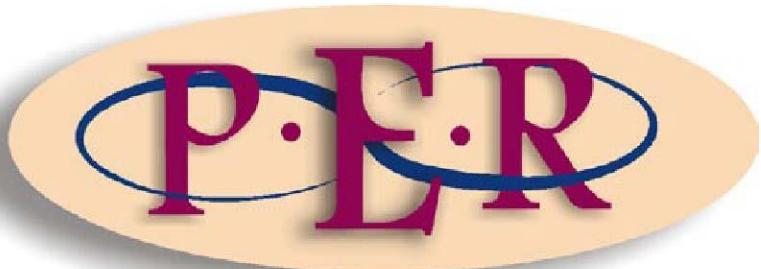


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## DOMESTIC PARTNERS AND "THE CHOICE ARGUMENT": *QUO VADIS?*

**B Coetze Bester and A Louw\***

### 1 Introduction

Despite the fact that a domestic partnership<sup>1</sup> has been recognised as a life-partnership,<sup>2</sup> similar to that of marriage, domestic partners cannot *ex lege* avail themselves of spousal benefits.<sup>3</sup> The imperatives of equality and human dignity imposed by the *Constitution*<sup>4</sup> have, however, necessitated the legislative and judicial recognition of domestic partners as spouses for certain purposes on an *ad hoc* basis.<sup>5</sup>

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<sup>1</sup> Two terms are generally used to refer to informal cohabitation outside of marriage, namely "domestic partnerships" and "life partnerships". The term "life partnership" gained significant support in the era prior to the promulgation of the *Civil Union Act* 17 of 2006. See eg Cooke 2005 *SALJ* 542-557; Schäfer 2006 *SALJ* 626-647; De Ru 2009 *Speculum Juris* 111-126; Smith *South African Matrimonial Law* 150-151; Heaton *Family Law* 243; and Manyathi 2012 *De Rebus* 94-97. Despite the frequent use of the term "life partnership", some authors employ the term "domestic partnership" when referring to informal cohabitation outside of marriage. See Clarke 2002 *SALJ* 634-648; Goldblatt 2003 *SALJ* 610-629; Lind 2005 *Acta Juridica* 108-130; Barnard and De Vos 2007 *SALJ* 795-826; Kruuse 2009 *SAJHR* 380-391; and Meyersfeld 2010 *CCR* 271-294. This article will use the latter term. The reason for this is that the term "life partnership" has two possible meanings. Firstly, it can be used narrowly to refer to informal cohabitation outside of marriage (as used by the authors mentioned above). Secondly, it can be used in a broader sense to refer to all forms of "intimate cohabitation". If used in this wider sense it refers not only to informal relationships but also to marriages and civil unions: see Schäfer 2006 *SALJ* 626-627. In the light of this it is argued that the term "life partnership" should be avoided, as its use might cause unnecessary confusion. This point of view is, however, not universally accepted: see Smith *South African Matrimonial Law* 160-161.

<sup>2</sup> Such as maintenance, intestate succession and property division. *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 36.

<sup>3</sup> Schwellnus *Legal Implications of Cohabitation* 48-51; Sinclair *Law of Marriage* 274; Clarke 2002 *SALJ* 637; SALRC Report on *Domestic Partnerships* 108-109; Heaton *Family Law* 243; Skelton and Carnelley *Family Law* 208; Van Schalkwyk *Familiereg* 359; and Smith 2013 *SALJ* 538.

<sup>4</sup> The *Constitution of the Republic of South Africa*, 1996 (hereinafter the *Constitution*). See specifically ss 9 and 10 respectively.

<sup>5</sup> For the *ad hoc* legislative recognition of domestic partnerships: see eg s 20(13) of the *Insolvency Act* 24 of 1936; s 35(2)(f)(i) of the *Constitution*; s 1 of the *Employment Equity Act* 55 of 1998; s 1 of the *Domestic Violence Act* 116 of 1998 and finally ss 231 and 293 of the *Children's Act* 38 of 2005. In addition, domestic partnerships were provided with *ad hoc* judicial recognition in the following instances: *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *J v Director General; Department of Home Affairs* 2003 5 BCLR 463 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA

The piecemeal recognition<sup>6</sup> afforded to domestic partnerships on this basis has been deemed insufficient to protect the interests of the partners concerned, as it largely ignores the *consortium* that exists between them. Coupled with the increasing prevalence of cohabitation *in lieu* of marriage,<sup>7</sup> the limited protection provided to domestic partners as life-partners has challenged the Napoleonic adage "cohabitants ignore the law, and the law ignores them".<sup>8</sup> While there is general consensus that there is a dire need to regulate domestic partnerships by way of comprehensive and robust legislation,<sup>9</sup> it is less certain what rationale should underlie the status-giving legislation. Until now, the non-recognition of domestic partnerships has been justified by what is commonly referred to as "the choice argument".<sup>10</sup> Simply put, the choice argument dictates that unmarried partners cannot claim spousal benefits because they choose not to "marry".<sup>11</sup> Whether this argument should still underlie the future recognition of domestic partnerships has become uncertain in the light of the enactment of the *Civil Union Act* 17 of 2006, the decision of *Gory v Kolver*,<sup>12</sup> and finally, certain conceptual deficiencies identified in the rationale underlying the choice argument.

The article will, at the outset, justify why the choice argument cannot provide a suitable foundation for the future regulation and recognition of domestic partnerships. Alternative possibilities will thereafter be identified and discussed with a view to finding the most acceptable replacement for the choice argument. In the light of the already existing draft legislation on domestic partnerships, the article will conclude by investigating if the legislation to be enacted sufficiently incorporates the preferred rationale advocated for in this article.

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<sup>6</sup> 359 (SCA); *Gory v Kolver* 2007 4 SA 97 (CC); *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP); and *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA).

<sup>7</sup> Phrase used by Smith 2013 *SALJ* 543.

<sup>8</sup> See generally Sinclair *Law of Marriage* 269-271; Goldblatt 2003 *SALJ* 610-611; Lind 2005 *Acta Juridica* 111; SALRC *Report on Domestic Partnerships* 20; Skelton and Carnelley *Family Law* 207; and Heaton *Family Law* 243.

<sup>9</sup> See Hutchings and Delport 1992 *De Rebus* 122.

<sup>10</sup> Bonthuys 2004 *SALJ* 879; Skelton and Carnelley *Family Law* 206-207; Heaton *Family Law* 243; and Smith 2011 *SALJ* 560.

<sup>11</sup> See eg Smith 2010 *PELJ* 238. Owing to the fact that the term was coined by Smith it should ideally be placed in inverted commas for the remainder of the article. For ease of reference, however, the commas will be left out.

<sup>12</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC).

<sup>13</sup> *Gory v Kolver* 2007 4 SA 97 (CC).

## 2 The choice argument

While the choice argument has been formulated in a variety of ways,<sup>13</sup> Sachs J in his minority decision of *Volks v Robinson*<sup>14</sup> described it in the following terms:

By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage, a person cannot complain if she is denied the legal benefits she would have had if she had married. Having chosen cohabitation rather than marriage, she has to bear the consequences. Just as the choice to marry is one of life's defining moments, so, it is contended, the choice not to marry must be a determinative feature of one's life.<sup>15</sup>

It is clear, therefore, that supporters of the choice argument do not only attach consequences to a person's choice to marry, but also to a person's choice not to marry.<sup>16</sup> This argument presupposes that a person's marital status, whether married or unmarried, is a result of an explicit or positive choice.<sup>17</sup> As is clear from the quoted *dictum* above, the choice argument operates within a paradigm in terms of which it is, in fact, possible for the domestic partners to conclude a valid marriage. If there is an impediment or bar to their marriage, the law can obviously not penalise the partners for not formalising their relationship, as they would not have had a choice in the matter.

