

## CHAPTER 2: SOCIAL AND POLITICAL CONTEXT

### 2.1 Incidence of domestic partnership

2.1.1 The domestic partnership is not a new concept. An early form of the opposite-sex domestic partnership was the concubinage.

2.1.2 The Roman concubinage was a union short of marriage, which was usually entered into between a man of rank and a woman of lower status. Marriageable age and consent were required, and a man who had a concubine could not have a legal wife or another concubine, but there was no *dos*, as in marriage.<sup>1</sup> The main distinguishing factor between the two institutions lay in the *maritalis affection*, viz the intention to be married.<sup>2</sup> Unlike a promiscuous union, the *concubinatus* carried no social stigma. Children were natural children, not bastards.<sup>3</sup>

2.1.3 The Christian emperors did not look upon concubinage in a favourable light but did accept its existence without recognising its legality. Justinian regarded concubinage as an *inaequale coniugium* or second-rate marriage with legal consequences, if certain requirements were met.<sup>4</sup>

2.1.4 The concubinage relationship was abolished in the Byzantine kingdom by Basilus the Macedonian and given the death-blow by Emperor Leo VI, the philosopher, in his 91<sup>st</sup> Novellae where he stated:

It shall not be lawful to keep Concubines. The law which authorised men who did not blush at such a connection to keep concubines was conducive to neither modesty nor virtue. Hence we do not permit the error of former legislators to disgrace our government, and we hereby repeal this law forever. For, in accordance with the precepts which we have received from God, and which are becoming to Christians, we prohibit such a practice as being injurious not only to religion but also to nature. And, indeed, if you have a spring and the Divine Law invites you to drink from it, do you prefer to resort to a muddy pool, when you can obtain pure water? And even though you have no such a spring, you still should not make use of what is forbidden.

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<sup>1</sup> Hahlo *Fiat Iustitia*, at 245.

<sup>2</sup> Labuschagne E 1989 *TSAR*, at 662.

<sup>3</sup> Hahlo *Fiat Iustitia*, at 260 fn 66.

<sup>4</sup> Labuschagne E 1989 *TSAR*, *ibid*.

It is not difficult to find a consort for life. (See Scott XVII The Civil Law 276).<sup>5</sup>

2.1.5 In so far as same-sex relationships are concerned, we know that at all stages of human existence people of the same sex have been erotically and emotionally attracted to each other and have found affinity and bonding and commitment with each other - on all continents, in all peoples, amongst all cultures and at all times and all places.<sup>6</sup>

2.1.6 Roman society did not distinguish between homosexual and heterosexual persons and until the thirteenth century Christianity did not display disapproval of homosexuality.<sup>7</sup> The Canon law that spread through Western Europe in the Middle Ages, however, carried with it the disdain for homosexuality and profoundly influenced the law of the countries reached. It is submitted that it is this remnant of a religion-based legal system that still influences most countries' refusal to recognise same-sex marriages.<sup>8</sup>

2.1.7 In recent times, the patterns of marriage, divorce, and living together without marriage have been changing. That the incidence of domestic partnership is growing throughout the world is not a disputed proposition.<sup>9</sup> Family lawyers across the globe will tell of the increase in the number of palimony suits. In America forty-five per cent of all couples living together are unmarried.<sup>10</sup> In Sweden, nine out of ten couples marrying for the first time already live together, while in Denmark, more than one-third of women in their early twenties are living with a partner without the ties of marriage. The Scandinavian pattern appears to be emerging in Austria, Belgium, France and across the channel, in Scotland and Wales as well.<sup>11</sup> As a rough estimate, around one million heterosexual couples are living together without being married in Britain,<sup>12</sup> while in France the number has reached two and a half

<sup>5</sup> Labuschagne E 1989 **TSAR**, at 661-662.

<sup>6</sup> Cameron 2002 **SALJ**, at 649.

<sup>7</sup> Pantazis 1997 **SALJ**, at 559.

