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Human dignity features prominently in various international human rights instruments and forms the basis for the protection of family life.[1] As contemplated by our Constitution,[2] family life can be provided in various ways and the right to marry and purse family life is an inalienable elementary human right.[3] It therefore follows that the right to regulate one's own family life and enforce their own conceptions of marriage resonates with the notion of human autonomy and individual freedom.[4] Whilst this holds true, it remains important to note that the institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society. It is therefore the state's role to ensure that the members of these institutions are well protected.[5] On the other hand, the law ought to champion the ideals of one's freedom of choice and to ensure that one's autonomy is protected from invasion, by both the state and others. [6] Autonomy, however, can arguably be seen as a concept that does not quite fit comfortably into some of the central themes of family law.[7] This is clearly illustrated in cases of Domestic Partnerships. With the notion of autonomy as the central theme, the essay reflects on Domestic Partnerships in South Africa and argues that the law ought to intervene and attach consequences in cases of domestic partnerships. The essay will show that this is not only occasioned by the need for equitable distribution of assets upon the dissolution of the partnership but the increased prevalence of domestic partnerships demands that such measures be implemented. The essay will further interrogate the notion of autonomy in a family law context and will endeavor to demonstrate that given the South African context, opting not to marry is not always a matter of choice as so often argued. Drawing on the *Volks v Robinson* case[8] as well as Canadian cases the essay highlights some of the existing deficiencies of the regulation of Domestic Partnerships as well as our current Domestic Partnership Bill.[9]

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[1] The Universal Declaration of Human Rights. The African Charter on Human and Peoples' Rights

[2] Constitution of South Africa,1996.

[3] De Vos and Barnard "Same Sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an ongoing saga" (2007) 124 *SALJ* at 795.

[4] B Smith *The Development of South African Matrimonial Law with Specific Reference to the Need for and Application of a Domestic Partnership Rubric* (2009) 315.

[5] Ibid.

[6] A Donchin " Understanding autonomy relationally: Toward a reconfiguration of bio-ethical principles" (2001) 26 *Journal of Medicine and Philosophy* at 372.

[7] J Herring *Relational Autonomy and family law* (2010) at 259.

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

[9] Domestic Partnership Bill, 2008.

The right to family life is an internationally recognized right that has been enunciated in various international human rights documents.[10] The International Covenant for instance, describes the family as the "natural and fundamental group unit of society that is worthy of protection by both the society and state."[11] Although our constitution makes no express provision for the right to family life, it was confirmed in the *Certification judgment*[12] that other rights and values expressed in the Bill of Rights provide further support to the protection of family life in our constitution.[13] This right however, was denied to many in the past years and particularly during the dark Apartheid Era when the only recognized "family" form was a legal marriage with its privileges reserved only for monogamous, heterosexual, same-race unions.[14] Marriage was regarded as the cornerstone of society, "a fixed traditional structure essential for the raising of children and a healthy family."[15] The past few years have however witnessed the institution of marriage undergo significant changes, while divorce was previously a rather rare occurrence; it has today become a common and widespread reality.[16] The move from fault-based to no-fault grounds for divorce is perhaps the most noticeable change in matrimonial property laws.[17] Marriage in its various constructions has enjoyed considerable privileged status, this is evidenced in the *Dawood case*[18] where marriage was described to be a "social institution of vital importance."[19] The same, however, cannot be said for Domestic Partnerships as they previously enjoyed almost no recognition and very little legal status was attached to them.[20] Moreover, as far as proprietary matters apply, the common law made no provision for life partners to share in each other's property. These consequences are left to be regulated by the parties themselves

[10] A Barratt *Law of Persons and the Family* at 167.
[11] International Convent on Civil and Political Rights (1967) 6 ILM 368, Article 23.
[12] *Chairperson of the Constitutional Assembly, Ex Parte: In re Certification of the Constitution of South Africa,* 1996 (4) SA 744 (CC).
[13] Ss 9,10 and 28(1)(b) A Barratt *Law of Personas and the Family* at 168.
[14] Meyerson, Denise *Who's in and who's out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa* in J Brickhill et. al (eds) Constitutional Court Review (2010) at 302.
[15] B Smith *The Development of South African Matrimonial Law with Specific Reference to the Need for and Application of a Domestic Partnership Rubric* (2009) LLD Thesis at 185.
[16] South African Law Reform Commission (SALRC) Report on Domestic Partnerships (2006a: para at 3. Barratt A Law of Personas and the Family at 325.
[17] *Schwartz v Schwartz* 1984 (4) SA 467 (A).
[18] *Dawood v Minister of Home Affairs, Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC).
[19] Ibid at para 30.
[20] supra (note 14) .