There are two possible impediments which could prevent domestic partners from marrying, namely an objective legal impediment and a subjective circumstantial impediment.<sup>18</sup> The choice argument disregards the latter subjective circumstantial impediment as the choice argument "... assesses the availability of choice for any given couple by looking only to the presence or absence of an absolute legal impediment to marriage".<sup>19</sup> This implies that a mere subjective impediment, such as economic or social hardship, will not affect the application of the choice argument.

<sup>13</sup> See eg Schäfer 2006 *SALJ* 627.

<sup>14</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC).

<sup>15</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) para 154.

<sup>16</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) para 156.

<sup>17</sup> See eg Lind 2005 *Acta Juridica* 121-122, where he explains, even if he does not support, this line of reasoning.

<sup>18</sup> See Schäfer 2006 *SALJ* 640-644. Schäfer 2006 *SALJ* 626-647 was the first South African author to provide a comprehensive analysis of the choice argument (or as he calls it the "objective model of choice"). In this work he lays a theoretical foundation for the choice argument, and ultimately, advocates for its retention (albeit in a slightly amended form).

<sup>19</sup> Schäfer 2006 *SALJ* 640. Legal impediments to marriage can further be sub-divided into objective legal impediments (as referred to in the quote above) and relative legal impediments. Relative

Because sexual orientation created an objective legal impediment to marriage before the enactment of the *Civil Union Act*,<sup>20</sup> same-sex domestic partners received *ad hoc* judicial recognition as spouses for the following purposes: immigration,<sup>21</sup> pension benefits,<sup>22</sup> joint adoption and registration as parents,<sup>23</sup> the dependent's action,<sup>24</sup> and intestate succession.<sup>25</sup> Conversely, heterosexual domestic partners received very little of the *ad hoc* recognition provided to their same-sex counterparts.<sup>26</sup>

### 3 Discarding the choice argument

Although the choice argument and the reasoning associated therewith are deeply entrenched in South African law,<sup>27</sup> its application is not undisputed.<sup>28</sup> The doubt that

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legal impediments such as age and capacity do not disrupt the application of the choice argument provided that the impediment in question promotes a legitimate and reasonable objective (see Schäfer 2006 *SALJ* 640). As a result of this, two domestic partners cannot claim spousal benefits if they were prevented from marrying due to the fact that one of the domestic partners, for example, lacked capacity. Although Schäfer 2006 *SALJ* 640 only describes age and capacity as relative legal impediments, it is submitted that the general principles in relation to affinity and consanguinity will also serve as such impediments. For a general explanation of these principles see eg Heaton *Family Law* 15-34 and Van Schalkwyk *Familiereg* 102-135. The reason for this submission is that these impediments, as the impediments in relation to age and capacity, promote a legitimate and reasonable objective.

<sup>20</sup> *Civil Union Act* 17 of 2006. See eg *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) para 26, where it was held that the fact that same-sex couples were unmarried was "... inextricably linked to their sexual orientation".

<sup>21</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC).

<sup>22</sup> *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC).

<sup>23</sup> See *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) and *J v Director-General: Department of Home Affairs* 2003 5 SA 621 (CC) respectively.

<sup>24</sup> *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA).

<sup>25</sup> *Gory v Kolver* 2007 4 SA 97 (CC).

<sup>26</sup> See eg *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 60; *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) para 16; *J v Director-General: Department of Home Affairs* 2003 5 SA 621 (CC) para 19; and *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) para 43. Heterosexual domestic partners have, however, recently received some modicum of recognition in the case of *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA). In this case the Supreme Court of Appeal held that heterosexual domestic partners could be accommodated within the ambit of the defendant's action. For a discussion of this case: see Smith and Heaton 2012 *THRHR* 472-484 and Scott 2013 *TSAR* 777-793. It is contended that this judgement should not be regarded as an abandonment of the principles of the choice argument but rather as a natural development of the defendant's action.

<sup>27</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *J v Director-General: Department of Home Affairs* 2003 5 SA 621 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA); and *Gory v Kolver* 2007 4 SA 97 (CC).

<sup>28</sup> See eg Mamashela and Carnelley 2006 *Obiter* 390; Bilchitz and Judge 2007 *SAJHR* 466-499; Picarra 2007 *SAJHR* 565; Kruuse 2009 *SAJHR* 385; Heaton *Family Law* 253-254; Louw 2011 *Juridikum* 240; and Van Schalkwyk *Familiereg* 360.

persists in relation to the choice argument has led some authors to question its future viability. A number of arguments have been used to support the abolition of the choice argument, each of which will be discussed below.

Prior to the enactment of the *Civil Union Act*,<sup>29</sup> there existed a rational distinction between heterosexual and same-sex domestic partnerships founded on the fact that the former had the ability to conclude a valid marriage while the latter did not. This led to a differentiation (based on the choice argument) between the manner in which South African law dealt with heterosexual domestic partnerships on the one hand, and same-sex domestic partnerships on the other. However, the common assumption that this differentiation would fall away as soon as the prohibition against same-sex marriage was removed<sup>30</sup> was shrouded in some uncertainty following the judgment in *Gory v Kolver*.<sup>31</sup> In this case, which was decided a week before the enactment of the *Civil Union Act*,<sup>32</sup> the court was tasked to determine whether it was constitutionally acceptable for section 1(1) of the *Intestate Succession Act*<sup>33</sup> to exclude same-sex life partners from its ambit.<sup>34</sup> After concluding that such exclusion was indeed unconstitutional,<sup>35</sup> Van Heerden AJ made the following statement with regard to the *ad hoc* recognition of same-sex domestic partners:<sup>36</sup>

Any change in the law pursuant to *Fourie* will not necessarily amend those statutes into which words have already been read by this Court so as to give effect to the constitutional rights of gay and lesbian people to equality and dignity. In the absence of legislation amending the relevant statutes, the effect on these statutes of decisions of this Court in cases like *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs, Satchwell, Du Toit and J v Director-General, Department of Home Affairs* will not change. The same applies to the numerous other statutory provisions that expressly afford recognition to permanent same-sex life partnerships.<sup>37</sup>

<sup>29</sup> *Civil Union Act* 17 of 2006.

<sup>30</sup> Louw 2011 *Juridikum* 240.

<sup>31</sup> *Gory v Kolver* 2007 4 SA 97 (CC).

<sup>32</sup> *Civil Union Act* 17 of 2006. For a general case discussion see Barnard and De Vos 2007 *SALJ* 823; Picarra 2007 *SAJHR* 563-569; Wood-Bodley 2008(a) *SALJ* 260; and Smith 2010 *PELJ* 260-261.

<sup>33</sup> *Intestate Succession Act* 81 of 1987.

<sup>34</sup> Section 1(1) of the *Intestate Succession Act* 81 of 1987 conferred certain benefits on heterosexual spouses but not on same-sex life partners.

<sup>35</sup> *Gory v Kolver* 2007 4 SA 97 (CC) para 19.

<sup>36</sup> *Civil Union Act* 17 of 2006.

<sup>37</sup> *Gory v Kolver* 2007 4 SA 97 (CC) para 28.