<sup>8</sup> M van Eeden "State involvement and religion in marriage: its effect on the recognition of same-sex marriage" Submission for the Ismael Mahomed Essay Competition South African Law Commission August 2001, at 9.

<sup>9</sup> See for example Sinclair & Heaton **Marriage Law**, at 269; Rodriguez Cohabitation, Labuschagne 1989 **TSAR**, at 371 and Labuschagne E 1989 **TSAR**, at 649.

<sup>10</sup> J Haskey and K Kiernan "Cohabitation in Great Britain - characteristics and estimated numbers of cohabiting partners" 1989 **Population Trends** 58, referred to by Singh 1996 **CILSA**, at 317; See Sinclair & Heaton **Marriage Law**, at 270 fn 13 and the references therein: In the United States of America the number of people cohabiting increased from just over 500 000 in 1970 to more than 1,1 million in 1978, 1,9 million in 1983 and more than 2,8 million in 1990.

<sup>11</sup> "No frontiers" (1992) 22 **Family Law** 177, referred to by Singh 1996 **CILSA**, at 317.

<sup>12</sup> See Sinclair & Heaton **Marriage Law**, at 270 fn 12 and the references therein: In 1986/7 in the age group 16-59, 12% of men and 14% of women were cohabiting, making up about 900 000 cohabiting couples.

million.<sup>13</sup>

2.1.8 South African statistics also demonstrates the rising trend in domestic partnerships. Even conservative statistics indicate that a very large number of people live in domestic partnerships in South Africa.<sup>14</sup> Statistical data show that only about 40% of Africans and Coloured women are married.<sup>15</sup>

2.1.9 In the 1996 Census the figures for people living together in the different population groups were as follows: African: 1 056 992; Coloured: 132 180; Indian/Asian: 7119; White: 84 027; Unspecified: 8181.<sup>16</sup>

2.1.10 Even allowing for imprecision, we must recognise that there are large numbers of people in dependence-producing relationships who are ignored by the law.<sup>17</sup> The significant numbers involved mean that the Napoleonic adage that “cohabitants ignore the law and the law ignores them” is no longer acceptable.<sup>18</sup>

2.1.11 It should be noted that reference is not merely being made to what Kiernan has termed 'nubile' cohabitation: there has been an increase in the numbers living together across all age categories and domestic partnerships are more common among the divorced than among those who have never married.<sup>19</sup> Overall, national statistics show that one in five of all couples cohabit in France as compared with 27% of never-married women and 32% of divorced women between 18 - 49 in Britain.<sup>20</sup>

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<sup>13</sup> Barlow & Probert **WJCL Studies**.

<sup>14</sup> The census of 1996 found 1, 268, 964 people to describe themselves as living together with a partner. This is approximately 5% of the total population over the age of 14 (25,691,803). This is probably a significant undercount for the following reasons: Firstly, many people both cohabit and are married. When asked, they are likely to describe themselves as married rather than as cohabiting because marriage is regarded as more socially acceptable. Secondly, people may not be willing to admit that they are cohabiting because of the (perceived) social stigma attached to cohabitation. It is also important to note that the percentage of cohabitation is based on total population over the age of 14. If only the adult population were included, the percentage should increase significantly.

<sup>15</sup> It is assumed that while many of the remaining 60% of these women live without men, a significant number cohabit with men but do not marry. The figures for Indian and White women show that more than 60% of them are married.

<sup>16</sup> **Population Census Report** No 03-01-11 (1996).

<sup>17</sup> Sinclair & Heaton **Marriage Law**, at 271.

<sup>18</sup> Hutchings & Delport 1992 **De Rebus**, at 122.

<sup>19</sup> Singh 1996 **CILSA**, *ibid*.

<sup>20</sup> L'Insee **Social Trends 1999**, referred to by Singh 1996 **CILSA**, *ibid*.