either contractually, through the principles of unjustified enrichment or by means of the law of agency.[21]

Smith[22] describes domestic or life partners as:

> "Persons who are not spouses in a purely religious marriage; and are involved in permanent (intimate) relationships that have not been formalized in terms of the *Marriage Act,*[23] the *Recognition of Customary Marriages Act*[24] or the *Civil Union Act.*[25]

Our current legal position relating to life or domestic partnerships is marked by inconsistencies, uncertainty and remains largely fragmented.[26] This is especially unsettling as the 2001 South African consensus indicated that over 2.4 million people were in domestic partnerships.[27] Needless to say, the increase of domestic partnerships is a clear indication of the evolving mores of our society and further attests to the reality that these non-formalized relationships serve a pivotal role in meeting the economic, production as well as financial needs of its members.[28] This preferred form of a family unit is furthermore no new concept and has become increasingly prevalent not only within our boarders but has also become a world-wide phenomenon. For instance, in the United States of America, it was noted that over forty percent of couples living together were not married.[29] The Denmark statistics indicated that just over one third of women

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[21] Ibid.
[22] B Smith and J Robinson An Embarrassment of riches or a profusion of confusion? An Evaluation of the Continued existence of the *Civil Union Act 17 of 2006* in light of the prospective Domestic Partnerships Legislation in South Africa (2010) 13 *PELJ* at 38.
[23] The Marriage Act 25 of 1961.
[24] Recognition of Customary Marriages Act 120 of 1998.
[25] Civil Union Act 17 of 2006.
[26] Supra (note 22) at 38.
[27] SALRC *Discussion paper 104 (Project 118): Domestic partnerships* http://www.justice.gov.za/salrc/dpapers/dp104.pdf at para 2.1.9.
[28] B Goldbatt "Regulating Domestic Partnerships – A necessary step in the Development of the South African Family Law" (2003) 3 *SALJ* at 610.
[29] Supra (note 27) at para 2.1.7. The SALRC obtained these stats from *J Haskey and K Kiernan "Cohabitation in Great Britain - Characteristics and Estimated Numbers of Cohabiting Partners" 1989* ***Population Trends*** *58 referred to by Singh* ***CILSA*** *1996 at 317.*

who were below the age of thirty were living together with their partners without the ties of marriage.[30]

Given the gender and social inequalities that exist within our South African context, it is difficult to understand why unregistered domestic partnerships continue to be largely outside the security of family law and clogged with uncertainties.[31] Although there have been positive developments and progress made by our courts and legislature with regards to extending protection to same sex marriages[32], Muslim marriages,[33] customary marriages as well as civil partnerships,[34] there remains very limited protection extended to couples who, particularly in heterosexual domestic relationships, *choose* not to register a civil partnership, or lack the power to negotiate the registration of the relationship. To this end, the Domestic Partnerships Bill is an attempt at countering this sad reality; however movement towards legislative change has been relatively stagnant and dormant.

This lacuna in our current legal framework has a negative impact on woman; the most vulnerable members of society. These issues were extensively discussed in *Volks v Robinson,*[35] a case that has received much criticism in the South African legal community.

Mrs Robinson and the late Mr Shandling had been in a monogamous and committed permanent relationship for sixteen years. They had a shared household and had undertaken mutual duties of support.[36] Mr Shandling had played the role of bread-winner and Mrs Robinson that of a home-maker and care giver as she would see to the daily running of the household and would nurse and take care of Mr Shandling who suffered from bi-polar disorder/maniac depression.[37] Upon Mr Shandling's death, Mrs Robinson sought to claim maintenance against Mr Shandling's estate in terms of the Maintenance of Surviving Spouses Act[38]. She was denied this claim on grounds that she was not a "survivor" entitled to maintenance as per the terms of the Act.[39] The Court found

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[30] Ibid.
[31] Supra (note 22) at 39.
[32] *Fourie v Minister of Home Affairs*2005 (3) SA 429 (SCA).
[33] *Hassam v Jacobs NO* & *Others* 2009 5 SA 572 (CC).
[34] Supra (note 25).
[35] *Volks v Robinson* (note 8) .
[36] Ibid at para 3 – 6 and 103.
[37] Ibid.
[38] Act27 of 1990.
[39] Ibid.

