



Gender Research and Advocacy Project
LEGAL ASSISTANCE CENTRE
2010



A FAMILY AFFAIR

**The Status of
Cohabitation in Namibia
and Recommendations
for Law Reform**

ACKNOWLEDGEMENTS

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SUMMARY

This is a summary of a longer study by the Legal Assistance Centre. The summary includes all key information but omits detail which is of primary interest only to legal professionals. The summary also keeps references to a minimum, whilst full and detailed references are included in the full report. The full report is available online at www.lac.org.na, or on request from the Legal Assistance Centre.

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Chapter 1

INTRODUCTION

The law currently provides little protection for people who are not married but live together as a couple. The primary purpose of the study is to inform recommendations for potential law reforms in this area.

Recent Namibian law reforms and reforms in progress have focused on recognising and protecting family structures that exist in practice but do not conform to traditional notions of “family”, in order to cater for the realities of Namibian experience. For example, the Children’s Status Act 6 of 2006 and the Maintenance Act 9 of 2003 both help protect children born outside of marriage against discrimination. The draft Child Care and Protection Bill under discussion at the time of writing would legally recognise, support and protect child-headed households in certain circumstances, in order to cater for the reality that the HIV pandemic has left some family groupings without adult supervision. A Recognition of Customary Marriages Bill which has been proposed by the Law Reform and Development Commission would recognise

customary unions as marriages for all legal purposes. Namibian lawmakers and policymakers have recognised that the law must be altered to reflect reality if it is to serve people well. Thus, legal concepts of family in Namibia are in the process of evolving.

In the same vein, lawmakers should apply a similar approach to regulating cohabitation by considering what kind of legal framework would best suit family realities. In other countries, it has been suggested that family law should focus less on the formalities of family relationships, such as whether or not a marriage has taken place, and instead regulate family relationships on the basis of functions such as mutual economic dependence.

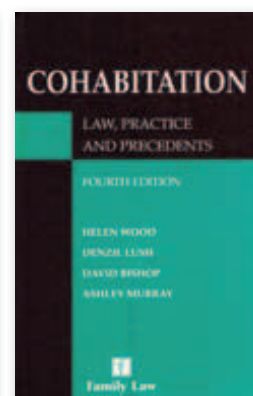
Cohabitation is a type of intimate relationship which is relevant to significant numbers of Namibians. While it is difficult to gauge the precise prevalence of cohabitation relationships in Namibia, the practice is certainly common. National surveys indicate that at least one-fifth of Namibians in the prime of their adulthood are living together without being formally married, and this is likely to be an underestimate. The lowest figure of all the national surveys considered comes from the 2001 census, which found that 7% of the population age 15 and over was living together informally. Other surveys have produced much higher figures. Even if the relatively low estimate from the 2001 census is correct, this means that over 82 000 members of the Namibian population were cohabiting at the time of the census. The inescapable conclusion is that cohabitation, and thus the law on cohabitation, affects many people.

Cohabitation is on the increase worldwide and there is hardly a country left in the world which does not provide some measure of recognition to cohabitation.

... worldwide, extramarital cohabitation has become an important constituent of modern family life.

Brigitte Clark,

"Families and domestic partnerships", 119 (3) SALJ 634 (2002)



1.1 Definition of cohabitation

This study provisionally defined cohabitation as two adults living together in a relationship resembling a marriage in some key respects, without being married under civil or customary law.

The definition used for this study covered both opposite-sex and same-sex couples. It included cohabitation relationships where the man (or woman) in the partnership was cohabiting with one partner whilst being married to another. Cohabiting couples were interviewed regardless of the amount of time they had lived together.

This study did not treat persons in customary marriages as cohabiting partners, even though Namibian law does not yet recognise customary marriage for all purposes, because a law on the recognition of customary marriages – which would give customary marriages a status equal to that of civil marriages – is already under discussion.

Some of the possible circumstances which could fit our definition of cohabitation include:

- where one or both partners have chosen not to marry;
- where one partner is already married to another: the cohabitation could be a ‘second house’ relationship (ie informal polygamy), or the married partner may be separated from the legal spouse without having gotten formally divorced;
- where the cohabitants are unable to marry for some reason, such as an unacceptably close blood relation, the absence of the required parental permission (for minors) or the fact that they are of the same sex;
- where the form of marriage entered into by the parties is a religious marriage (such as a Muslim or Hindu marriage) which is not fully recognised in law.

Many definitions of cohabitation, like our provisional one, use marriage as a point of comparison. One question which should be considered is whether marriage should remain the standard, or whether it would be preferable to aim at a complete transformation of the legal framework governing intimate relations. Monogamous civil marriage is the only form of human pairing which is recognised comprehensively in the eyes of the law.

Yet the Constitutional requirement of respect for all cultures and religions would seem to mandate respect for other kinds of marriage and family – including giving full recognition to African customary marriages as well as Muslim, Jewish and Hindu marriages. Furthermore, there are many living arrangements which do not conform to the idea of the ‘nuclear family’ which are deserving of respect as valid family structures – including cohabiting partners and more diverse family groupings, such as single-parent families and families which incorporate extended family members.

The Namibian Constitution protects “*the family*”, without specifying what “*family*” means – which allows for legal concepts of family to evolve to fit social realities. Providing new legal protections to cohabiting partners could be a first step towards giving legal protection to vulnerable persons in a wider range of family groupings.

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Namibian Constitution, Article 14(3) (emphasis added)





Chapter 2

COHABITATION IN NAMIBIA

This chapter is a literature review. It summarises existing information on cohabitation in Namibia.

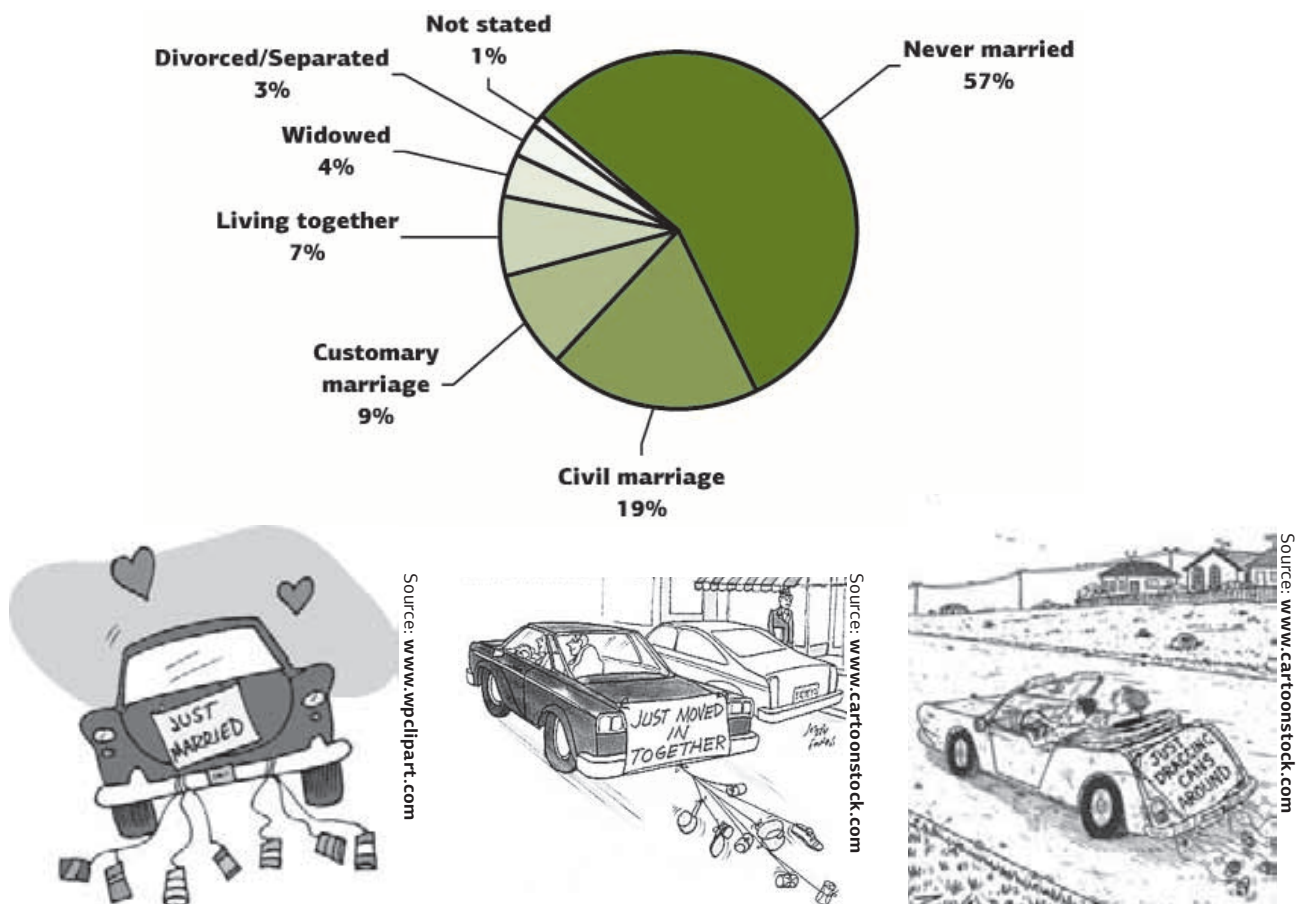
2.1 Incidence of cohabitation

Namibia has a low rate of marriage, a large number of children who are born outside marriage and a significant incidence of cohabitation. The most recent national surveys indicate that 7% to 15% of Namibian adults are in cohabitation relationships.