2.1.12 Domestic partnerships are found under:

- (a) young, never-married (sometimes tertiary educated) persons, who seek freedom from the legal, financial and social constraints of marriage;
- (b) the poorer sections of the population (this is a trend especially noticeable in South Africa); and
- (c) older people choosing the life-style in response to legal, financial, emotional and religious problems.

2.1.13 The increase in cohabitation is indicative of the changing mores. Domestic partnership has come to be accepted by many people and although the moral and social stigma attached to domestic partnership has not disappeared completely it has diminished substantially. The traditional nuclear family is no longer the universal norm.<sup>21</sup>

## **2.2 Reasons why domestic partnerships exist**

2.2.1 Although there is a dearth of empirical data on this point it is assumed that couples cohabit for a number of reasons including the following:

### **a) Parties have chosen not to marry**

2.2.2 People choose not to marry for many reasons. Some are unique to South Africa. The issue of domestic partnership has a particular meaning in South Africa, given our history and socio-economic context. Whereas in a number of developed countries a domestic partnership is a middle class choice, in South Africa it is a real problem outside of the control of most poor women.<sup>22</sup> The following reasons for the existence of domestic partnership have been noted:

#### **(i) Migrant labour and apartheid**

2.2.3 In South Africa a battery of apartheid legislation in many instances shattered families and family life. Influx control, group areas and forced removals, coupled with overcrowding

<sup>21</sup> Sinclair & Heaton **Marriage Law**, at 271.

<sup>22</sup> Goldblatt *Living Together*, at 3.

caused by rapid urbanisation and inadequate housing, have all had an enormous impact on the intimate relationships of black people, often resulting in cohabitation for socio-political and economic reasons.<sup>23</sup>

2.2.4 Migrant labour and apartheid have led to the breakdown of many traditional family arrangements and many couples live together for most of the year in the urban area without marrying (the man often has a rural wife). These women have little legal protection of their property interests in families.<sup>24</sup>

2.2.5 Research indicates that in some urban areas domestic partnerships have "grown up specifically to meet the needs of the isolated migrant men and women". For them domestic living together is cheaper than maintaining separate households. It protects the partners against destitution in times of illness, unemployment<sup>25</sup> or pregnancy. Furthermore, it is considered unnatural, particularly for male migrant workers, to "be alone".

2.2.6 It is interesting to note that the research suggests that the cohabitation relationship which the migrant worker builds up in town is supposed to be temporary in the same sense that town life itself is supposed to be temporary for migrants. Therefore, the urban woman partner must accept the temporary nature of the relationship and must respect the fact that the other partner's main obligation is to support his family in his rural village or town.

2.2.7 More recently it has also become necessary for some women to leave their families behind to search for work. This has resulted in her living in two separate places as well. The fact that children have been forced to live separately from their fathers (and often their mothers as well) causes them to suffer greatly and has significant consequences for stable family life.<sup>26</sup>

## (ii) Poverty and unemployment

2.2.8 Women need men to support them and their children since men usually have better access to jobs, income and accommodation. Women rely on them for their basic needs. Women accept the man's refusal to marry them as well as economic and physical abuse

<sup>23</sup> Sinclair & Heaton **Marriage Law**, at 273.

<sup>24</sup> Goldblatt Living Together, at 3.

<sup>25</sup> Motshogolane for HSRC, at 197 -8, referred to by Sinclair & Heaton **Marriage Law**, at 273.

<sup>26</sup> See CALS Report. The full Report is available from the Centre for Applied Legal Studies Documentation Centre. For more information see <http://wwwserver.law.wits.ac.za/cals/gender/genderindex.htm>.

because their material needs are so great. Women remain in these relationships despite the insecurity they feel.<sup>27</sup>

2.2.9 In research conducted it was found that, generally speaking, domestic partnerships were less common in settled townships and in the formal housing areas and more common in the back rooms and shacks. The prevalence of domestic partnerships seems to be partly related to poverty.<sup>28</sup>

2.2.10 There also appears to be a link in people's perceptions between proper housing and marriage as opposed to informal housing and domestic partnership. In an interview in Pimville two married women said: "People who own formal houses or concrete houses do not cohabit. Once people move to solid houses they get married."