that section 2(1) of the Act[40], which conferred benefits on surviving 'spouses' but not on the survivors of heterosexual life partnerships, did not unfairly discriminate on the ground of marital status against the survivors of such partnerships.[41] In reaching this conclusion, the Court reasoned that heterosexual life partners do not have maintenance obligations arising by operation of law and the freedom and right to marry was one that had always been afforded to them.[42] Although the fact that the couple had indeed been life partners and had entered into a kind of 'consortium omnis vitae' was not in dispute, the majority of the court nonetheless elected to adopt the formal approach in reaching their conclusion thus failing to give effect to the aims of substantive equality.[43] It was further reasoned by the court that the very objective of the Act[44] was to extend the maintenance obligations of parties to a marriage beyond the death of one of the parties. Since unmarried cohabitants do not have such maintenance obligations, the majority held that the Act's failure to impose such an obligation on the estate of an unmarried cohabitant after death was not unfair.[45] Ngcobo J further emphasized the fact that the protective regime which applies to married people was one that was also open to cohabitating life partners since the option to marry was always available to them.[46] Furthermore, it was highlighted that for the law to step in and impose legal consequences of marriage against the will of one or both of the parties concerned would constitute disrespect and an imposition upon the wishes of the one party upon the other.[47]

It is submitted that this line of reasoning presents a convincing argument as it speaks to the very essence of freedom and autonomy, a value which our constitution seeks to uphold.[48] It furthermore calls for the respect of an individuals' intimate sphere of their lives and maintains that people who choose not to marry exercise their right to freedom of choice and as a result, the state ought to refrain from encroaching upon their ability to regulate their own affairs.[49] While this may hold true, the essay will now turn to argue that the purpose of family law is to protect vulnerable members of families and will demonstrate that given the nature of our social and

[40] Ibid.
[41] *Volks v Robinson* (note 8) at para 56 .
[42] Ibid.
[43] ibid at para 58 . Supra (note 10) at 426.
[44] Maintenance of Surviving Spouses Act27 of 1990.
[45] *Volks v Robinson* (note 8) at para 56 – 58.
[46] *Volks v Robinson* (note 8) at para 91 – 92.
[47] *Volks v Robinson* (note 8) at para 94.
[48] *Barkhuizen v Napier* 2007 (5) SA 323 (CC). Supra (note 6) at 364.
[49] Supra (note 6) at 263.

gender dynamics, failure to provide adequate measures to regulate these relationships only increases the vulnerability of those in domestic partnerships.[50] This will be considered against the backdrop of the "autonomy argument" that is often leveled against the regulation of cohabitation. The essay will draw from the Canadian Courts in order to further support its contention.

It is often argued that people who choose not to marry do so out of their own free will and to this end, their autonomy or free choice ought to be respected.[51] This view is largely supported by liberalists who also hold that "our society is experiencing over-legislation."[52]It is submitted that this view cannot be supported as it fails to take into account the various social-economic dynamics that exist within our South African context and consequently assumes that the decision not to marry is a simple matter of unfettered choice. Indeed, as Sachs J pointed out, the option to marry, for many of those in these non-formalized interpersonal relationships is merely illusionary and exists only in theory.[53] In addition to this, research indicated that the proliferation of domestic partnerships was partly as a result of the poverty that is so rife in South Africa.[54] Goldbatt neatly describes this reality in the following terms:

> "The libertarian presumption of free choice is incorrect. It is itself premised on the idea that all people entering into family arrangements are equally placed. This is not so. Men and women approach intimate relationships from different social positions with different measures of bargaining power. Gender inequality and patriarchy result in women lacking the choice freely and equally to set the terms of their relationships. It is precisely because weaker parties (usually women) are unable to compel the other partner to enter into a [marriage or] contract or register their relationship that they need protection. The research showed that it usually suits men to neither marry nor formalize the partnership in any way, so that they might have the freedom to take what they want from the relationship

[50] Supra (note 28) at 610 -611.
[51] *Volks v Robinson* (note 8) at 94 and 154.
[52] Supra (note 28) at 615 – 616.
[53] *Volks v Robinson* (note 8) at para 155 - 162.
[54] Supra (note 28) at 610-613.

free of any concomitant obligations. The illiteracy, ignorance and lack of access to the law and other resources compounds the already difficult position facing many women."[55]

Social practices and state action tend to reflect societal values. Thus, the power of the state to structure and affect intimate relationships is justified as it is the vulnerable in these non-formalized relationships it seeks to protect.[56] Furthermore, Jonathan Herring[57] argues that privileging individualist autonomy can result in a manner that places women at a greater disadvantage as it may reinforce the "unattached unencumbered person" as the norm.[58] In grappling with the issue of autonomy and non-interference by the state, it is important to consider the haunting words of Canadian Supreme Court Judge L'Heureux-Dubé who correctly pointed out that "the flip side of one's person's autonomy is often another's exploitation….one cannot speak of "autonomy" or "free choice" without first asking whose autonomy one seeks to preserve, and at what cost it is to others."[59]