National Namibian surveys have produced the following findings:

- According to the 1991 census, about 12% of Namibia's population over the age of 15 were in a cohabitation relationship. The 2001 census figures showed a reduction in this rate to 7%.
- The *Namibia Demographic and Health Survey 2006-2007*, which is based on a national sample, found that about 15% percent of women and 13% of men between the ages of 15 and 49 were “living together” with a partner, without being formally married.
- The *Namibia Demographic and Health Survey 2000* similarly found that about 16% of women and 13% of men surveyed were informally cohabiting.

MARITAL STATUS – 2001 Census (national population age 15 and over)

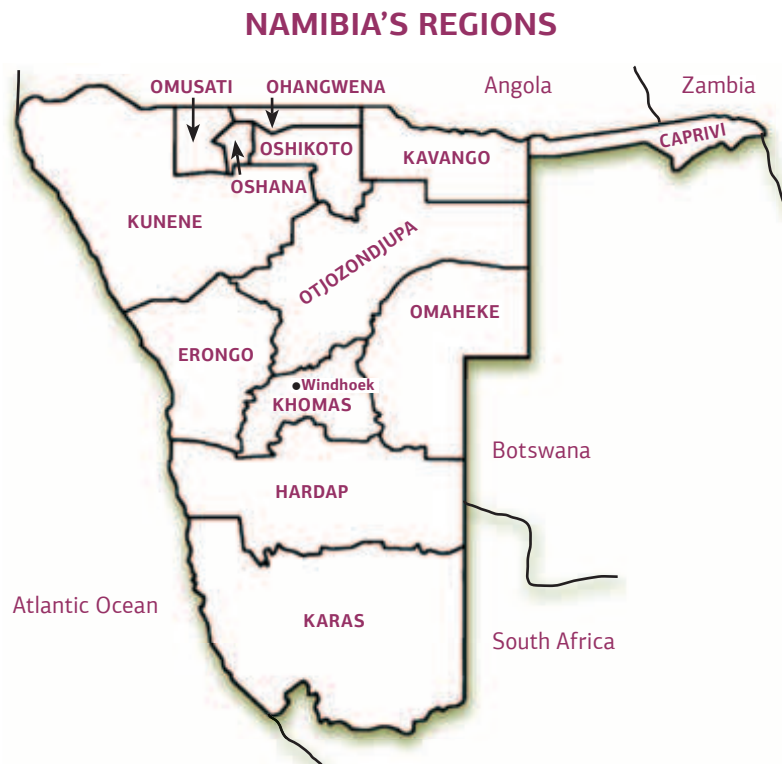


2.1.2 Regional distinctions

There are dramatic regional differences in cohabitation and marital status, but it is difficult to discern clear patterns. According to the 2001 census, cohabitation is most popular in Otjozondjupa, Omaheke and Kunene Regions and least popular in Caprivi Region. The complex regional differences suggest that cultural preferences may be a relevant factor in the choice of conjugal relationship.

Region	Percentage of people married consensually (cohabitation)
Otjozondjupa	13%
Omaheke	13%
Kunene	12%
Erongo	10%
Hardap	9%
Kavango	8%
Karas	8%
Oshikoto	7%
Khomas	7%
Oshana	6%
Ohangwena	4%
Omusati	4%
Caprivi	2%

Source: 2001 Population and Housing Census



Some of the key regional comparisons are as follows:

- The most common marital status in all regions is “never married”.
- The highest percentages of people in cohabiting relationships are found in Otjozondjupa and Omaheke, followed by the Kunene. The lowest percentage of people in cohabiting relationships is in Caprivi.
- In Otjozondjupa, Omaheke and Kunene, a similar proportion of people live in the various types of conjugal relationships (civil marriage, customary marriage, and cohabitation).
- The percentage of people in civil marriages is 10-20 percentage points higher than the percentage of people in cohabiting relationships in most other regions (Hardap, Karas, Khomas, Oshikoto, Omusati, Erongo, Oshana and Ohangwena).
- Customary marriages are considerably more common than cohabiting relationships in Kavango, Oshikoto and Caprivi.
- Looking at any form of formal marriage compared to informal cohabitation, the gap is smallest in Omaheke (where only 8% more of the population is married than cohabiting), and largest in Oshikoto (where 60% more of the population is formally married than cohabiting).



Source: <http://api.ning.com>

These complex patterns mean that one cannot say, for example, that cohabitation is replacing customary marriage, or that it is more or less popular in regions where customary marriage is popular. However, the fact that the patterns are so different in different regions suggests that conjugal status is influenced at least in part by cultural preferences.

Region	Married consensually (cohabitation) (%)	Married with certificate (civil marriage) (%)	Married traditionally (customary marriage) (%)	Never married (%)	Divorced/ Separated (%)	Widowed (%)
Namibia	7	19	9	56	3	4
Otjozondjupa	13	15	10	55	2	3
Omaheke	13	13	8	60	2	3
Kunene	12	12	17	52	2	4
Erongo	10	24	2	57	2	3
Hardap	9	30	1	54	2	4
Kavango	8	13	29	39	6	6
Karas	8	29	3	55	1	3
Oshikoto	7	22	45	59	2	4
Khomas	7	24	3	61	2	2
Oshana	6	20	4	63	2	4
Ohangwena	4	17	9	59	4	6
Omusati	4	19	8	60	3	5
Caprivi	2	5	34	46	6	5

Source: 2001 Population and Housing Census

Region	Married consensually (cohabitation) (%)	Married with certificate or traditionally (civil or customary marriage) (%)	Never married (%)	Divorced/ Separated (%)	Widowed (%)
Namibia	7	28	56	3	4
Otjozondjupa	13	25	55	2	3
Omaheke	13	21	60	2	3
Kunene	12	29	52	2	4
Erongo	10	26	57	2	3
Hardap	9	31	54	2	4
Kavango	8	42	39	6	6
Karas	8	32	55	1	3
Oshikoto	7	67	59	2	4
Khomas	7	27	61	2	2
Oshana	6	24	63	2	4
Ohangwena	4	26	59	4	6
Omusati	4	27	60	3	5
Caprivi	2	39	46	6	5

Source: 2001 Population and Housing Census

2.1.3 Regional studies

Several recent localised studies have found that the rates of cohabitation and marriage are about equal in some study populations, whilst cohabitation is about half as common as marriage in several other study populations.

More localised studies of family arrangements conducted at points spanning a longer time period have varying figures on the incidence of cohabitation, but show that it is not a new phenomenon.

- Comparative studies of Katutura in the 1960s and the 1990s found that about 20% of the households studied in both periods were formed by couples living together informally, compared to about 24% who were married in the 1960s and about 47% who were married in the 1980s.¹ (The study attributed the increase in marriage between the two studies to an improved economic situation, which meant that the cost of marriage was not so great a barrier as it had been in the past.)
- A 1994 study that surveyed 600 female respondents in three sites in north-central Namibia found that 7% to 8% reported that they were living in a “*non-formalized union*”, compared to 32% who indicated that they were married.²
- A study undertaken in 2004 to investigate the relationship between HIV/AIDS and female migration in four different informal settlements in Windhoek: Goreangab, Okahandja Park, Hakahana and Greenwell Matongo found more cohabitation than marriage in this population: 15,5% of the respondents reported that they were cohabiting with a partner as compared to only 13,4% who were married.³ This outcome may, of course, have been influenced by the fact that the study population was made up of residents of informal settlements, and included many recent migrants who may have been living separate from extended family members or spouses and thus unwilling or unable to marry.
- The highest incidence of cohabitation in the studies examined was reported in a very small 2006 study of 150 adults age 30 and up in the Kavango, Omaheke and Ohangwena Regions, where almost half of this sample (47%) reported being married and almost 23% said that they were living together with a partner.⁴ The study shows an unusually high rate of marriage as well as cohabitation, probably because it sampled an older group than most of the other studies discussed here.

¹ Wade C Pendleton, *Katutura: A Place Where We Stay, Life in a Post-Apartheid Township in Namibia: Katutura Before and Now*, Windhoek: Gamsberg Macmillan, 1994.