2.2.11 Lack of money for lobola was sometimes cited as a reason for the domestic partnership. A man in Vryberg said: "If I want to marry her it means I have to pay lobola. Marriage is a commitment. You cannot marry if you won't be able to provide for wife and children".<sup>29</sup>

2.2.12 An elderly widow in Vryberg said the following about the problems of poverty and unemployment as causes of domestic partnerships:

People cohabit rather than marry because of unemployment. Most of the young people are unemployed. It could have been different if people, especially women, were employed. They could be independent and not depend on a man for anything. She could buy her own things and a house and look after her own children .... In the past there was a strong community network and people had land to plough on. There was less hunger and people helped each other. Those who were employed in the cities brought something home and those at home worked the fields. There was an exchange of goods and responsibilities. These days things are different. We all rely on money which is difficult to get.

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<sup>27</sup> CALS Report, at 40.

<sup>28</sup> CALS Report, at 36: A woman in Pimville said: "Some girls cohabit because of poverty. The girl will go to cohabit with a man so that she gets something to eat and clothes to wear. These girls find it difficult leave because they are already used to wearing expensive clothes and a meal everyday." Another woman said: "People cohabit because if they do not share a place with fathers of their children, then the man would not pay maintenance. So people cohabit so that the fathers can maintain their children."

<sup>29</sup> CALS Report, at 37.

### (iii) Economic conditions

2.2.13 In the past, in South Africa, couples may have elected to live together in a domestic partnership (rather than marry) because of the obvious tax benefits at a time when married women were the most heavily burdened citizens, or because married women were immediately excluded from the many state or other work-related subsidies. This has changed, yet getting married still has an effect on the woman's chances of a permanent position or promotion<sup>30</sup> and evidence indicates that domestic partnership remains a popular life-style despite the lack of legal rules regulating the rights of partners.<sup>31</sup>

2.2.14 Further, a divorced person or surviving spouse<sup>32</sup> who receives maintenance, pension or income from an annuity may choose a domestic partnership rather than lose the financial benefits of maintenance, pension or annuity on remarriage.<sup>33</sup>

### (iv) The avoidance of the traditional obligations of marriage<sup>34</sup>

2.2.15 An increase in domestic partnerships can be seen in young, tertiary educated, never-married couples. These groups are likely to see domestic partnerships as being free from the legal and social constraints and financial obligations imposed by formal marriage.<sup>35</sup>

2.2.16 People seek companionship and intimacy, and wish to share their domestic lives with each other even where they do not wish to marry.<sup>36</sup> Men benefit from the lack of legal protection of domestic partnerships as they are able to enter and leave relationships very freely and have no obligations to support women or share their property with them.<sup>37</sup>

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<sup>30</sup> Hutchings & Delpont 1992 **De Rebus**, at 122.

<sup>31</sup> Singh 1996 **CILSA**, at 318.

<sup>32</sup> Respondents in the CALS Report said that widows formed relationships with men in their village. A man would then contribute in some way to a woman's household by bringing food that she would cook and then they would eat together. From his side he would help her with agricultural work or chop wood for her. Although they do not actually live together they may even have children together. The widow would benefit from his assistance and enjoy a relationship. She would, however, not remarry or live with him because according to custom she will lose her use of the house in which she lived, which had been the property of her husband. Also, anecdotally, it is well known that woman with husbands in the cities have "boyfriends" who help out around the house.

<sup>33</sup> Sinclair & Heaton **Marriage Law**, at 272.

<sup>34</sup> Holland 2000 **CJFL**, at 22.

<sup>35</sup> Hutchings & Delpont 1992 **De Rebus**, *ibid*; Sinclair & Heaton **Marriage Law**, *ibid*.

<sup>36</sup> CALS Report, at 39.

<sup>37</sup> CALS Report, at 40.