The *dictum* invites the inference that, unlike heterosexual domestic partners, same-sex domestic partners who fail to marry (even though there is no longer any objective legal impediment to such a union)<sup>38</sup> can still claim certain spousal benefits which were extended to them prior to the decision of *Fourie*.<sup>39</sup> On face value it would thus seem as though the choice argument is strictly applied to heterosexual domestic partnerships,<sup>40</sup> while being overlooked in relation to their same-sex counterparts. This anomalous result has generated a varied response from academics,<sup>41</sup> most of whom argue that not applying the choice argument consistently to both same-sex and heterosexual domestic partners amounts to an unjustifiable infringement of heterosexual domestic partners' rights to equality.<sup>42</sup> This point of view is nevertheless not universally accepted.<sup>43</sup>

In addition to the aforementioned constitutional uncertainty which has arisen from the decision of *Gory v Kolver*,<sup>44</sup> there are other reasons for discarding the choice argument, to wit:

- (a) It disregards the context within which choice is made, as it takes into account only an objective legal impediment to marriage.<sup>45</sup> As remarked by Schäfer "[f]or some, social and economic hardships can be so acute as to render meaningless ... their capacity to choose".<sup>46</sup> According to Sachs J,<sup>47</sup> applying such a de-

<sup>38</sup> See s 1 of the *Civil Union Act* 17 of 2006.

<sup>39</sup> *Minister of Home Affairs v Fourie; Lesbian Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC).

<sup>40</sup> As applied by the majority in *Volks v Robinson* 2005 5 BCLR 446 (CC).

<sup>41</sup> See generally Kruuse 2009 *SAJHR* 385-386 and Louw 2011 *Juridikum* 240.

<sup>42</sup> See eg Mamashela and Carnelley 2006 *Obiter* 390; Bilchitz and Judge 2007 *SAJHR* 496-497; Picarra 2007 *SAJHR* 565; Kruuse 2009 *SAJHR* 385; Heaton *Family Law* 253-254; Louw 2011 *Juridikum* 240; and Van Schalkwyk *Familiereg* 360.

<sup>43</sup> For differing opinions as to the influence of the enactment of the *Civil Union Act* 17 of 2006 and *Gory v Kolver* 2007 4 SA 97 (CC) para 28, see Smith *South African Matrimonial Law* 285-300; Smith 2010 *PELJ* 261; Skelton and Carnelley *Family Law* 215-216; Wood-Bodley 2008(a) *SALJ* 259-273; Wood-Bodley 2008(b) *SALJ* 46-62; Wood-Bodley 2008(c) *SALJ* 483-488; and De Ru 2009 *Speculum Juris* 111-126.

<sup>44</sup> *Gory v Kolver* 2007 4 SA 97 (CC).

<sup>45</sup> Schäfer 2006 *SALJ* 640-641 and Smith *South African Matrimonial Law* 234.

<sup>46</sup> Schäfer 2006 *SALJ* 641. Cooke 2005 *SALJ* 555 reiterates that choice implies that a person has alternatives. If such alternatives are not present, be this due to social, legal or economic reasons, choice cannot exist.

<sup>47</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) para 162.

contextualised approach to choice will inevitably lead to "... very unfair anomalies".

- (b) The choice argument fails to respect the individual autonomy of *both* partners in a domestic partnership.<sup>48</sup> Lind remarks that when adhering to the principles of the choice argument, the law would appear to give effect to the autonomy of only the more powerful partner in the relationship.<sup>49</sup> Personal autonomy must surely dictate that the law provides equal weight to both parties' personal autonomy.
- (c) Finally, certain authors criticize the choice argument for its inability to differentiate between informed and uninformed choice.<sup>50</sup> Conversely stated, it does not take into account that certain choices are made "... on the basis of ignorance or error".<sup>51</sup> The choice argument assumes that it is giving effect to the intention of the parties.<sup>52</sup> In reality this may not be the case as partners can either be "... remiss about directing their lives",<sup>53</sup> or alternatively, mistakenly believe that they are already, on the basis of a "common law marriage", entitled to spousal benefits.

The flaws described above, in addition to the constitutional uncertainty created by the decision in *Gory v Kolver*,<sup>54</sup> in our view amply justify the rejection of the choice argument as the guiding principle for the future recognition and regulation of domestic partnerships. However, what regulatory foundation should replace it is a matter of some debate.

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<sup>48</sup> See authors such as Lind 2005 *Acta Juridica* 123; Schäfer 2006 *SALJ* 641-642; and Smith *South African Matrimonial Law* 234. Also see the remarks made in *Volks v Robinson* 2005 5 *BCLR* 446 (CC) para 108.

<sup>49</sup> Lind 2005 *Acta Juridica* 123.

<sup>50</sup> Bonthuys 2004 *SALJ* 895; Schäfer 2006 *SALJ* 642; and Smith *South African Matrimonial Law* 234. Bonthuys delivers her contribution in the context of domestic partnership agreements. It is contended, however, that those principles are also applicable to the current discussion.

<sup>51</sup> Schäfer 2006 *SALJ* 642.

<sup>52</sup> Bonthuys 2004 *SALJ* 895.

<sup>53</sup> Sinclair *Law of Marriage* 273. According to Sinclair these types of domestic partners "... drift into and remain in relationships without consciously considering the implications of failure and termination [of their relationship]".

<sup>54</sup> *Gory v Kolver* 2007 4 SA 97 (CC).

## 4 The theoretical basis that should underlie the recognition of domestic partnerships in future

### 4.1 *Introduction*

Based on the conclusion reached in the previous paragraph that the choice argument is not a suitable foundation for the regulating of domestic partnerships, an alternative must be found. Three viable alternatives to that argument have thus far been identified, namely the contextualised model of choice, the function-over-form approach, and finally, the revised model of contextualised choice as proposed by Smith. If accepted, the former will have a far less invasive effect on South African family law than the latter two approaches.

### 4.2 *Existing alternatives*

#### 4.2.1 *The contextualised model of choice*

Traditionally the choice argument was based on the premise that a person's choice either to marry or not to marry was a result of a direct and explicit choice.<sup>55</sup> One of the main flaws in this assumption was that it did not appreciate the context within which choice or autonomy was expressed. It did not, for example, take into account that "... [g]ender inequality and patriarchy result in women lacking the choice to freely and equally ... set the terms of their relationships".<sup>56</sup> As a result the choice argument invariably favoured the more powerful partner in the relationship.<sup>57</sup> In an attempt to adequately address the shortcomings of the choice argument, calls were made for a more nuanced (contextualised) approach to choice.<sup>58</sup>

The contextualised model of choice does not penalise a party (by excluding him or her from claiming spousal benefits) for not exercising his or her choice to marry.<sup>59</sup> As stated by Cooke "... cohabitants should not be penalised for the fact that they are not

<sup>55</sup> Lind 2005 *Acta Juridica* 122.

<sup>56</sup> Goldblatt 2003 *SALJ* 616.

<sup>57</sup> Lind 2005 *Acta Juridica* 123.

<sup>58</sup> See *inter alia* Clarke 2002 *SALJ* 634-648; Goldblatt 2003 *SALJ* 610-629; Lind 2005 *Acta Juridica* 108-130; Cooke 2005 *SALJ* 542-557; Meyersfeld 2010 *CCR* 271-294; Smith *South African Matrimonial Law* 233-242; and Smith 2010 *PELJ* 238-294.

<sup>59</sup> Smith 2010 *PELJ* 244.

married, because marriage may not be something they had the power or ability to enter into".<sup>60</sup> The implication of adopting a contextualised approach to choice was thoroughly analysed by Sachs J in *Volks v Robinson*.<sup>61</sup> He, in turn, relied heavily on Canadian case law in the form of *Miron v Trude*<sup>62</sup> and *Nova Scotia (Attorney-General) v Walsh*.<sup>63</sup>

According to Sachs J,<sup>64</sup> adopting a contextualised approach to choice will mean that South African law will have to differentiate between spousal claims relating to need on the one hand and spousal claims not relating to need on the other. The reason for this differentiation is based on the fact that a contextualised approach to choice recognises that a domestic partner cannot be deprived of claims relating to need, despite the fact that he or she has chosen not to get married. However, the contextualised model of choice does not allow domestic partners to claim spousal benefits which are not based on need. Owing to its importance, the distinction between needs-based claims and non needs-based claims should be clarified.