² Namibia Development Trust (NDT), Social Impact Assessment and Policy Analysis Corporation-Namibia (SIAPAC-Namibia), Friedrich Ebert Stiftung (FES) and Centre for Applied Social Studies (CASS), *Improving the Legal and Socio-economic Situation of Women in Namibia. Uukwambi, Ombalantu and Uukwanyama Integrated Report*, Windhoek: NDT, 1994.

³ Lucy Edwards, *HIV/AIDS, Poverty and Patriarchy: A Gendered Perspective*, Windhoek: !Nara Training Centre, 2004.

⁴ Research Facilitation Services, *Knowledge, Attitudes, Practice and Behaviour Study*, Windhoek: UNICEF, 2006.

- A 2006-2007 survey in eight regions (Caprivi, Erongo, Karas, Kavango, Kunene, Ohangwena, Omaheke and Otjozondjupa) also found high levels of cohabitation, with almost equal numbers of respondents cohabiting (19%) as being married (20%).⁵

Virtually all [focus group] participants in all regions agreed that relationships between unmarried women and men have increased dramatically since independence. This type of relationship was felt to have not been very prevalent in the past, as it was heavily frowned upon. "In the past, there was great respect between partners before they got married, but now this respect is lacking in many relationships, resulting in increased physical and mental abuse" among unmarried partners.

Social Impact Assessment Policy Analysis Corporation (SIAPAC),
Knowledge, Attitudes and Practices Study on Factors that may Perpetuate or Protect Namibians from Violence and Discrimination: Caprivi, Erongo, Karas, Kavango, Kunene, Ohangwena, Omaheke and Otjozondjupa Regions,
 Windhoek: Ministry of Gender Equality and Child Welfare, 2009

2.1.4 Understanding the statistics

The studies probably under-represent the true incidence of cohabitation because of persisting negative social perceptions of cohabitation.

It has been suggested in South Africa that cohabitation is under-reported for several reasons.⁶ These factors are likely also relevant in Namibia.

- Married people who are also cohabiting with a different partner will probably describe themselves as married rather than cohabiting since marriage is seen as being generally more socially acceptable.
- Unmarried people may not admit that they are cohabiting because of the perceived negative social connotations of this unofficial status.
- Many same-sex cohabitants are probably unwilling to identify their relationship because of homophobia in society.
- The prevalence of cohabitation would probably be much higher if the sample population were limited to adults instead of including relatively young teens together with adults.
- Different interviewees may interpret questions regarding cohabitation differently, as the subject is complicated and very culture-specific.

⁵ Social Impact Assessment Policy Analysis Corporation (SIAPAC), *Knowledge, Attitudes and Practices Study on Factors that may Perpetuate or Protect Namibians from Violence and Discrimination: Caprivi, Erongo, Karas, Kavango, Kunene, Ohangwena, Omaheke and Otjozondjupa Regions*, Windhoek: Ministry of Gender Equality and Child Welfare, 2009.

⁶ Beth Goldblatt, *Cohabitation and Gender in the South African Context – Implications for Law Reform*, Johannesburg: Centre for Applied Legal Studies, University of the Witwatersrand, 2001.

Even if we accept the statistics from the 2001 census, which gives the lowest percentage of cohabitation of all the large-scale surveys considered, this still means that over 82 000 Namibians were cohabiting at the time of that census. It seems safe to say that a significant proportion of the Namibian population is currently cohabiting.

2.2 The historical background to cohabitation

Historical influences on cohabitation include contract labour, and patterns of economic activity which still in the post-independence era lead to extensive rural-urban migration in search of employment, particularly by men. It has also been speculated that informal cohabitation with multiple partners may be gradually replacing polygamy.

The system of **contract labour** imposed during the colonial era had the effect of separating husbands and wives, as men from rural areas were recruited to provide labour on farms, in mines and factories and as domestic servants. Women were excluded from the contract labour system, and male workers were not allowed to bring their families along, as the colonial authorities wished to prevent migration into the white settlement areas. Often, migrant workers were able to see their families in the rural areas only once a year (or even less frequently), so it is not surprising that many migrant workers established relationships with other women in urban areas – often establishing a second household that in many cases included children.

The economic patterns set during the colonial era persist in the post-independence era, as economic opportunities are still concentrated in urban areas while many families maintain a home base in the rural areas where there is access to communal land – and where the economic activities of women are dominated by subsistence agriculture. **Migration in the post-independence era** is still predominantly male, although the number of women moving to urban areas in search of employment has increased since independence.

Formal relationships were in some cases prohibited by the **laws against inter-racial marriage**, such as the Prohibition of Mixed Marriages Act 55 of 1949 which banned marriage and cohabitation between whites and non-whites, and amendments to the Immorality Amendment Act 21 of 1950 which went even further and prohibited sexual relations between whites and non-whites. This situation obviously drove some relationships underground, which may have a persisting influence on the attitudes of some people toward formalising their relationships.

Another persisting colonial influence can be seen in the fact that, even now in post-independence Namibia, **the common law does not give full recognition to customary unions or**

Muslim marriages – which prevents some people from receiving recognition of the marriage rites and ceremonies appropriate to their beliefs. In some cases people have combined their own forms of marriage with civil marriage just to get the requisite “piece of paper” required for various administrative purposes, but in other cases marriage-like relationships have simply remained outside the legal framework.



Source: <http://images.dexknows.com>

Another issue to consider is that **cohabitation may be gradually replacing polygamy**. The *Namibia Demographic and Health Survey 2006-2007* found that 6% of currently-married women were in a polygamous union and had co-wives, showing a sharp decrease over the 2000 survey where the proportion of women in polygamous unions with co-wives was double (12%) – and raising the possibility that polygamous relationships may be becoming less formal in nature. A 1995 study of customary marriage in Namibia found a growing trend for formal polygamous unions to be replaced by “second house” relationships, where a married man sets up house with another woman without following any civil or customary formalities.⁷

2.3 Why do people cohabit?

Previous studies indicate that there are a range of reasons for cohabitation in Namibia.

In addition to the historical factors noted, there are many other reasons why people cohabit:

- Some cohabit to save costs on living expenses or to test the relationship before formalising it.
- Some erroneously believe that the law already protects cohabitants or that they are legally married after they have lived together for a period of time.
- Many cohabitants say that they would prefer to marry, but do not do so for a variety of reasons, often because the man does not want to formalise the union (usually because he does not wish to share assets with the woman) or because he cannot afford to pay the traditional bride price (*lobola*).
- Some couples live together as a prelude to marriage, often while they are saving for the expenses attendant upon marriage. Traditional church weddings are costly (entailing food and drink for many guests as well as special clothes), and customary marriages can involve expensive gifts and *lobola*.
- Some may prefer the privacy of informal arrangements, where it is not necessary to obtain the permission or blessing of relatives. A couple may also like the fact that they are free to terminate their relationship without consulting anyone about this step.

⁷ Heike Becker and Manfred Hinz, *Namibia Papers No. 30: Marriage and Customary Law in Namibia*, Windhoek: Centre for Applied Social Studies (CASS), 1995.

- Some women avoid marriage in an attempt to avoid the male domination so often associated with marriage. They may wish to protect their independence, particularly if they have income-earning opportunities on their own, and fear that marriage might entail losing decision-making autonomy or control over their own income. They may also fear being tied to an abusive spouse.
- In contrast, since Namibian women are generally poorer than men and often financially dependent upon men, the decision not to marry is often forced on them by a man who is reluctant to make the commitment of marriage or already has a wife elsewhere.
- Some couples may live together without formally marrying in order to retain benefits which might otherwise be lost – such as maintenance from a divorce which would end upon remarriage.
- Other couples simply do not believe in formalising their relationship through marriage.
- The declining rate of marriage may also mean that, since many children grow up in a family environment that does not include both a mother and a father, marriage is not a readily available model to be copied.

Since marriage is a family matter, men are sometimes concerned that they will be unable to carry the social and financial burden of a marriage, ie meet the expectations and demands of their future wife's family. They therefore prefer to maintain a loose partnership until they are in a position to meet these demands.

Mothers, on the other hand, sometimes discourage their daughters from getting married on the grounds that once married a daughter will not be as easily able to financially support her mother since her income will have to be shared with her husband.

Among educated women, conflicting gender roles were cited as the main obstacle preventing marriage: women felt that their lifestyle and independence would be constrained because the man would automatically assume the traditional position of head of household. The fact that men are often loath to marry women who are better educated than they are or who earn better salaries also prevents some women from marrying.

A further deterrent to marriage is the fear that a new partner might not get along with the children the woman already has.

Parents' disapproval of the partner may also serve as a deterrent.

Women also complained that there is a shortage of responsible men, ie men who are employed and do not abuse alcohol.

Women are also often unaware of the fact that the father of their child is already married or that he has other children. In other instances, the relationship had already ended by the time the woman realised that she was pregnant, or she felt that she was too young for marriage, or the father denied paternity.