2.2.17 It is furthermore easier to end a cohabiting relationship than to end a marriage. Domestic partners expect fewer "exit costs" to ending the relationship.<sup>38</sup> However, most couples do not engage in crystal-ball gazing at the inception of the relationship and do not have a clear idea which obligations they are consciously choosing to avoid. If they did, one would expect such couples to have entered into a domestic contract rather than risking subsequent claims based on support or unjustified enrichment.<sup>39</sup>

(v) **Avoidance of traditional roles**

2.2.18 The position of women in society has improved dramatically over the past few years and the growing trend towards individualism has led to the woman's economic, social and sexual independence. Independence and equality are of the utmost importance to modern women. Marriage is often associated with male domination.

2.2.19 The traditional marriage is seen to enforce inequality. Domestic partnership, on the other hand, represents a more flexible, free and equal relationship. This has become an important factor in choosing domestic partnership above marriage<sup>40</sup>. Holland refers to women who reject marriage because of the patriarchal assumptions upon which many believe it to be based as the "marriage resisters".<sup>41</sup>

2.2.20 These women want to avoid the stereotyped role-allocation attendant upon marriage.<sup>42</sup> The current philosophy of human autonomy, individual freedom and individuality in so far as the family is concerned also plays a role.<sup>43</sup>

2.2.21 On the other hand it was found that some men also want to avoid their traditional role as husbands. Women who want to get married often depend on men to ask them to marry

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<sup>38</sup> Rodriguez Cohabitation.

<sup>39</sup> Holland 2000 **CJFL**, *ibid*. The fact that partners by and large do not use contracts suggests that the fear of liability does not play a major role in their decision to cohabit.

<sup>40</sup> Hutchings & Delport 1992 **De Rebus**, *ibid*.

<sup>41</sup> Holland 2000 **CJFL**, *ibid*.

<sup>42</sup> Sinclair & Heaton **Marriage Law**, at 272; Labuschagne 1989 **TSAR**, at 371 fn 8.

<sup>43</sup> Labuschagne 1989 **TSAR**, at 374 and fn 33: "The family in historical times, and at present, is in transition from an institution to a companionship. In the past, the important factors unifying the family have been external, formal and authoritarian, as the law, the mores, public opinion, tradition, the authority of the family head, rigid discipline, and elaborate ritual. At present, in the new emerging form of the companionship family, its unity inheres less and less community pressures, and more in such interpersonal relationships as the mutual affection, the sympathetic understanding, and the comradeship of its members."

and consider it inappropriate to make such a suggestion. Generally, women want the security and status of marriage while men prefer the freedom of domestic partnership. A woman from Pimville expressed the insecurity of living in a domestic partnership as follows:

People should marry but then it depends on the man. You cannot push him to marry you. He has to say it. So sometimes they choose to cohabit with you and tell you that they will get married to you later. You have to be patient. Cohabiting is not safe. He can kick you out of the house anytime.

2.2.22 Respondents to the Issue Paper<sup>44</sup> reflected contradicting views; many wanted to be married because of the status, security and property but also saw marriage as entailing lack of freedom, slavery and a restriction on their ability to leave.

**b) Parties are unable to marry**

**(i) Same sex unions**

2.2.23 Our common law defines marriage as a union between a man and a woman. This leaves parties of same-sex unions without legal resource.

**(ii) Prohibited degree of blood-relationship**

2.2.24 Persons within the prohibited degree of blood-relationship or affinity are not allowed to marry. Examples are a woman and her ex son-in-law or father-in-law or a man and his stepchild. Consanguinity entails incest and criminal prosecution if parties have a sexual relationship.

**(iii) Married already**

2.2.25 Prior to the Divorce Act, 1979<sup>45</sup> it was difficult to obtain a divorce if one of the parties refused to cooperate. Today the spouse wishing to obtain a divorce may take the initiative without the other spouse's cooperation.<sup>46</sup> Factors such as the division of matrimonial

<sup>44</sup> Issue paper no 17 (Project 118) available at <http://wwwserver.law.wits.ac.za/salc/issue/issue.html>.