It is proposed that a refined and flexible approach, cognizant of the realities and social dynamics of the South African society ought to be adopted when adjudicating matters.[60] Smith suggests that when settling disputes, a distinction between claims based on need and those pertaining to property should be drawn. He points out that this is the same approach suggested by Gonthier J in the Supreme Court of Canada in the case of *Nova Scotia (Attorney General) v Walsh.*[61] In this case Gonthier J relied on s 15(1) of the *Canadian Charter of Rights and Freedoms*[62] to reason that to obtain spousal assets without giving due consideration to need raises the spectra of forcible taking in disguise, even if, in particular circumstances, equitable principles may justify it.[63] Smith argues that the same would hold true in the South African context and subsequently submits that when adjudicating matters based on property disputes, an inquiry into the partner's explicit and intentional choice not to formalize their relationship would be necessary in order to

[55] Supra (note 28) at 616.
[56] Supra (note 4) at 264.
[57] Ibid.
[58] Ibid.
[59] *Miron v Trudel* [1995] 2 S.C.R. 418 at para 101.
[60] Supra (note 4) at 273.
[61] *Nova Scotia (Attorney General) v Walsh* 2002 SCC 83, 32 R.F.L. (5th) 81.
[62] *Canadian Charter of Rights and Freedoms*
[63] *Nova Scotia (Attorney General) v Walsh* (note 59) at para 204. *Volks v Robinson* (note 8). Sachs J at 158 – 162.

determine if matrimonial property law rules should be applied to settle the dispute. In contrast to this, if the claim be based on need (as was Mrs Robinson's claim[64]) the choice of the partners would not be of utmost relevance and the only determination would be whether there existed a reciprocal duty of support for the partners.

Although this approach may demand a slight reconstruction of the Domestic Partnerships Bill as it currently stands, it is observed that similar legislation passed in other jurisdictions such as New Zealand, Australia, Trinidad and Canada proved successful in assisting vulnerable individuals, while preserving the distinctive rights and obligations of marriage.[65] Additionally, such laws assist the court in dealing with the complex issues that arise when domestic partnerships break down. The 2009 Cohabitation Bill of the United Kingdom for instance, has proven to be successful in ensuring fair distribution of assets and promoting the ability of each party to become self-supporting without unreasonably burdening the other.[66]

It is submitted that providing adequate legal protection to domestic partnerships will not deter people from marrying, neither will it undermine the sanctity of marriage. Contrary to this notion, it was observed in jurisdictions where legal protection had been extended to cohabiting partners that there was no evidence of any resulting decline in marriage rates.[67] With this said, Sachs J words are noted:

> "...the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not be astute to penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them."[68]

Over and above the *Civil Union Act,*[69] developments occasioned by both our Courts and the Legislature in recognising life partnerships by way of the Domestic Partnerships Bill[70] must be

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[64] *Volks v Robinson* (note 8).
[65] B Meyersfeld *If you can see, look: Domestic partnerships and the law* in J Brickhill et. al (eds) Constitutional Court Review (2010) at 293.
[66] ibid.
[67] Ibid.
[68] *Volks v Robinson* (note 8) at para 156.
[69] Supra (note 9).

commended. What calls for greater debate and interrogation however, is the impact of its enactment on the current state of affairs, whether it provides more consistent and principled legal position and perhaps thought should be given to amending some of its provisions.

In conclusion, it is observed that the demands of economic and social survival have resulted in a redefinition of family forms and the significant increase in domestic partnerships attests to this. Formal Apartheid policies, migrant labour, illiteracy and ignorance of the law are factors that have profoundly attributed to this proliferation. Additionally, the reality of gender power imbalances and women disempowerment as was reflected in the *Volks case* adds on to these. Going forward, it is submitted that the intention to cohabit should be considered in isolation with the intention to be bound by law. This approach is premised on the belief that the role of the law is to assist and defend those with unequal access to power, the vulnerable and weak. Equally, autonomy should not serve to impede the law from protecting the defenseless and peril. Instead, the notion of autonomy ought to be interpreted in a manner that will protect women's interests more effectively and in keeping with our social realities. It is accepted that the call for the respect of the private sphere of families ought to be respected, however it should be understood that the family is contained within the larger society, therefore, the state should seek to foster conditions where one can exercise their autonomy by entering a relationship that enjoys support and protection by the law and society, with the assurance that one will not be disadvantaged by entering such a relationship.[71]

[70] Supra (note 25).
[71] Supra (note 7) at 263.

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