A Iken, M Maasdorp and C Solomon,

Socio Economic Conditions of Female-Headed Households and Single Mothers
in the Southern Communal Areas of Namibia, SSD Research Report 17,

Windhoek: Social Sciences Division, Multi-Disciplinary Research Centre, University of Namibia, 1994

2.4 Attitudes about cohabitation

Although there are differing opinions about cohabitation, some of the terms for it in indigenous languages, and various investigations into community attitudes, indicate that it still attracts widespread social disapproval in some communities whilst being well-tolerated in others.

Cohabitation may be common, but that does not mean that it is universally condoned. The terms used in indigenous languages to describe cohabitation sometimes carry negative connotations. For example, Nama/Damara terms which are used to describe cohabitation include “*≠nû gomes lameb*” or “*≠nû- gomas ùib*”. These terms literally mean “black cattle marriage” and “black cattle life” and arise from the fact that cohabitation outside of marriage has been viewed, particularly in the past, as a dirty practice. An Oshiwambo word for informal cohabitation is “*okwootekwa*”, which means “staying together illegally”.

On the other hand, some communities use more judgement-neutral terms for cohabitation, such as the Nama term “*hâ-lhaos*” and the Afrikaans term “*saamelewes*” (both of which mean simply “living together”), the Nama/Damara term “*soregu hâ*” (which refers to “people who are dating for a long time”), the Otjiherero word “*otjiwoteka*” (which refers to “a fixed girlfriend” and is not confined to the situation where a couple lives under one roof) and the Rukwangali term “*sihorwa*”, meaning simply “love”.

Even though it is a sin, people cohabit anyway.

woman interviewed by the Legal Assistance Centre

Attitudes about cohabitation appear to differ. For example, several studies have found that cohabitation is generally accepted in Herero communities.⁸ However, one study found that such relationships were disapproved of by Owambo communities in Katutura.⁹ A social anthropologist who interviewed some 200 women in Khorixas in 2005-06 reported that whilst most of these women, particularly the older ones, dreamt of being married, only 15-20% of them were actually married. The women interviewed in this study acknowledged that marriage does not guarantee faithfulness, but they generally said that they would feel safer in a relationship with legal status.¹⁰ In contrast, some people interviewed in Katutura identified little difference between marriage and cohabitation.¹¹

⁸ HP Steyn, “Huwelikspatrone by die Herero van Omatjette, Namibie”, in *South African Journal of Ethnology/Suid-Afrikaanse Tydskrif vir Etnologie*, Vol 14, No 3, 1991; Heike Becker and Manfred Hinz, *Namibia Papers No. 30: Marriage and Customary Law in Namibia*, Windhoek: Centre for Applied Social Studies (CASS), 1995.

⁹ Heike Becker and Manfred Hinz, *Namibia Papers No. 30: Marriage and Customary Law in Namibia*, Windhoek: Centre for Applied Social Studies (CASS), 1995.

¹⁰ Martina Gockel-Frank, “The gift from God: Reproductive Decisions and Conflicts of Women in Modern Namibia”, in Suzanne LaFont and Dianne Hubbard (eds), *Unravelling Taboos: Gender and Sexuality in Namibia*, Windhoek: Legal Assistance Centre, 2007.

¹¹ Debie LeBeau and P Stanley Yoder, *Alcohol Consumption, Sexual Partners, and HIV Transmission in Namibia*, Calverton, Maryland, USA: US-AID, 2009; Wade C Pendleton, *Katutura: A Place Where We Stay, Life in a Post-Apartheid Township in Namibia: Katutura Before and Now*, Windhoek: Gamsberg Macmillan, 1994.

Prior to independence there were some economic advantages to marriage. For example, it was easier for married couples to obtain housing in urban areas, and a marriage certificate often gave some protection to a woman in an urban area who had no identification papers. It is also reported that white employers often encouraged their black employees to get married in a civil marriage, thus promoting Western values about marriage.¹² These factors, combined with church disapproval of informal cohabitation, probably increased the sense that informal cohabitation was an inferior and undesirable status.

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One disturbing fact about cohabitation in Namibia is that it tends to be a common site of domestic violence. A recent study of women in Windhoek found that the prevalence of violence was higher for Namibian women who were cohabiting with partners without being married to them than for married women.¹³

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¹² Heike Becker and Manfred Hinz, *Namibia Papers No. 30: Marriage and Customary Law in Namibia*, Windhoek: Centre for Applied Social Studies (CASS), 1995.

¹³ Ministry of Health and Social Services (MoHSS), *An Assessment of the Nature and Consequences of Intimate Male-Partner Violence in Windhoek, Namibia: A sub-study of the WHO multi-Country Study on Women's Health and Domestic Violence*, Windhoek: MoHSS, 2003 at 24.



Chapter 3

CONSTITUTIONAL BACKGROUND

The Namibian Constitution protects the family, prohibits discrimination on the basis of sex and social status, and provides for the right to dignity. Court cases in Namibia and South Africa show that all these rights are relevant to cohabitation.

One of the key provisions of the Namibian Constitution with respect to cohabitation is Article 14 on “*Family*”. This constitutional provision is almost identical to Article 23 of the International Covenant on Civil and Political Rights.

Article 14 – Family

- (1) *Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.*
- (2) *Marriage shall be entered into only with the free and full consent of the intending spouses.*
- (3) *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

Namibian Constitution (emphasis added)

Other relevant Namibian Constitutional provisions include Article 10, which provides that all people are equal before the law and explicitly forbids discrimination on the grounds of sex, creed or social status (amongst other grounds).¹⁴ Arguably, the prohibition on discrimination on the basis of social status includes a ban on discrimination on the ground of marital status, although this issue has not yet been canvassed by Namibian courts. The prohibition on sex discrimination is relevant because, in practice, the dearth of legal protections for cohabitants usually disadvantages women. Article 8(1), which states that the “*dignity of all persons shall be inviolable*” also protects the rights of cohabitants because the basic human dignity of those who cohabit is at stake when the laws do not respect and protect their fundamental life choices.

3.1 Family and cohabitation in international law

International law recognises and protects the myriad varieties of families that exist in practice, including families in the form of unmarried cohabitating couples. Comments and recommendations officially interpreting the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women, have explicitly stated that the protections for the family in these conventions apply to women in cohabitation relationships.

International law on family and cohabitation is important to Namibia – firstly, because public international law and binding international agreements become part of the law of Namibia by virtue of Article 144 of the Namibian Constitution,¹⁵ and secondly, because internationally law serves as a guide to the meaning of “*family*” in Article 14 of the Namibian Constitution.

¹⁴ Namibian Constitution, Article 10(2): “No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.”

¹⁵ Article 144 states: “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”

A General Comment on Article 23 of the **International Covenant on Civil and Political Rights** noted the existence of various forms of “family”, including *unmarried couples and their children*.¹⁶ A subsequent General Comment emphasised the need to include “unmarried couples” in the concept of family, along with single parents, and to ensure that women in these family contexts get equal treatment with similarly-situated men.¹⁷

Diverse, culturally specific forms of family are similarly protected by the **International Covenant on Economic, Social, and Cultural Rights**. Article 10(1) expressly requires that States Parties accord the “*widest possible protection and assistance . . . to the family, which is the natural and fundamental group unit of society*”. This protection encompasses a broad definition of family; the Committee on Economic Social and Cultural Rights, the body charged with officially interpreting this Convention, has stated that “*the term ‘family’ should be interpreted broadly and in accordance with appropriate local usage*”.¹⁸

A similarly broad concept of family is found in the UN **Convention on the Rights of the Child**. Discussing the Convention’s use of the term “*family environment*”, the UN Committee on the Convention on the Rights of the Child has stated that the Convention reflects “*different family structures arising from various cultural patterns and emerging family relationships*” and applies to a variety of families, including the “*common-law family*” (referring to cohabitation).¹⁹

Cohabitation has received more detailed attention under the **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**. Article 16 of CEDAW states that “*States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations...*”. The Committee on the Elimination of Discrimination Against Women which monitors compliance with CEDAW has noted the following concerns about the treatment of women in informal cohabitation relationships, which it referred to as “*de facto*” relationships:

- *...generally a de facto union is not given legal protection at all. Women living in such relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law. Such women should share equal rights and responsibilities with men for the care and raising of dependent children or family members.*
- *... any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.*

¹⁶ Human Rights Committee, *General Comment 19: Protection of the family, the right to marriage and equality of the spouses* (Art 23), HRI/GEN/1/Rev.2 (1990).

¹⁷ Human Rights Committee, *General Comment 28: Equality of rights between men and women* (Article 3), UN Doc CCPR/C/21/Rev.1/Add.10 (2000).

¹⁸ Committee on Social, Economic and Cultural Rights, *General Comment 5: Persons with Disabilities*, UN Doc. E/C.12/1994/13 (1994).

¹⁹ UN Committee on the Rights of the Child, “Fortieth Session: Day of General Discussion, Children without Parental Care”, CRC/C/153, 17 March 2006.

