Home Affairs & Another v Fourie & Another* [2005] ZACC 19; 2006 3 BCLR 355 (CC); 2006 1 SA 524 (CC); *Lesbian and Gay Equality Project & 18 Others v Minister of Home Affairs* [2005] ZACC 20; 2006 3 BCLR 355 (CC); 2006 1 SA 524 (CC).

extend marital protection to heterosexual couples who do not, for whatever reason, obtain a registered certificate of marriage.

5 The court, the law and marriage

5.1 The monolith of marriage in South Africa

The *Hassam* Court's analysis is one that embraces substantive equality, understands the functional role of marriage (and not just the definitional constraints of the institution). The Court in that case remedied the legal deficiencies, notwithstanding the absence of an overarching governmental policy regulating polygynous marriages. The *Volks* Court's analysis is the inverse of *Hassam*. It roots its decision in formal equality, definitional constraints and improper deference to the legislature.

Would the *Hassam* Court render a different decision if it was deciding the facts in *Volks*? If the Court applied the *Hassam* analytical framework to the *Volks* facts, it would seem logical that it would have to come to the same conclusion as the dissent in *Volks* and award some form of protection to domestic partnerships. This, however, is not a certain conclusion.

The *Hassam* Court speaks to the importance of the Constitution as transformative mostly in respect of religious freedom and tolerance.⁹⁰ The *Hassam* Court commits itself to religious diversity. It notes that the aim of South Africa's equality commitments is to

facilitate our transition into a 'democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.'⁹¹

But the heart of this equality claim is based on religious intolerance towards Muslim marriages. The fight for the *Hassam* Court is to encourage respect for the institution of polygynous marriage within a previously-marginalised religious group. It is less about the overall plight of South African women in unprotected domestic partnerships. Of course, the *Hassam* Court's decision is fortified by the disadvantages experienced by Muslim women in polygynous marriages and how the law treats such women unequally compared to men in polygynous marriages, customary marriages and same-sex marriages. But nowhere in the decision does the Court allow itself to entertain the legal gaps affecting women who simply fall outside the regime of

⁹⁰ *Hassam* (n 1 above) para 28.

⁹¹ *Hassam* (n 1 above) para 27, citing *Minister of Home Affairs* (n 89 above) para 60.

marriage. Naturally, the Court must limit itself to the four corners of the case before it but there was an opportunity for the Court, even in the form of *obiter dicta*, to highlight the similarities, not only between women in Muslim polygynous marriages and customary or same-sex marriages; but also between women in Muslim polygynous marriages and women in domestic partnerships.

5.2 Comparative approaches: International and foreign

Is the regulation of domestic partnerships simply too difficult? After all, how does one regulate amorphous relationships? How does one determine what type of cohabitation, what length of time, what vague notions of commitment, should be used to delineate one domestic partnership from another?

These questions are answered not only in South Africa's academic literature, the South African Law Reform Commission, judgments and the proposed domestic partnerships Bill, but they have also been addressed by other jurisdictions. For example, the United Kingdom Cohabitation Bill of 2009 illustrates growing international recognition of the inadequacy of current remedies to assist former cohabitants who, at the termination of their relationship, seek equitable distribution of financial assets committed to or acquired during a domestic partnership. Although legal theories of contract, partnership, trust, estoppel or enrichment provide bases for some individuals to file claims, members of Britain's House of Lords note that many complainants are unable to obtain a reasonable portion of shared assets under existing law.⁹²

The UK Bill introduces important and creative legal tools that may be relevant to the South African context. It enables qualifying cohabitants to obtain judicial orders for the distribution of assets based on various factors, including the nature and length of the parties' commitment, the welfare of any relevant children, financial contributions, economic advantages or disadvantages related to the relationship, responsibilities to support third parties, and employment prospects (section 9). Financial settlement orders should aim to enable both former cohabitants to become self-supporting 'as

⁹² See the full text of the Cohabitation Bill (UK) 2009 <http://www.publications.parliament.uk/pa/ld200809/ldbills/008/09008.i-ii.html>; the Explanatory Notes http://www.resolution.org.uk/site_ontent_files/files/explanatory_notes.pdf; Second Reading before House of Lords, 13 March 2009 <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90313-0005.htm>; and an update on the Bill's status as at 28 October 2009, including an overview of the Bill's text, arguments put forward during the second reading, and amendments made in committee in April 2009, <http://www.familylawweek.co.uk/site.aspx?i=ed42665> (accessed 31 March 2011).

soon as reasonably practicable' and 'should not exceed the applicant's reasonable needs' (section 8(3)).