<sup>45</sup> Act No. 70 of 1979.

<sup>46</sup> Hutchings & Delport 1992 **De Rebus**, at 122.

property, however, may still prevent spouses from seeking a divorce. See also above for the example of the city woman living with the man with a rural wife.

**c) Customary marriage**

2.2.26 A customary marriage may be incomplete or defective in some way. The new Recognition of Customary Marriages Act, 1998<sup>47</sup> has not provided complete assistance to people who believe they are married but do not have a marriage certificate. For example, a woman may try to make use of the protections that the Act offers and her partner may deny that there is a marriage. It remains to be seen how the courts will deal with a situation where the parties differ on whether they are married. Many men are likely to deny the existence of a marriage because they realise that the law provides women with greater rights that they were afforded under the previous customary law.<sup>48</sup>

**d) Trial marriage**

2.2.27 Another reason for the existence of the domestic partnership is that parties may use the domestic partnership as a precursor to marriage, the so-called "trial marriage".<sup>49</sup> Whereas just 11% of marriages in the USA between 1965 -1974 were preceded by domestic partnerships, between 1980-84, 44% of all marriages involved at least one spouse who had cohabited. It is estimated that half of all couples who married after 1985 began their relationships as domestic partners.<sup>50</sup>

**e) Ignorance of the law**

2.2.28 Even today many people believe that simply living with another person for a continuous period of time establishes legal rights and duties between them.<sup>51</sup> Jackson notes that the regular reference to "common-law husband or wife" appears to lend credibility to this

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<sup>47</sup> Act No. 120 of 1998.

<sup>48</sup> Goldblatt *New Families*, at 3.

<sup>49</sup> Holland 2000 **CJFL**, *ibid*.

<sup>50</sup> Rodriguez *Cohabitation*.

<sup>51</sup> Research showed that a woman from Eldorado Park believed that the period was three months while others in Vryberg thought it was six months or two years. CALS Report, at 35.

notion.<sup>52</sup>

2.2.29 Many different perceptions exist about the law. Some believe that the duration of the relationship creates legal protection while others think that having children together entitles the domestic partners to legal protection. Some parties do not know that there is no legal recognition of domestic partnerships.

2.2.30 This lack of awareness of legal rights may in part be due to the still prevalent belief in the existence of common-law marriage, despite the fact that this concept has been abolished worldwide. Common-law marriage is conceptually very different from domestic partnership. The latter conveys an impression of freedom from responsibility, implying also that this is the result of a deliberate choice. The former implies that "common-law spouses" will be awarded the same rights as married couples after a certain period of time without any affirmative action being needed by the parties, although ironically even some of the forms of common-law marriage that existed required some affirmative action.<sup>53</sup>

2.2.31 It should, however, not be overlooked that many people are remiss about directing their lives. They drift into and remain in relationships without consciously considering the implications of failure and termination. The difficulty of formulating policy for those who do not marry is therefore compounded by the fact that within the group of domestic partners there are many who have not made any real choice.<sup>54</sup>

2.2.32 Some people furthermore believe that marriage is unnecessary or irrelevant if no children are involved.<sup>55</sup>

#### f) HIV/Aids

2.2.33 Besides the historic reasons for the massive breakdown in families and social dislocation, current problems relating to HIV/Aids have a profound impact on social relations and family forms. The fact that the Aids epidemic has left thousands of children orphaned has resulted in young children having to act as heads of families of even younger children,

<sup>52</sup> J Jackson "People who live together should put their affairs in order" (1990) 20 **Family Law** 439, referred to by Singh 1996 **CILSA**, at 318.

<sup>53</sup> L Stone **Uncertain Unions** Oxford: OUP 1992 and R B Outhwaite **Clandestine Marriage in England 1500-1850** London: The Hambledon Press 1995, referred to by Barlow & Probert **WJCL Studies**, at 22.