- *There are countries that do not acknowledge that **right of women to own an equal share of the property** with the husband during a marriage or **de facto relationship** and when that marriage or relationship ends. Many countries recognize that right, but the practical ability of women to exercise it may be limited by legal precedent or custom.*
- *In many States, including those where there is a community-property regime, there is no legal requirement that a **woman be consulted when property owned by the parties** during [a] marriage or **de facto relationship** is **sold or otherwise disposed of**. This limits the woman's ability to control disposition of the property or the income derived from it.*
- *In many countries, **property accumulated during a de facto relationship** is not treated at law on the same basis as property acquired during marriage. Invariably, **if the relationship ends**, the woman receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged.*

The Committee accordingly recommended that States Parties should enact and enforce legislation to comply with Article 16 of the Convention.²⁰

International law on marriage and the family obligates Namibia to give increased protection to cohabitation relationships, since the current legal framework is insufficient to ensure equity between cohabiting partners.

3.2 Namibian constitutional cases

There is little Namibian jurisprudence on cohabitation. The *Frank* case refused to give the relationship of a same-sex couple the same status as a marriage for the purposes of permanent residence, but left open many other questions about various kinds of cohabitation. The *Detmold* and *Frans* cases gave recognition to some non-traditional family forms (adoptive parents and children and children born outside marriage).

There is to date only one Constitutional case which has addressed cohabitation. The **2001 Frank case**²¹ dealt with the role of a lesbian relationship between a foreigner and a Namibian citizen in the foreign partner's application for permanent residence. Ms Frank argued that if her relationship with a Namibian citizen had been a heterosexual one, she could have married and would have been able to reside in Namibia or to apply for citizenship as the spouse of a

²⁰ Committee on the Elimination of Discrimination Against Women, *General Recommendation No 21: Equality in marriage and family relations*, HRI/GEN/1/Rev.7 (1994) (emphasis added).

²¹ *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC).



Namibian citizen. She asserted that the failure to afford her comparable rights in her lesbian relationship implicated the constitutional right to equality in Article 10 and the protection of the family in Article 14. The Supreme Court rejected this argument, holding that there was no unfair discrimination because “[e]quality before the law for each person does not mean equality before the law for each person’s sexual relationships”.

The Court also found that there was no violation of the constitutional right to dignity because the state’s failure to afford the same treatment to “an undefined, informal and unrecognized lesbian relationship with obligations different from that of marriage” as compared to “a recognized marital relationship” in respect of permanent residence amounts to differentiation, but not discrimination.

The Court found Article 14 of the Constitution inapplicable on the ground that the “family” protected by it “envisages a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race”. But this focus on procreation as a defining feature of the concept of “family” is problematic. Family units can and often do comprise many groupings not defined by procreative potential, such as siblings, aunts or uncles and their nieces or nephews, cousins, single parents and children, single grandparents and children, and child-headed households – just to name a few of the myriad household compositions one might find in Namibia. Moreover, defining the family unit in terms of childbearing seems in tension with Namibia’s international commitments, which seem to require recognition and protection for all kinds of families as they exist in practice.

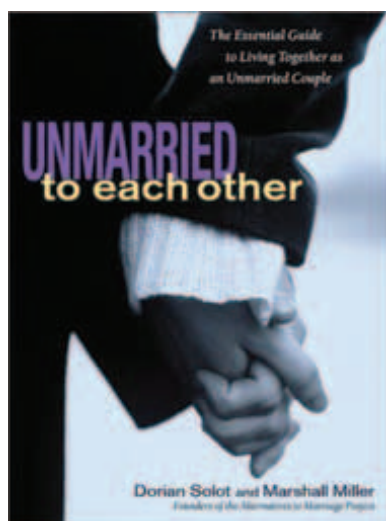
It is not clear what the *Frank* case would mean for some future constitutional challenge to the failure to afford appropriate protections to cohabiting relationships. It may be that a male-female cohabiting couple might have more success, or that an attempt to establish constitutional protection for either same-sex or opposite-sex relationships might have more success in a context which does not involve a discretionary decision such as a grant of permanent residence.

At the moment, there is little other Namibian jurisprudence to guide us on cohabitation. However, comments made by the High Court suggest that there is scope for a more generous interpretation of “family”.

In the **2004 *Detmold* case**,²² the High Court examined a provision in the Children’s Act 33 of 1960 which prohibited the adoption of children born to Namibian citizens by non-Namibian citizens. The Court held that the prohibition in question violated Article 10(1) on equality and Article 14(3) on the family. The Court agreed with the applicants’ assertion that the provision in question might deprive a child of the benefits of a loving and stable family life which might otherwise be available to that child.

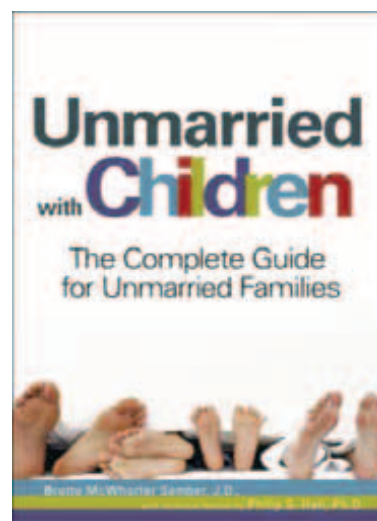
Another significant statement on the meaning of “family” in Namibia was made in the context of the **2007 *Frans* case**.²³ Here, the High Court struck down the common law rule prohibiting ‘illegitimate’ children from inheriting from their fathers in the absence of a will, on the grounds that this constituted unconstitutional discrimination on the basis of social status. The Court noted in this case that “*loving partners and parents have the right to live together as a family with their children without being married*”.

The three cases suggest that the Namibian courts may take a functional approach to the concept of family in some circumstances, rather than confining it to a specific definition. This indicates that there is probably some scope for establishing a constitutional right to some protections for families formed by cohabitation.



*... loving partners
and parents have
the right to live
together as a
family with their
children without
being married.*

Frans v Paschke and Others,
High Court of Namibia 2007 (2)
NR 520 (HC) (per Heathcote AJ)



²² *Detmold and Another v Minister of Health and Social Services and Others* 2004 NR 174 (HC).

²³ *Frans v Paschke and Others* 2007 (2) NR 520 (HC).

3.3 South African constitutional cases

South African Constitutional jurisprudence has given increasing protection to same-sex cohabitants, who until recently were not able to marry in South Africa. It has given less protection to opposite-sex cohabitants, on the theory that such couples have the choice to marry.

3.3.1 Opposite-sex cohabitation

The South African Constitutional Court has provided few protections to cohabitating opposite-sex couples. Although it has considered cohabitation relevant when considering a parent's relationship to a child born of that relationship, it has refused to provide cohabitating heterosexual couples with the same rights as married couples on the ground that marriage was a viable option they chose not to undertake. In treating marriage and cohabitation as voluntary choices, however, it has ignored the social and economic realities that circumscribe women's autonomy.

In *Fraser v The Children's Court, Pretoria North*,²⁴ the Constitutional Court considered parental cohabitation as a factor relevant to determining a father's rights over his child. At issue was the constitutionality of a statute that allowed unmarried women to consent to the adoption of their children without the consent of the children's fathers. The Court held that this categorical exclusion of unmarried fathers amounted to unconstitutional discrimination. Giving Parliament two years to develop an alternative approach, the Court warned that the problem required the consideration of individual circumstances, including the nature of the parents' relationship. The Court also noted that statutory and judicial responses to these problems in other jurisdictions are "nuanced", having regard to a variety of factors, including the duration and the stability of the relationship between the parents.

In the 2005 case of *Volks NO v Robinson*²⁵ the South African Constitutional Court addressed the question of whether the exclusion of an opposite-sex cohabiting partner from the Maintenance of Surviving Spouses Act 27 of 1990 was unconstitutional. The Act grants a surviving spouse a claim for maintenance against the estate of the deceased spouse if the spouse lacks sufficient means and earnings to provide for his or her own maintenance. The *Volks* case involved a woman who had been in a life partnership with a man for 16 years. The man was the main breadwinner in the relationship, whilst the woman had only a small income. She was registered as a dependant on his medical aid scheme and named as a beneficiary in his will. They were publicly accepted as a couple, and she nursed him through a recurrent mental illness. After her partner's death, she sought to claim maintenance from the estate but was barred from doing so because the Act covered only a "surviving spouse in a marriage dissolved by death".

²⁴ 1997 (2) SA 261 (CC).

²⁵ 2005 (5) BCLR 446 (CC).

Consequently, she argued that the statute's failure to give a surviving partner in a heterosexual life partnership the same protection as a surviving spouse violated the constitutional rights of equality and dignity.

The issue split the Constitutional Court.