Fortunately, some guidance was provided in the Canadian case of *Nova Scotia (Attorney General) v Walsh*,<sup>65</sup> where Gonthier J held that one should look to the objective that is fulfilled by the specific claim in order to determine whether or not it can be described as a needs-based claim. While claims based on need fulfil a social objective, non needs-based claims do not. According to Gonthier J<sup>66</sup> claims based, for example, on property division do not fulfil a social objective as they merely attempt to divide matrimonial assets according to a particular property regime chosen by the parties.<sup>67</sup> Considering that the division of property does not fulfil a social objective, the court concluded that such a claim will not be regarded as being based on need.<sup>68</sup>

<sup>60</sup> Cooke 2005 *SALJ* 554.

<sup>61</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) paras 152-165.

<sup>62</sup> *Miron v Trudel* 1995 2 SCR 418.

<sup>63</sup> *Nova Scotia (Attorney-General) v Walsh* 2002 4 SCR 325.

<sup>64</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) para 161.

<sup>65</sup> *Nova Scotia (Attorney-General) v Walsh* 2002 4 SCR 325 para 204.

<sup>66</sup> See *Nova Scotia (Attorney-General) v Walsh* 2002 325 4 SCR para 204; *Volks v Robinson* 2005 5 BCLR 446 (CC) para 160.

<sup>67</sup> See *Nova Scotia (Attorney-General) v Walsh* 2002 4 SCR 325 para 204; *Volks v Robinson* 2005 5 BCLR 446 (CC) para 160.

<sup>68</sup> See *Nova Scotia (Attorney-General) v Walsh* 2002 4 SCR 325 para 204; *Volks v Robinson* 2005 5 BCLR 446 (CC) para 160.

If one accepts the reasoning used by Gonthier J, the division of property does not qualify as a needs-based claim. There are two claims that will, however, qualify as needs-based claims. The first, namely spousal maintenance, was specifically identified by Sachs J in *Volks v Robinson*<sup>69</sup> as a needs-based claim. Smith contends that intestate succession, in addition to spousal maintenance, should also qualify as a needs-based claim.<sup>70</sup> Although his argument has not explicitly been accepted by the judiciary, it does seem to be convincing. Smith bases his opinion on the fact that intestate succession, as described not only by the judiciary<sup>71</sup> but also by legal commentators,<sup>72</sup> is indeed based on the achievement of a social objective. As stated by De Waal:

The social function of the law of succession is intimately linked with the family. It proceeds from the premise ... that the family is an important social unit, worthy of legal protection and preservation. Therefore, in a situation where a person dies with a spouse and dependent children, the law attempts to ensure that the *basic needs of the surviving family members* will be provided for via the estate of the deceased.<sup>73</sup>

These considerations lead Smith to conclude that it can "... be accepted that both the Intestate Succession Act [81 of 1987] and the Maintenance of Surviving Spouses Act [27 of 1990] serve a similar fundamental purpose, namely to address the *needs* of the survivor".<sup>74</sup>

Smith argues that domestic partners should be allowed to institute needs-based claims only if they are able to prove the existence of a reciprocal duty of support.<sup>75</sup> In fact, he regards a reciprocal duty of support as a *sine qua non* for needs-based claims.<sup>76</sup> While not necessarily required to prove the existence of a domestic partnership,<sup>77</sup> it

<sup>69</sup> In *Volks v Robinson* 2005 5 BCLR 446 (CC) para 161.

<sup>70</sup> Smith 2010 *PELJ* 270.

<sup>71</sup> See *Daniels v Campbell* 2004 5 SA 331 (CC) paras 22-23, where the objective of intestate succession was, *inter alia*, described as "... ensur[ing] that widows would receive at least a child's share instead of being precariously dependent on family benevolence".

<sup>72</sup> De Waal 1997 *Stell LR* 162-166.

<sup>73</sup> De Waal 1997 *Stell LR* 164-165 (own emphasis added).

<sup>74</sup> Smith 2010 *PELJ* 270 ([]) own addition).

<sup>75</sup> Smith 2010 *PELJ* 260.

<sup>76</sup> Smith 2010 *PELJ* 256, 260.

<sup>77</sup> How one is expected to prove the existence of a domestic partnership is currently a moot point. While it is generally accepted that there must exist a *consortium omnis vitae* between the partners (which is apparently proved by indicating the permanence of the partnership: see *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 53), it is unclear why the courts have intermittently required the domestic partners to also prove the existence of a reciprocal duty of support between them. This was required in cases such as *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) para 37; *Du Plessis v Road Accident Fund* 2004

seems appropriate to require domestic partners to prove the existence of a reciprocal duty of support to succeed with a need-based claim.<sup>78</sup>

#### 4.2.2 *The function-over-form approach*

According to Goldblatt the purpose of family law is to "... protect vulnerable members of families and to ensure fairness between the parties in family disputes".<sup>79</sup> As such, the functional approach to family law recognises that not all families are created by the conclusion of a valid marriage,<sup>80</sup> and that a domestic partnership can possibly fulfil the same social function as marriage.<sup>81</sup> In addition, it also recognises that "... the gender division of labour within the family means that women and children are at particular risk of being left economically vulnerable when such relationships end, *just as they are at the end of a marriage*".<sup>82</sup>

As in the case of the contextualised model of choice, the function-over-form approach has a particular understanding of what autonomy entails. It recognises that choice need not necessarily be expressed in the form of marriage in order to be a recognisable choice.<sup>83</sup> Functionally, choice includes "... the lived conditions in which multiple autonomous choices, changing almost daily, are made and expressed *in the practice*

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1 SA 369 (SCA) para 42; and *Gory v Kolver* 2007 4 SA 97 (CC) para 66. According to Schäfer 2006 *SALJ* 630 this lack of consistency can be attributed to the so-called proportionality principle which determines that "... there should be a broad measure of proportionality between the extent to which the state and third parties are expected to underwrite a life partnership and the extent to which its participants have elected to assume binding legal obligations towards one another". In the light of this reasoning many authors are currently of the opinion that the requirements needed to prove the existence of a domestic partnership are dependent on the type of relief sought: see Schäfer 2006 *SALJ* 630; Wood-Bodley 2008(a) *SALJ* 271; De Ru 2009 *Speculum Juris* 117; Heaton *Family Law* 252-253; and Louw 2011 *Juridikum* 239. Therefore, if the claim of the domestic partners has certain financial implications the partners will be required to prove both a *consortium* as well as a reciprocal duty of support between them. Conversely, if the claim has no financial implications the partners will be required to prove only a *consortium omnis vitae* between them.

<sup>78</sup> This is because needs-based claims will clearly have "financial implications".

<sup>79</sup> Goldblatt 2003 *SALJ* 610, 616. For a general discussion of the functional approach to family law, see Goldblatt 2003 *SALJ* 610-629; Lind 2005 *Acta Juridica* 108-130; SALRC *Report on Domestic Partnerships* 55-60; Smith *South African Matrimonial Law* 238-241; Meyersfeld 2010 *CCR* 271-294; and Meyerson 2010 *CCR* 295-316. Approaching family law functionally has also been analysed by the Constitutional Court: see eg *Volks v Robinson* 2005 5 BCLR 446 (CC) para 171 and *Hassam v Jacobs* 2009 11 BCLR 1148 (CC).