<sup>54</sup> Sinclair & Heaton **Marriage Law**, at 274 and references made therein.

<sup>55</sup> Labuschagne 1989 **TSAR**, at 371 fn 8.

and has increased the numbers of grand parents taking care of their orphaned grandchildren, and other children living in adoptive families. Millions of people find themselves in these types of family relationships which directly affect their proprietary (and other) interests.

2.2.34 Seen against this background, the law and social policy reforms should aim to provide for both cohabiting couples in general as well as these new family types.<sup>56</sup> This must be done whilst acknowledging gender inequality and serious levels of violence against women.

### **2.3 Forms of domestic partnership**

2.3.1 Account was taken of the family and family arrangements of the couple in order to categorise the main types of domestic partnership. The following forms of domestic partnerships have been identified:<sup>57</sup>

#### **a) Casual relationships of convenience**

2.3.2 This relationship is also sometimes referred to as "easy come, easy go". It is seen as an impermanent arrangement of convenience that arises from material and other needs. This usually (though not exclusively) occurs among young people. Often the women would like the relationship to become more stable or even lead to marriage but do not have major expectations of men seeing it this way. It is also found where men bring girlfriends to town to look after them.

2.3.3 In the poorer sections of the community the women often squirrel away money and then hide their purchases such as cutlery and crockery. A number of domestic workers said that they no longer cohabit as men use them to get free accommodation, food and money.<sup>58</sup>

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<sup>56</sup> For a discussion of legal recognition of new families, see Goldblatt *New Families*. In principle, our Constitution requires our law to ensure the rights to equality and dignity of all types of families and their members. Addressing discrimination is a key priority of our new democracy. Such recognition must be accompanied by legal regulation since the existing law contains inadequate mechanisms to address disputes arising from cohabitation relationships.

<sup>57</sup> Labuschagne 1989 **TSAR**, at 372 and the references therein.

<sup>58</sup> CALS Report, at 30: A female respondent who is also a domestic worker described her arrangement as follows: "We are only keeping each other company. There is not much in the relationship".

**b) Extension of affectionate dating and courtship or trial marriage**

2.3.4 This is also seen as a temporary alternative to marriage. This type of relationship was found to be common in the Coloured community where there are no rural ties. Variations of this were found in the African community where there is an intention to marry but lobola has not been paid.

**c) Permanent alternative to marriage**

2.3.5 The couple often has children together and both partners contribute towards a joint household. Generally the woman depends on the man for accommodation in this type of domestic partnership but there are exceptions, for example where (women) domestic workers provide accommodation for men.

2.3.6 A variation of this was also found in the middle-class second "marriage", where the couple was older, had children from the first marriage and regarded re-marriage as inappropriate.

2.3.7 Most of the respondents in the Coloured township of Joe Slovo Park confirmed that domestic partnership rather than marriage was the norm in the area, even where people had been together for many years. A number of respondents said that while most Coloured people cohabit, their Xhosa neighbours were more likely to marry because "they have a tradition that they follow".<sup>59</sup>

2.3.8 As was indicated in the discussion of rural wives, there are conflicting interests between the rural wife and the urban woman partner over resources. The death of the man poses particular problems in that the wife and the urban woman may have competing claims to inherit. Following separation (usually when the man leaves his cohabiting partner), the ongoing maintenance of the two households is an area of conflict over property.

2.3.9 From a law reform point of view, these categories suggest the need for a solution to the problem of de facto "polygamy"<sup>60</sup> and a workable definition or test of domestic

<sup>59</sup> CALS Report, at 29: A female respondent from Vryberg said cohabitation was prevalent outside of rural areas: "In Vryberg it is only 'vat en sit'. Everyone does it even though they do not always feel free to tell that they cohabit."

<sup>60</sup> See discussion in chap 7 below.

partnership that captures the essential elements of those relationships that are deserving of legal protection.