- (1) The majority judgment found no unfair discrimination on the basis of marital status. The majority believed that the Act's distinction between married and unmarried people is fair because the law imposes a reciprocal duty of support upon spouses whilst there is no such legal duty between unmarried persons. In contrast to married couples, cohabitants acquire only the duties they have agreed to assume.
- (2) The concurring opinion focussed on dignity and emphasised the issues of choice, noting that heterosexual couples in life partnerships may choose to marry if they wish and that the choice *not* to marry must also be respected.
- (3) A joint dissenting opinion by two justices thought that discrimination on the ground of marital status occurs where relationships that serve a similar social function to marriage are not regulated in the same way as marriage. They did not assert that cohabitation must be treated equally to marriage in every respect, but thought that there was unfair discrimination in the case before the court because the cohabiting couple had in fact entered into reciprocal duties of support during the relationship and the survivor was financially vulnerable upon the death of her partner.
- (4) A second dissenting opinion also argued for a focus on the function of relationships rather than their definition. Noting the South African context of poverty and patriarchy, the justice who wrote this opinion thought that the challenged statute discriminated unfairly in respect of at least two classes of surviving cohabitants: those where the parties had committed themselves to a life of interdependence marked by mutual emotional and material support, and those where the relationship had produced dependency for the more economically vulnerable party who would probably have been unable to insist upon marriage.

3.3.2 Same-sex cohabitation

There have been a number of South African cases dealing with same-sex cohabitation which have held that certain rights analogous to the rights afforded to married couples must be extended to persons in same-sex life partnerships – including the rights of same-sex partners to statutory health insurance schemes, residence permits, pensions for judges, adoption, guardianship and intestate inheritance. Moreover, the Constitutional Court has also declared the common law definition of marriage and the provisions of the Marriage Act to be unconstitutional because they exclude same-sex partners, and the state has accordingly provided for civil unions for same-sex partners through the Civil Union Act 17 of 2006.

The key cases are:

- *National Coalition for Gay and Lesbian Equality v Minister of Justice* (criminalising sodomy violates the rights to equality, dignity and privacy and deprives gay men of a basic human need which is central to family life)²⁶
- *Langemaat v Minister of Safety and Security and Others* (exclusion of same-sex partner from a statutory police health insurance scheme would violate the right to equality)²⁷
- *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (differential treatment of spouses and same-sex partners for purposes of residence permits is discrimination on the basis of sexual orientation and marital status, as well as a violation of the right to dignity)²⁸
- *Satchwell v President of the Republic of South Africa* (provision of pension payments and other benefits to spouses of judges but not to same-sex partners is unconstitutional discrimination on the grounds of sexual orientation in relationships where the parties have in fact undertaken reciprocal duties of support)²⁹
- *Du Toit v Minister of Welfare and Population Development* (exclusion of suitable persons in permanent same-sex partnerships from joint adoption defeats the very essence and social purpose of adoption, which should focus on the best interests of the child, and violates the partners' constitutional right to dignity)³⁰
- *J v Director General, Department of Home Affairs* (failure to recognise and register a woman as the parent of a child conceived by her same-sex female partner by means of artificial insemination is unconstitutional discrimination on the grounds of sexual orientation)³¹
- *Du Plessis v Road Accident Fund* (same-sex partners who have undertaken a reciprocal duty of support entitled to claim damages for loss of support in the same way as a spouse in order to give effect to the constitutional rights to dignity and equality)³²
- *Minister of Home Affairs and Another v Fourie and Another* (exclusion of same-sex couples from marriage constitutes a denial of their right to equal protection)³³
- *Gory v Kolver NO* (exclusion of permanent same-sex life partners who have undertaken reciprocal duties of support from the law on intestate succession is unconstitutional discrimination on the ground of sexual orientation).³⁴

This line of cases is not directly applicable to a discussion of opposite-sex cohabitation, as their holdings have been generally premised on the fact that same-sex life partners have no option to enter into a marriage.

*...what constitutes family life should change as
social practicess and traditions change.*

***Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC)**

²⁶ 1998 (6) BCLR 726.

²⁷ 1998 (3) SA 312 (T).

²⁸ 2000 (2) SA 1 (CC).

²⁹ 2002 (6) SA 1 (CC).

³⁰ 2003 (2) SA 198 (CC).

³¹ 2003 (5) SA 621 (CC).

³² 2004 (1) SA 359 (SCA).

³³ 2006 (1) SA 524 (CC).

³⁴ 2007 (4) SA 97 (CC).



Chapter 4

SOME THEORETICAL CONSIDERATIONS

Some fundamental questions are raised by a discussion of possible law reform on cohabitation. This chapter introduces some of the key considerations.³⁵

4.1 Cohabitation, marriage and new concepts of ‘family’

Should marriage be the touchstone for defining cohabitation, or should the law approach different forms of families in a more open-ended way by asking what function they serve in society?

³⁵ For an excellent brief introduction to the key issues, see Elsje Bonthuys & Catherine Albertyn, *Gender, Law and Justice*, Cape Town: Juta & Co, 2007 at 207-213.

A key question in considering the best legal approach to cohabitation is: Should marriage be the standard, or should the law take a more open-ended approach to different forms of families?

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

Dawood v Minister of Home Affairs 2000 (8) BCLR 837 (CC)

When people enter into a marriage, their status changes. In the case of a civil marriage, there is a very specific point in time when the parties change from being unmarried to being married, and this change in status is associated with new legal rights and responsibilities. Customary marriage may involve lengthier rituals and processes, but it also involves a change in status which affects the families involved as well as the individuals. Furthermore, it is a constitutional imperative that marriage must be undertaken by free choice on the part of the spouses. The end-point of a marriage involves another clear change in status. There are specific procedures for dissolution by divorce, with many of the procedures involved being designed to ensure that the interests of children and economically vulnerable spouses are protected. Furthermore, the kind of marriage the deceased had determines in part which rules of intestate succession apply.

In contrast, cohabitation is not a formal status. There is not necessarily a clear point at which it begins or ends, and there are no established rituals or procedures associated with it. Few legal consequences flow automatically from cohabitation, regardless of its duration – the exceptions are a small number of statutory provisions giving some limited rights and protections to cohabiting partners. Other legal rights and obligations between cohabiting partners arise only from an express agreement between the parties, or an agreement which can be inferred from their conduct – and it will usually be very difficult to infer what each party actually chose or consented to in such a situation. Another point of contrast between cohabitation and marriage is that informal cohabitation sometimes still attracts stigma and disapproval, on religious or other moral grounds.

Several legal analysts in South Africa have argued for a functional approach to families, but with an emphasis on comparing the functions of cohabitation to the functions of marriage. For example, the South African Law Reform Commission noted that “*domestic partnerships have come to be perceived as functionally similar to marriage*” and recommended that “*the decisive consideration ought to be whether a mutual dependency can be inferred from the partners’ conduct during the existence of the relationship*”.³⁶

Marriage and cohabitation create similar emotional involvements, dependencies and complex issues of finance and property.

June D Sinclair assisted by **Jacqueline Heaton**,
The Law of Marriage, Volume 1, Kenwyn: Juta & Co, Ltd, 1996

³⁶ South African Law Reform Commission (SALRC), *Project 118: Report on Domestic Partnerships*, Pretoria: SALRC, March 2006.

An alternative approach would move away from using matrimonial law as the yardstick for cohabitation. Marriage fulfils certain social functions primarily because the law has assigned those functions to marriage alone, but the legal preference for marriage does not match the lived reality of many people in diverse societies like South Africa and Namibia. Instead of looking to marriage as the ideal, the law could focus on practical issues such as caretaking and dependencies in a range of family units, and attempt to address the inequalities and injustices associated with those roles.³⁷

American law professor Martha Fineman suggests that contract law should provide the framework for the private ordering of all kinds of personal relationships, supplemented where necessary by underlying default rules which set forth basic parameters, such as those found in labour law.³⁸ Another American law professor, Martha Ertman, proposes an approach to family law based on a range of legal frameworks for family relationships, in the same way that business enterprises can construct themselves as companies, partnerships or close corporations. She suggests that laws on family relationships should focus on addressing financial losses, gains and interminglings in the same way as business law, and that definitions of family affiliation should focus on finance rather than on sexual conduct.³⁹

These observations emphasise the need to move away from the idea that marriage is the only form of family worthy of legal protection, and toward a legal framework which does not view marriage as the ideal model for family relationships. A law aimed at providing protection for cohabiting couples need not accomplish an entire transformation of Namibian family law in one step, but it is useful to in thinking about law reform on cohabitation to keep the larger picture of family law and family relationships in mind.

If we move away from defining relationships in terms of marriage, we can look at the actual functions that they perform in society.

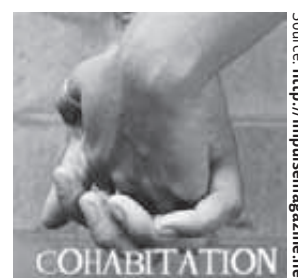
Volks NO v Robinson 2005 (5) BCLR 446 (CC) at 502B (Justice Sachs, dissenting), citing Beth Goldblatt “Regulating Domestic Partnerships – A Necessary Step in the Development of South African Family Law” (2003) 120 SALJ 610.