<sup>80</sup> See the dissenting judgement of Mokgoro and O'Reagan JJ in *Volks v Robinson* 2005 5 BCLR 446 (CC) para 106.

<sup>81</sup> Meyerson 2010 *CCR* 295.

<sup>82</sup> Meyerson 2010 *CCR* 295 (own emphasis added).

<sup>83</sup> Lind 2005 *Acta Juridica* 123-124.

*of a family life*".<sup>84</sup> According to the function-over-form approach the conduct of the parties is deemed to be an expression of choice<sup>85</sup> and a partner living in a domestic partnership cannot avoid being sued for spousal benefits by claiming that he or she had expressly chosen not to marry.<sup>86</sup> In such circumstances Lind argues that autonomy should be subverted in order to come to the need of the vulnerable partner.<sup>87</sup>

The effect of applying the function-over-form approach is that a person can claim spousal benefits despite the fact that the person is unmarried. If the law does away with the requirement of an express formal choice, namely the conclusion of a valid marriage, what is the basis for the extension of the benefits in question? One might simply argue that the extension of rights should be provided by the functional approach as soon as a domestic partnership is formed. This is, however, not as uncomplicated as it might seem, owing to the uncertainty relating to the requirements for a domestic partnership.<sup>88</sup> Sachs J in *Volks v Robinson*<sup>89</sup> is of the opinion that domestic partners should be able to claim in terms of the functional approach as soon as there is a familial *nexus* of such proximity and intensity as to render it manifestly unfair to deny the partner in question certain spousal benefits. Sachs J is of the opinion that it would be manifestly unfair to deny spousal benefits to domestic partners in two instances.<sup>90</sup> The first instance is where the partners had either expressly or through their conduct created a reciprocal duty of support.<sup>91</sup> The second is where the reciprocal duty of support had not been created by any agreement but rather *ex lege* from "...

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<sup>84</sup> Lind 2005 *Acta Juridica* 123-124 (own emphasis added).

<sup>85</sup> Lind 2005 *Acta Juridica* 124.

<sup>86</sup> Lind 2005 *Acta Juridica* 124.

<sup>87</sup> Lind 2005 *Acta Juridica* 124 states that autonomy is regularly subverted in family law in order to insure that justice (presumably with regard to the more vulnerable partner) prevails. According to him family obligations are often imposed against the wishes of a particular member of the family. Child support is one example of this. Another may possibly be post-divorce maintenance. Meyersfeld 2010 *CCR* 283 concurs with Lind by stating that "[l]egal protection in our constitutional order has never required the consent of ... individuals before bestowing rights – we have always maintained as a constitutional order that rights exists irrespective of one's compliance with the mainstream".

<sup>88</sup> See para 4.2.1 above.

<sup>89</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) para 213. Smith *South African Matrimonial Law* 241 seems to accept Sachs J's opinion.

<sup>90</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) paras 214, 218.

<sup>91</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) para 214.

the nature of the particular life partnership itself".<sup>92</sup> Smith finds the latter instance, namely the *ex lege* extension of spousal benefits to domestic partners, unconvincing.<sup>93</sup> His criticism seems apt as it would appear logical to attach rights and obligations to domestic partnerships on the basis that the partners had contractually created a reciprocal duty of support rather than an inexact standard such as "... by the nature of their relationship".

#### 4.2.3 *Smith model*

The third and final approach that could possibly underlie the future recognition of domestic partnerships is the revised model of contextualised choice as proposed by Smith. While the Smith approach<sup>94</sup> is based to a large extent on the contextualised model of choice discussed above, it does have certain features which cannot be reconciled with the principles associated with the contextualised model of choice. As such, it will be analysed and discussed separately.

The Smith model accepts the underlying rationale of the contextualised model of choice, namely, "... that while in theory the individual is free to marry or not to marry, in practice the reality may be otherwise".<sup>95</sup> Like the model of contextualised choice, the Smith model would thus provide domestic partners with the right to rely on needs-based claims. The model does, however, differ from the contextualised model of choice in that it also allows domestic partners to rely on principles of matrimonial property law (including the division of joint property and the transfer of separate property) in certain circumstances.

As stated earlier, the contextualised model of choice does not provide domestic partners with proprietary claims, as these claims are not regarded as needs-based claims. This is because they do not fulfil any social objective and the mere fact that

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<sup>92</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) para 218.

<sup>93</sup> See Smith *South African Matrimonial Law* 244-245, where he expresses the opinion that there is no real distinction between the two categories of domestic partnership, as a reciprocal duty of support will exist in both instances. As such, he finds the distinction to be less than convincing.

<sup>94</sup> Termed as such considering that Smith developed this model as a result of certain shortcomings identified by him in the application of the contextualised model of choice: see Smith *South African Matrimonial Law* 567-584 and Smith 2010 *PELJ* 274-294.

<sup>95</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) para 157.

two persons live together is not indicative of an intention to share in each other's assets and liabilities.<sup>96</sup> The Smith model, on the other hand, does not necessarily exclude the possibility of extending proprietary claims to domestic partners. As far as proprietary claims are concerned, the Smith model takes into account the differences between registered and unregistered domestic partners as envisaged by the *Draft Domestic Partnerships Bill* of 2008.<sup>97</sup> While the differences between registered and unregistered domestic partners will be analysed only in the following paragraph, for the present purposes it should be noted that in order to be recognised as such, registered domestic partners would have to undergo a ceremony of public commitment, while unregistered domestic partners would not.

With regard to registered domestic partnerships, Smith contends that any principle of matrimonial property law should be available to registered domestic partners where domestic partnership legislation does not provide "... an effective and well-defined alternative to matrimonial property law".<sup>98</sup> He remarks that this protection will not automatically be forced upon registered domestic partners, but must simply be available should it be needed.<sup>99</sup> According to this view, registered domestic partners will be able to claim not only needs-based claims, but could also make claims relating to the division of property, which strictly speaking fall outside the ambit of the contextualised model of choice.

Furthermore, with regard to unregistered domestic partnerships, he contends that:

Where the facts of an application lead a court to conclude that a vulnerable applicant was unable to convince his/her partner to formalise their relationship, the extension of a principle of matrimonial (or registered domestic partnership) property law may conceivably be justified due to the lack of any real choice.<sup>100</sup>

<sup>96</sup> See *Nova Scotia (Attorney-General) v Walsh* 2002 4 SCR 325 para 204 as accepted in *Volks v Robinson* 2005 5 BCLR 446 (CC) paras 160, 244-245.

<sup>97</sup> Discussed in more detail in para 5.1 below.

<sup>98</sup> See Smith 2010 *PELJ* 284-285. Primarily he (280-282) uses the case of *Van Der Merwe v Road Accident Fund* 2006 4 SA 230 (CC) to conclude that there can be no rational governmental purpose behind the lack of protection afforded to registered domestic partners in terms of the *Draft Domestic Partnerships Bill* of 2008 (GN 36 in GG 30663 of 14 January 2008). He states that "... there can surely be no legitimate governmental purpose behind denying protection to a person who has entered into a relationship that, in the same way as marriage does, involves both the undertaking of a formal public commitment before the state, as well as an alteration of legal status".

<sup>99</sup> Smith 2010 *PELJ* 285.

<sup>100</sup> Smith 2010 *PELJ* 293-294.