There is similar legislation passed in New Zealand, Australia, Canada and Trinidad and Tobago. The experience of these jurisdictions suggests that laws regarding distribution of former cohabitants' assets can assist financially vulnerable individuals, while preserving the distinctive rights and obligations of marriage. This comparison demonstrates the underlying legal principles that the Court and parliament could and should engage.

Legal protections granted to cohabitants in Australia,⁹³ New Zealand, Trinidad and Tobago,⁹⁴ Canada, Scotland,⁹⁵ Sweden⁹⁶ and Tanzania⁹⁷ reflect growing international recognition of the inadequacy of current remedies to assist cohabitants who, at the termination of their relationship, seek equitable distribution of financial assets committed to or acquired during the relationship. Scotland's Family Law Act of 2006 aims 'to introduce greater certainty, fairness and clarity into the law' by providing parameters for 'disentangling the shared life of cohabitants when their relationship ends'.⁹⁸ In Trinidad and Tobago, the Cohabitation Relationships Act of 1998 was enacted to facilitate closure of 'the financial relationship between the cohabitants and avoid further proceedings between them'.⁹⁹ The Cohabitation Bill (United Kingdom) of 2009 seeks to ensure that the distribution of assets promotes the ability of each party to become self-supporting without unreasonably burdening the other. Such laws provide courts with the means to weigh the complex issues that arise when domestic partnerships break down.

Providing legal guidelines for the distribution of finances after the termination of domestic partnerships will not deter individuals from marrying. As noted by Lord Lester of Herne Hill QC, sponsor of the UK bill, 'in those countries which give legal protection to cohabiting couples and their children, there is no evidence of any resulting decline in marriage rates. People marry for religious, social and emotional reasons, and these personal choices will remain unaffected' by the implementation of such protections.¹⁰⁰

⁹³ Property (Relationships) Legislation Amendment Act, 1999.

⁹⁴ Cohabitation Relationships Act 1998, Republic of Trinidad and Tobago, Act 30 of 1998, *Legal Supp. Part A to the Trinidad and Tobago Gazette* 37 221 (25 November 1998) 293.

⁹⁵ Family Law Act (Scotland), 2006.

⁹⁶ Cohabitees Act, 2003.

⁹⁷ Law of Marriage Act of 1971.

⁹⁸ Policy Memorandum para 64 <http://www.scottish.parliament.uk/business/bills/36-familyLaw/b36s2-introd-pm.pdf> (accessed 31 March 2011).

⁹⁹ Sec 8(2) Cohabitation Relationships Act 1998.

¹⁰⁰ Second Reading, Hansard (March 2009).

Many jurisdictions that recognise unregistered domestic partnerships have adopted ‘opt-out’ clauses or other options that preserve couples’ freedom to make alternative arrangements for their financial affairs. Such provisions safeguard cohabitants’ ability to choose, by mutual and informed agreement, to forego the financial rights and obligations of domestic partnerships.

6 Conclusion

Where the Constitution is clear in its call for equality and the inequality is visible for all to see, for the most part the Court has responded admirably. There is a worrying trend, however, where the inequality is subliminal, lying below the surface of social conduct, distorted by the assumption of choice and libertarian values.

The intersection of formal apartheid policy with the demands of economic and social survival has resulted in a significant part of South Africa’s population living in domestic partnerships. The *Volks* Court saw this reality. It looked and observed the vulnerability. And the South African legislature, informed in extensive detail by the South African Law Reform Commission, saw this reality. It, too, looked. And it, too, observed the vulnerability. And, until the law is reformed, we are going to see, look and observe the streams of women walking into legal aid clinics across the country, asking for advice about their legal rights upon the dissolution of their domestic relationships. And when these individuals leave with the advice that there is no legal protection, they will see that there has been a constitutional failure on a grand scale.