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Source: <http://impulsemagazine.net>

³⁷ See Pierre de Vos, “Same-sex Sexual Desire and the Re-Imagining of the South African Family”, 20 *SAJHR* 179 (2004), drawing on Martha Fineman, *The Neutered Mother: The Sexual Family and other Twentieth Century Tragedies*, New York: Routledge, 1995. See also Anna-Marié de Vos, “Sexual Orientation and Family Law in South Africa”, paper delivered at the Miller Du Toit-Law Faculty of the University of the Western Cape Family Law Conference, Cape Town, March 2002.

³⁸ Martha A Fineman, “Why marriage?”, 9 *Virginia Journal of Social Policy and Law* 239 (2001-02).

³⁹ Martha M Ertman, “The ALI Principles’ Approach to Domestic Partnerships”, 8 *Duke Journal of Gender Law & Policy* 107 (2001).

4.2 Freedom of choice and gender inequality

Because cohabitation occurs in a society marked by gender inequality, the role of the ‘choice’ not to marry is complex. Do men and women in Namibia have the same freedom of choice about the form their relationships will take?

Personal choices should be afforded respect, but the role of choice in respect of cohabitation is complex. Is it fair to assume that both parties in a cohabitation relationship have really chosen not to marry? Are men and women positioned to have the same freedom of choice about the form their relationships will take? Should the law focus on the negative fact that the parties have chosen not to marry, or on the positive fact that they have chosen to be part of a relationship with particular emotional, social and financial functions?

The question of choice is more complex than a decision simply “to marry or not to marry”. As the Canadian Supreme Court has pointed out, “*Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons – all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law.*”⁴⁰ It would be unrealistic and unfair to discriminate against the weaker partner to a cohabitation relationship on the basis that this partner should either have insisted on marriage or else withdrawn from the relationship.⁴¹

It is small consolation, indeed, to be told that one has been denied equal protection... by virtue of the fact that one's partner had a choice.

Miron v Trudel [1995] 2 SCR 418 (per L'Heureux-Dubé J) at 471-472,
quoted in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) (per Sachs J) at 496B

There is an important gender dimension to the concept of free choice, since many women lack the same degree of free choice as their male partners in the context of patriarchy and poverty which has historically prevailed in Namibia, and has not yet been fully eradicated. South African researcher Beth Goldblatt, points out, “*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.*”⁴² South Africa's Centre for Applied Legal Studies has also emphasised women's vulnerability in cohabitation relationships:

⁴⁰ *Miron v Trudel* [1995] 2 SCR 418 (Justice L'Heureux-Dubé, concurring) at paragraph 102.

⁴¹ *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at 502B (Justice Sachs, dissenting) at 521A.

⁴² Beth Goldblatt, “Regulating domestic partnerships – a necessary step in the development of South African family law”, 120 *SALJ* 610 (2003) at 616.

Women, who may wish to marry, often feel unable to insist on this because they are dependent on men. Many of the men are reluctant to marry because of the freedom this affords them to come and go as they please and to remain outside of legal regulation of their relationship while benefiting from the domestic labour of women. Women depend on men because of their unequal position in society, their relative lack of access to income, their responsibilities to children and their inability to resist physical abuse by men.⁴³

The impact of systemic gender inequalities justifies some legal intervention to protect vulnerable and disempowered women who do not have the same degree of choice as their male partners.

Their choice has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other.

Volks NO v Robinson 2005 (5) BCLR 446 (CC)
(per Sachs J) at 521H (speaking of “many women”).

Another strand in the issues surrounding the concept of choice is the question of informed versus uninformed choice. Some people in South Africa and Namibia mistakenly believe that there is some legal protection for cohabitation relationships as a form of ‘common-law marriage’, and so may ‘choose’ not to marry or acquiesce to a partner’s desire to remain unmarried on the basis of mistaken assumptions. There may also be situations where one party is deceiving the other, or holding out false promises of future marriage, so that the other partner’s ‘choice’ to cohabit is not being made with full and accurate knowledge of all the relevant factors.

The South African Law Reform Commission has taken the view that it is necessary to strike a balance between the interests of vulnerable parties in relationships and the autonomy of partners who do not want the relationship to incur any legal consequences. It suggests that there are two justifications for allowing the law to interfere with individual self-determination in the context of cohabitation: (1) a protective role, to prevent exploitation in a relationship where there are power imbalances and (2) a remedial role, to resolve disputes about rights and obligations fairly when a relationship has broken down.

More generally, US law professor Martha Fineman asserts that some consequences are simply too oppressive or unfair to be countenanced by society, even if individuals choose them.⁴⁴

This discussion should help to explain why the law is entitled to interfere with freedom of choice in the context of cohabitation, as in many other areas of life, when this is necessary to protect the fundamental rights of others.

⁴³ Quoted in South African Law Reform Commission (SALRC), *Project 118: Report on Domestic Partnerships*, Pretoria: SALRC, March 2006 at paragraph 2.4.175. See also Saras Jagwanth, “Expanding Equality”, 2005 *Acta Juridica* 131.

⁴⁴ Martha A Fineman, “Contract and Care”, 76 *Chicago-Kent Law Review* 1418 (2000-01). This principle is already evident in Namibian law, which does not allow persons to sell themselves into slavery (Article 9(1) of the Namibian Constitution) or to consent to being assaulted (JRL Milton, *South African Criminal Law and Procedure*, Volume 2, Cape Town: Juta & Co, 1982 at 471-473).

4.3 Cohabitation and religion

Because Namibia is a secular state, the Christian preference for marriage is not a valid reason for refusing to give legal protection to cohabitation. In any event, polygamous customary marriages and marriages under various religions are already recognised for specific purposes, evidencing a tolerance for a variety of customs and belief systems.

Although some Namibians may object to giving any legal recognition to cohabitation on religious grounds, such arguments should not be allowed to be the guiding influence on policy on this issue.

Christian theology generally disapproves of sexual relationships outside marriage. However, even though a large proportion of the Namibia population subscribe to Christian values, Namibia is a secular state. This is explicitly recognised in the Preamble to the Namibian Constitution and in Article 1(1), both of which proclaim Namibia as a “sovereign, secular, democratic and unitary state”. Furthermore, Article 14 on marriage specifically states that the right to marry and found a family may not be limited on the basis of religion.

Respect for religions other than Christianity has been evidenced in several Namibian statutes which define marriage to include customary marriage (which can be polygamous) or marriages under various religions. Since colonial times, there has been a tension between the Christian ideal of marriage between one man and one woman, and the institution of polygamy which is accepted by many Namibian cultures. Nevertheless, polygamous customary marriages are recognised in Namibian statutes for many purposes. Thus, in many ways, Namibian law and custom already respect a plurality of approaches to family life.

In an argument which is often aligned to religious views on marriage, some worry that legal recognition of cohabitation may threaten the continuation of the institution of marriage. However, the rate of marriage is already very low in Namibia at a time when the law affords virtually no protection to cohabitation. This indicates that it is appropriate to place a priority on reforming the law so that it is appropriate to the nation’s existing social reality. Furthermore, as Professor June Sinclair has pointed out, “if the popularity of marriage is declining, ways should be found to make it more attractive, not cohabitation punitively unattractive”.⁴⁵

⁴⁵ June D Sinclair assisted by Jacqueline Heaton, *The Law of Marriage, Volume 1*, Kenwyn: Juta & Co, Ltd, 1996 at 291-292.



Chapter 5

CURRENT COMMON LAW ON COHABITATION

The current Namibian law on cohabitation is based primarily on common law principles. There is no legislation that comprehensively regulates cohabitation, although certain limited rights are extended to cohabiting partners by specific statutes.

5.1 Common law on cohabitation versus marriage

Marriage and cohabitation currently have very different legal profiles.

In order to place the legal position of cohabiting partners into perspective, it is contrasted to that of spouses in a civil marriage. While cohabitation cannot and should not necessarily be equated with marriage, comparisons may be helpful in considering the possible legal reforms in respect of cohabitation.

5.1.1 Marriage

In the case of a civil marriage, the change in status which results from the marriage is associated with new legal rights and responsibilities. At marriage, husband and wife enter a physical, moral and spiritual community of life which includes companionship, love, affection, comfort, mutual services and sexual intercourse. Spouses in a civil marriage undertake to live together and to support one another on a scale commensurate with the social position, lifestyle, and financial resources of the spouse.

This duty of support means that all spouses in civil marriages, regardless of the property regime which applies, can bind one another to third parties for the provision of household necessities. It also gives spouses a right to claim damages from third parties for the loss of the other spouse's financial support in cases where the spouse has been killed or injured by the wrongful act of a third person.