He does remark, however, that such an extension will be unlikely owing to the wide range of protection afforded to unregistered domestic partnerships in chapter 4 of the *Draft Domestic Partnerships Bill* of 2008.<sup>101</sup>

Although the Smith model is based on the contextualised model of choice, it does not prevent domestic partners from relying on principles of matrimonial property law, despite the fact that these claims are not based on need. To avail themselves of such claims the domestic partners will, however, be obliged to do the following:

- bring an application to court;
- prove that the extension of a specific principle is necessary;
- indicate that the specific domestic partnership legislation does not provide for an effective and well-defined alternative to matrimonial property law;
- give sufficient reasons why the court should provide them with such claims; and
- in the case of unregistered domestic partners, indicate that the partner bringing the application lacked the choice to formalise his or her relationship.<sup>102</sup>

#### **4.3 *Critical assessment***

As far as the contextualised model of choice is concerned, it seems, at least *prima facie*, to solve many of the problems created by the traditional formulation of the choice argument. Adopting such an approach enables the law to take into account a person's subjective circumstantial constraints which prevent him or her from marrying. Such an approach does not, however, imply that a domestic partner can claim all the spousal benefits that attach to a marriage or civil union. A domestic partner will be allowed to claim spousal benefits that are based on need only, such as spousal maintenance and arguably intestate succession. Considering that the decision to live together is not deemed sufficient to indicate a positive intention to contribute to and share in each other's assets and liabilities, a domestic partner will not be able to claim the division of joint property or the transfer of separate property upon the termination of the domestic partnership in question.

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<sup>101</sup> Smith 2010 *PELJ* 294.

<sup>102</sup> Smith 2010 *PELJ* 284-285, 293-294.

Approaching domestic partnerships functionally implies that spousal benefits should be provided to domestic partners as soon as there is an adequate familial *nexus* between the partners which renders the refusal of spousal benefits manifestly unfair. This implies that spousal benefits must be extended to the partners despite the fact that they have not formalised their union, the reasoning being that marriage or civil union is not the only forms of relationship that creates safety, security and dependence within a family, and that to argue that it is would be to ignore the society that we have become.<sup>103</sup> Adopting such an approach would have a more invasive effect on the South African family law than the adoption of the model of contextualised choice, considering that all spousal benefits will have to be provided to domestic partnerships and not only those based on need.

Two criticisms can be leveled against the functional approach to family law. The first problem that confronts the proponents of the function-over-form approach is the uncertainty regarding the prerequisite of an adequate "familial nexus". For example, should this familial nexus be proved in addition to the existence of a domestic partnership? How must one determine if such a nexus exists? What factors should be taken into account? How does one determine if the familial nexus is sufficient to render the refusal of spousal benefits manifestly unfair? In contradistinction to this, the contextualised model of choice requires no further proof in addition to the existence of a domestic partnership.

The second, probably more serious critique, is based on the fact that by providing domestic partners with all the rights and benefits that attach to marriage (whether based on need or not), the functional approach to family law erodes the established differences between marital relationships and domestic partnerships. This is not insignificant given the considerable judicial<sup>104</sup> and academic<sup>105</sup> insistence that domestic partnerships cannot be equated with marriage. As was stated by Sachs J in his minority decision in *Volks v Robinson*:<sup>106</sup>

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<sup>103</sup> Lind 2005 *Acta Juridica* 111.

<sup>104</sup> See eg *Volks v Robinson* 2005 5 BCLR 446 (CC) para 123.

<sup>105</sup> See Schwellnus *Legal Implications of Cohabitation* 223-229; Sinclair *Law of Marriage* 292-293; and Smith 2010 *PELJ* 281-285.

<sup>106</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) para 154.

Just as the choice to marry is one of life's defining moments, so, it is contended, the choice not to marry must be a determinative feature of one's life.

And also by Mokgoro and O'Regan JJ:

... marriage is a particular form of relationship, concluded formally and publically with specified and clear consequences. Many people who choose to cohabit may do so specifically to avoid those consequences. In our view, the legislature is entitled to take this into account when it regulates cohabitation relationships.<sup>107</sup>

In support of this assertion, Sinclair argues that the law of domestic partnerships should preserve cohabitation as an alternative to marriage while recognising that the weaker parties at the breakdown of the relationship deserve protection.<sup>108</sup> This sentiment is echoed by Schwellnus,<sup>109</sup> who contends that domestic partnership regulation should rather clarify the position of domestic partners than intensively regulate their respective legal positions. The legislative intervention must, however, ensure that it grants protection to vulnerable partners who would otherwise be left destitute at the termination of the relationship.<sup>110</sup> According to Schwellnus, this does not include extensive (if any) proprietary rights to be extended to domestic partners.<sup>111</sup>

The Smith model would seem to have attributes of both the contextualised model of choice and the functional approach to family law. While it recognises that domestic partners should be able to rely on needs-based claims in line with the principles of the contextualised model of choice, it goes further by also providing them with the ability to rely on claims which are, strictly speaking, not based on need. Despite mimicking the functional approach to family law in this latter regard, the Smith model cannot, however, be described as a purely functional approach. Unlike the function-over-form approach in terms of which partners would automatically be able to claim all spousal benefits, the Smith model requires domestic partners to satisfy certain requirements before they can claim.

Despite the more onerous burden of proof referred to above, the functional tendencies of the Smith model make it vulnerable to the same criticisms as those that were raised

<sup>107</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) para 123.

<sup>108</sup> Sinclair *Law of Marriage* 292-293.

<sup>109</sup> Schwellnus *Legal Implications of Cohabitation* 223-231.

<sup>110</sup> Schwellnus *Legal Implications of Cohabitation* 231.

<sup>111</sup> Schwellnus *Legal Implications of Cohabitation* 227, 229.

against the function-over-form approach. As referred to in the previous paragraph, respect for autonomy remains a powerful argument against the regulation of domestic partnerships.<sup>112</sup> This means that the law should preserve cohabitation as a true alternative to marriage.<sup>113</sup> When considering the model proposed by Smith it can be argued that, like the function-over-form approach, it does not sufficiently differentiate between the regulation of spouses and domestic partners, as both approaches allow domestic partners to rely on claims which are not based on need.

However, Smith argues that his model does not aim to replicate matrimonial property law in domestic partnership regulation.<sup>114</sup> According to him,<sup>115</sup> the protection provided by matrimonial property law should be available only by way of court application and then only where it is necessary to seek such relief. Applying for protection will presumably be necessary in instances where domestic partnership legislation does not provide an effective and well-defined alternative to matrimonial law, and in addition, in the case of unregistered domestic partnerships, where it can be proven that a particular unregistered domestic partner lacked the ability to enforce his or her choice to marry.

#### **4.4 *Proposed model***

As is clear from the discussion above, the functional approach to family law cannot underlie the future recognition of domestic partnerships. This is because of the uncertainty relating to the requirement of a "familial nexus" in conjunction with the fact that the functional approach appears to create a regulatory system which does not sufficiently differentiate between domestic partners and spouses.

Rejecting the function-over-form approach implies that either the contextualised model of choice or the Smith model should underlie the recognition of domestic partnerships in future. The original model of contextualised choice would seem to be the most appropriate model. The reason for rejecting the Smith model is based on the fact that it could possibly lead to a duplication of matrimonial law into domestic

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<sup>112</sup> Sinclair *Law of Marriage* 292.

<sup>113</sup> Sinclair *Law of Marriage* 292-293.

<sup>114</sup> Smith 2010 *PELJ* 285.

<sup>115</sup> Smith 2010 *PELJ* 285.

partnership regulation. While it is true that the Smith model has certain requirements which serve to curb its functional nature, the fact remains that if domestic partners (whether registered or unregistered) could satisfy these requirements they would be able to rely on benefits which are, firstly, not based on need, and secondly, usually reserved exclusively for spouses. The danger in this is that it could lead to a situation where the choice of a domestic partner not to formalise his or her relationship was completely negated, as his or her relationship would for all intents and purposes be equated with a marriage. In contradistinction to this, the contextualised model of choice balances the need of the more vulnerable party proportionately to the autonomy of the stronger party. This contextualised model of choice appreciates that a domestic partnership cannot be equated with a marriage while at the same time it recognises that vulnerable domestic partners should be provided with at least a minimum standard of protection, i.e. the protection of their needs-based claims.

## **5 Does the Draft Domestic Partnership Bill of 2008 sufficiently adopt a contextualised approach to choice?**

### **5.1 *Introduction***

The South African Law Reform Commission (hereinafter "the SALRC") has investigated the formal recognition and regulation of domestic partnerships. The first draft Bill was attached as annexure E to the 2006 SALRC Report on *Domestic Partnerships*.<sup>116</sup> A revised version of this Bill was published in 2008 as the *Draft Domestic Partnerships Bill*.<sup>117</sup> Although the enactment of this Bill has not been forthcoming,<sup>118</sup> it would appear that its enactment is inevitable (albeit in a possibly amended form).<sup>119</sup> According to this Bill, the legislature intends to regulate registered as well as unregistered domestic partnerships.<sup>120</sup> When it is enacted it will provide registered and unregistered domestic

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<sup>116</sup> See annexure E "Domestic Partnerships Act of 2006" attached to the SALRC *Report on Domestic Partnerships*.

<sup>117</sup> *Draft Domestic Partnerships Bill of 2008* (GN 36 in GG 30663 of 14 January 2008).

<sup>118</sup> See Meyersfeld 2010 *CCR* 273, where she states that the current legislative process (pertaining to domestic partnerships) has become stagnated.

<sup>119</sup> For a detailed discussion of the proposed amendments to the *Draft Domestic Partnerships Bill* of 2008, see Smith *South African Matrimonial Law*, specifically chs 10-12.

<sup>120</sup> See chs 3 and 4 of the *Draft Domestic Partnerships Bill* of 2008 (GN 36 in GG 30663 of 14 January 2008).

partners with claims relating to intestate succession, maintenance and the division of property.<sup>121</sup> Registered domestic partners will have to register their relationship in order to receive these benefits, while unregistered domestic partners will be able to claim these benefits on an *ex post facto* (judicial discretionary) basis.<sup>122</sup>

## **5.2 *Recognition of registered domestic partnerships in terms of the Draft Domestic Partnership Bill of 2008***

Before establishing the extent to which the *Draft Domestic Partnerships Bill* gives effect to a contextualised model of choice, it is important to consider whether or not registered domestic partnerships should be included within the ambit of the Bill at all. Since a registered domestic partnership will require a formal process of registration to be recognised, such a partnership should perhaps rather be treated as a formalised union similar to a marriage or a civil union. If not excluded from the Bill, a registered domestic partnership will, like a civil partnership,<sup>123</sup> merely become another alternative to marriage with identical consequences.<sup>124</sup> The application of the Bill should therefore be restricted to the *ex post facto* recognition of unregistered domestic partnerships that are by definition devoid of any formal legal recognition for the duration of their existence.<sup>125</sup> But even if the provisions relating to registered domestic partnerships are not excised from the Bill, it would be unnecessary to consider whether or not these provisions adopt a contextualised approach to choice. It can be argued that by undergoing a ceremony of public commitment, registered domestic partners indicate their intention to attach more extensive consequences to their relationship. There

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<sup>121</sup> See cls 9, 19-20, 22-23 (with reference to registered domestic partnerships) and cl 26 (in relation to unregistered domestic partnerships).

<sup>122</sup> See cls 6 and 26 of the *Draft Domestic Partnerships Bill* of 2008 (GN 36 in GG 30663 of 14 January 2008), respectively.

<sup>123</sup> A civil partnership is one of two types of civil unions recognised in terms of the *Civil Union Act* 17 of 2006 – the other being a marriage: see the definition of a "civil union partner" in s 1 of the *Civil Union Act* 17 of 2006. Also see Smith and Robinson 2010 *PELJ* 65. Smith and Robinson 2010 *PELJ* 65 do, however, address the fact that there are some important differences between registered domestic partnerships and civil partnerships eg that the default proprietary system between the two forms of partnership differs.

<sup>124</sup> See *inter alia* Bilchitz and Judge 2007 *SAJHR* 297; Bakker 2009 *THRHR* 18-19; Smith *South African Matrimonial Law* 783-785; and Smith and Robinson 2010 *PELJ* 65-67.

<sup>125</sup> Smith *South African Matrimonial Law* 183; Smith 2013 *SALJ* 537; and Skelton and Carnelley *Family Law* 208.

would therefore be no justification to restrict claims by registered domestic partners to those based on need alone.

In the light of the above, it remains only to be investigated if the Domestic Partnerships Bill accords with a contextualised approach to choice in relation to unregistered domestic partnerships.

### ***5.3 The model of contextualised choice and unregistered domestic partners***

The contextualised model of choice proceeds from the premise that domestic partners should be allowed to succeed only with needs-based claims against each other. The Bill satisfies this criterion by providing unregistered domestic partners with both maintenance claims and, albeit less certainly, claims relating to intestate succession. What is problematic, at least if a contextualised approach to choice is adopted, is that the Bill also entitles unregistered domestic partners to claim the division of joint property and the transfer of separate property at the termination of their relationship.<sup>126</sup> It is thus contended that there are at least two reasons why the Bill cannot be reconciled with the contextualised model of choice as far as unregistered domestic partnerships are concerned:

(a) Allows for non needs-based claims

As was explained earlier, the difference between needs-based and non needs-based claims is based on the fact that needs-based claims fulfil a social objective while non needs-based claims do not. Furthermore, it was expressly held by Gonthier J in the *Walsh* case<sup>127</sup> that the division of assets does not fulfil a social objective as it merely "... aims to divide assets according to a property regime chosen by the parties". As such, the court concluded that "... the decision to live together, *without more*, is not

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<sup>126</sup> See cl 26 and 32 of the *Draft Domestic Partnerships Bill* of 2008 (GN 36 in GG 30663 of 14 January 2008).

<sup>127</sup> *Nova Scotia (Attorney-General) v Walsh* 2002 4 SCR 325 para 204. This point of view was subsequently referred to with approval by Sachs J in *Volks v Robinson* 2005 5 BCLR 446 (CC) para 160.

sufficient to indicate a positive intention to contribute to and *share in each other's assets and liabilities*".<sup>128</sup>

Since unregistered domestic partners will indeed be living together "without more," there is no justification for them sharing in each other's assets and liabilities. As such, one can contend that the Bill, by providing unregistered domestic partners with the possibility of non needs-based claims, infringes on the conceptual core of the contextualised model of choice.

(b) Negates personal choice

If one has regard to the benefits provided by the *Domestic Partnerships Bill*, it becomes clear that the Bill treats unregistered domestic partners not only as if they were spouses, but that it may in fact (once enacted) treat them even better than spouses. This is especially true if one considers clause 32 of the Bill, as it seemingly affords a court with a discretion to divide joint and separate property which extends much further than the discretion allowed to courts at the divorce of spouses.<sup>129</sup>

As far as spouses are concerned, property division is determined mainly with reference to the matrimonial property regime chosen by the spouses. Section 7(3) of the *Divorce Act*<sup>130</sup> gives a court some leeway to temper the effects of the chosen matrimonial property regime by ordering a redistribution of assets. The discretionary powers of the court to order a redistribution of assets are, however, limited in the sense that the powers apply only to civil marriages that comply with the prerequisites contained in section 7(3) of the *Divorce Act*,<sup>131</sup> namely, that the marriage was concluded prior to 1 November 1984<sup>132</sup> and that the marriage was concluded out of community of property without any form of profit sharing.<sup>133</sup>

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<sup>128</sup> *Nova Scotia (Attorney-General) v Walsh* 2002 4 SCR 325 para 154 (own emphasis added).

<sup>129</sup> See *inter alia* s 7(3) of the *Divorce Act* 70 of 1979.

<sup>130</sup> *Divorce Act* 70 of 1979.

<sup>131</sup> *Divorce Act* 70 of 1979.

<sup>132</sup> Or 2 December 1988 in the case of blacks.

<sup>133</sup> Section 7(3)(a) of the *Divorce Act* 70 of 1979. These comments are applicable to civil marriages only. After the *Gumede* decision courts can now order redistribution in all customary marriages irrespective of when the marriage was concluded or the matrimonial property regime chosen by the parties. See *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (SCA) paras 43, 59.

The *Domestic Partnerships Bill* does not limit the redistribution of assets between unregistered domestic partners in a similar manner.<sup>134</sup> Instead, the discretion provided for in terms of clause 32 is subject only to the court's considering the order just and equitable by reason of the fact that one partner made direct or indirect contributions to the property or maintenance of the other partner's estate.<sup>135</sup>

By treating unregistered domestic partners in almost all respects as spouses (and in some cases even better than spouses), it is contended that the *Domestic Partnerships Bill* completely ignores the choice of the partners not to marry. In addition to this apparent infringement of personal autonomy, the Bill also seems to create a regulatory system which is not a true alternative to matrimonial law. As already mentioned before, this is not an insignificant defect considering the overwhelming judicial and academic insistence that cohabitation must be preserved as a true alternative to marriage. As such, the Bill in its present form may unjustifiably infringe on the autonomy of one or both of the partners and as a result suffer from a fatal constitutional defect.

## 6 Conclusion

In order to align the *Domestic Partnerships Bill* with the contextualised model of choice, which was determined to be the best regulatory foundation for the future recognition and regulation of domestic partnerships, it is recommended that clauses 26 and 32 of the Bill be redrafted. The proposed amendments must have the effect of removing the possibility for unregistered domestic partners to claim the transfer of property.

The removal of proprietary claims from the *Domestic Partnerships Bill* will not leave unregistered domestic partners without any form of protection. Firstly, with regard to property jointly owned, unregistered domestic partners would still be able to claim

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<sup>134</sup> This has led Bakker 2013 *PELJ* 139 to conclude that the *Domestic Partnerships Bill* of 2008 places registered domestic partners in a more favourable position than their married counterparts (at least with regard to spouses married in terms of the *Marriage Act* 25 of 1961 or the *Civil Union Act* 17 of 2006). It is contended that although Bakker's remarks was made within the context of registered domestic partnerships the same rationale applies in the present context.

<sup>135</sup> Cl 32(5) of the *Draft Domestic Partnerships Bill* of 2008 (GN 36 in GG 30663 of 14 January 2008).

division by instituting the *actio communii dividundo*.<sup>136</sup> In terms of this action the court will divide the joint property according to the partners' respective shares. Secondly, an unregistered domestic partner will be able to claim a share in separate property held by the other partner if he or she can prove the existence of a universal partnership.<sup>137</sup> Failing that, a partner who has contributed to the separate property of the other domestic partner will possibly be able to redress the situation by using the claim for unjustified enrichment.<sup>138</sup> While unregistered domestic partners would thus not enjoy protection on a scale similar to that of spouses, they would still have some recourse in terms of the common law.

By limiting unregistered domestic partners (who have established a reciprocal duty of support) to needs-based claims, the law would be providing the much needed additional protection for the most vulnerable of the partners, while at the same time acknowledging the reality of their choice to live together "without more".

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<sup>136</sup> See generally Van der Walt and Pienaar *Law of Property* 56-57; Mostert and Pope *Law of Property* 100; and Van Schalkwyk and Van der Spuy *Law of Things* 199.

<sup>137</sup> See eg Smith *South African Matrimonial Law* 369-370; Heaton *Family Law* 46; and Skelton and Carnelley *Family Law* 217.

<sup>138</sup> Hutchings and Delport 1992 *De Rebus* 123; Smith *South African Matrimonial Law* 382; Heaton *Family Law* 247; and Skelton and Carnelley *Family Law* 217.

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## **Legislation**

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*Domestic Violence Act* 116 of 1998

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*Insolvency Act* 24 of 1936

*Intestate Succession Act* 81 of 1987

*Maintenance of Surviving Spouses Act* 27 of 1990

*Marriage Act* 25 of 1961

## **LIST OF ABBREVIATIONS**

CCR	Constitutional Court Review
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
Stellenbosch LR	Stellenbosch Law Review

THRHR

Tydskrif vir die Hedendaagse Romeins-Hollandse Reg

**DOMESTIC PARTNERS AND "THE CHOICE ARGUMENT": *QUO VADIS?*****B Coetze Bester and A Louw\*****SUMMARY**

In the absence of formal legal recognition, domestic partners are required to regulate the consequences of their relationship by utilising alternative regulatory measures and remedies which are, for the most part, inadequate. The traditional justification used to differentiate between domestic partners and spouses is known by some as the choice argument. The choice argument is based on the rationale that persons who choose not to marry cannot claim spousal benefits. It understands choice narrowly as it takes into account only an objective legal impediment to marriage. As such, it has been the driving force behind the non-recognition of heterosexual domestic partnerships. Same-sex domestic partnerships, on the other hand, have until recently been recognised under the choice argument on an *ad hoc* basis, as there existed an objective legal impediment to their marriage, namely their sexual orientation. According to the majority of legal commentators the enactment of the *Civil Union Act* 17 of 2006 removed the objective legal impediment against same-sex marriage. They therefore argue that the choice argument should now be applied to both heterosexual and same-sex domestic partners equally. However, the Constitutional Court has expressed some doubt as to the correctness of this assumption. Taking into consideration the choice argument's narrow understanding of choice, together with the possible unfair discrimination caused by its application, an alternative theoretical basis for the future recognition and regulation of domestic partnerships had to be found. Three possible solutions were investigated, namely the model of contextualised choice, the function-over-form approach, and finally the Smith model. Because of the invasive effect of the latter two approaches, this study advocates for the adoption of the model of contextualised choice. If adopted it would mean that the subjective

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considerations of domestic partners will be taken into account and they will be afforded with a minimum degree of protection based on need. After having accepted this approach the study had to determine to what extent proposed legislation adopts a contextualised approach to choice. Accordingly, it had to be determined whether proposed legislation provides domestic partners with need-based claims while still upholding the established differences between domestic partnerships and formalised relationships. It was ultimately concluded that the proposed legislation would have the effect of blurring the differences insofar as registered domestic partnerships were concerned, the reason being that such a partnership comes into existence through a public expression of the partners' commitment and, as such, does not really fall within the ambit of the definition of a domestic partnership in the narrow sense of the word. With regard to unregistered domestic partners, it was concluded that the proposed legislation went too far in protecting unregistered partners' proprietary rights (even if only on an *ex post facto* basis) as these claims were not based on need. It was therefore recommended that the proposed legislation be redrafted. If not redrafted the proposed legislation would have the effect not only of infringing on the autonomy of one or both of the partners but also of creating a regulatory system which does not fully appreciate the differences between marriage and domestic partnerships.

**KEYWORDS:** domestic partners; domestic partnerships; choice argument; contextualised model of choice; functional approach to family law; *Draft Domestic Partnerships Bill* of 2008.