Both spouses have a right to occupy the matrimonial home, and both are under a reciprocal duty to contribute to its upkeep. Neither spouse has a right to eject the other spouse from the matrimonial home without providing suitable alternative accommodation, even if the matrimonial home is owned by one spouse alone. A similar principle applies to the contents of the matrimonial home, such as the furniture.

There are various property regimes which can apply to civil marriages, but most such marriages in Namibia are "in community of property" with a joint estate,⁴⁶ where all major financial transactions require the consent of both spouses under the Married Persons Equality Act 1 of 1996.

Marriage to a Namibian citizen can (after ten years) give a non-Namibian citizen the right to Namibian citizenship by marriage, and the Namibian Constitution protects spouses from being compelled to give testimony against each other.

There are legal rules and procedures which govern the dissolution of a marriage by divorce. Divorce can be ordered only by the High Court. The divorce order will usually address the division of the marital property in a marriage which was "in community of property", and it may require one spouse to provide maintenance for the other regardless of the marital

⁴⁶ Legal Assistance Centre (LAC), *Proposals for Divorce Law Reform in Namibia*, Windhoek: LAC, 2000, at 47.

The default marital property regime for civil marriages in most parts of Namibia is "in community of property", meaning that unless a couple arrange to have an ante-nuptial agreement applying "out of community of property" or the "accrual system", they will automatically be married "in community of property". See Legal Assistance Centre (LAC), *Marital Property in Civil and Customary Marriages: Proposals for Law Reform*, Windhoek: LAC, 2005 at 36-48.

property regime which applied. If there are minor children, the divorce order will normally settle responsibility for their custody, access, guardianship and maintenance.

When one of the spouses dies, the estate will be divided before anything is inherited if the marriage was “in community of property”. Spouses had no right of intestate inheritance at common law, but this has now been changed by statute; now all surviving spouses have a right to inherit intestate from the property of the deceased spouse.

Customary marriage also involves a change in status which affects the families involved as well as the individuals. It is conceptualised as a union between two families or kin groups rather than a union between two individuals. The extended families of the two spouses often play a large role in mediation and attempting to resolve marital disputes, while community elders and members of the community or age mates may also play a mediating role. Divorce is usually accomplished by a relatively informal procedure which takes place without any intervention from traditional leaders, who are likely to become involved only if there are issues which cannot be resolved between the couple and their families. But despite its greater fluidity in respect of process, customary marriage still results in a clear status which places rights and obligations on the spouses and their family members.

5.1.2 Cohabitation

In contrast to marriage, cohabitation produces no automatic consequences under Namibian common law. Most statutes which involve issues pertaining to intimate and dependent relationships similarly ignore cohabitants.

There is no legal duty of support between cohabitants either during the relationship or when it ends. In the eyes of the law, each partner is responsible for his or her own upkeep.

The only way that cohabiting partners in Namibia can acquire mutual duties and obligations is through agreements – either express agreements between the two partners or implicit agreements inferred from their conduct. However, as discussed below, these avenues for establishing mutual obligations have limitations.

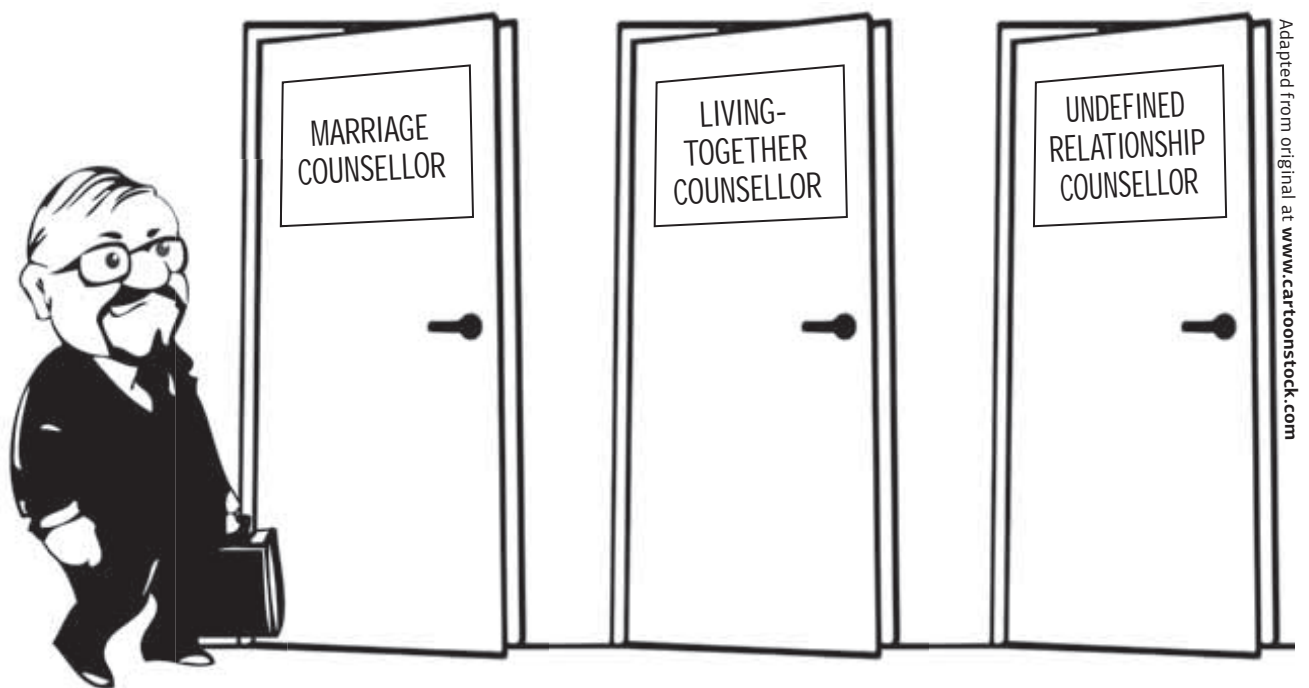
The law does not regard the property of cohabitants to be jointly owned unless they have entered into an express or implied agreement to this effect. If the property is owned individually, the cohabitant who owns the property has a legal right to deal with that property as he or she wishes, without consulting his or her partner – even if the property was acquired during the course of the relationship and even if the other partner made financial contributions to the purchase of the property. The person who holds the title to the property is regarded as the owner of the property and is not required to act with the consent or knowledge of his or her partner.

The cohabiting partner has no right to occupy a common home which is individually owned or leased by the other partner, and cohabiting partners have no rights in respect of private land or communal land which is held in the name of the partner.

Like any other person, a partner who is cohabiting has the right to bequeath his property to whomever he or she wishes. Thus, cohabitants may in a will bequeath their estate to their partners. If no will exists, then the surviving cohabitant has no right to inherit from the deceased cohabitant under the laws of intestate succession.

Spouses are protected from being compelled to testify against each other in civil and criminal cases, but there is no analogous protection for cohabiting partners.

The treatment of dependent cohabiting partners differs under different statutes; cohabitants would fall under the definition of “*dependant*” in a few, but are often left out and thus deprived of various benefits which would accrue to a spouse.



The only area in which cohabitation closely resembles marriage concerns children. This is primarily a result of statutory enactments which have overruled the common law (discussed in Chapter 7). Also, opposite-sex cohabitants are covered by the provisions of the Combating of Domestic Violence Act in the same way as spouses.



Although cohabitants have no clear legal recognition for their relationship at common law, they may sometimes make use of common law concepts to enforce certain rights and obligations. The main channel of litigation has been in the area of contract, and a number of cases have had successful outcomes on this basis. A less well-developed option is to utilise a claim of unjustified enrichment against the other party. Vulnerable parties could possibly find some assistance in existing common-law remedies in advance of law reforms.

5.2 Express contracts

Cohabiting couples could make a contract to govern their relationship. However, there are certain limitations to what such contracts can do. Moreover, it is unlikely that many cohabiting couples would find this option accessible.

People who are cohabiting could make a straightforward agreement about their respective rights and duties. Both oral and written contracts are enforceable, although there are obvious problems of proof in respect of oral contracts.

But there are several potential limitations to this approach:

- A contract which was considered to include sexual relations as a form of consideration might be considered unenforceable as a matter of public policy.
- If one of the cohabiting partners had a subsisting marriage in community of property, a contract of this nature might fall foul of the Married Persons Equality Act 1 of 1996.
- There are limitations on the power of cohabiting parties to contractually bind themselves beyond death, although it seems that unconditional contracts for maintenance after the death of one of the partners would be enforceable. However, because of the complexities of the common law on this point, it would be preferable for cohabiting partners to use the mechanism of wills to provide for maintenance to a surviving partner after one or the other partner dies.
- A contract between cohabitants would not be enforceable with respect to third parties, because of the general principle of contract law that no one can be bound by the terms of a contract to which he or she is not a party.
- Similarly, there is no basis in contract law for a suit against a third party who, without knowledge of the contract, prevents the other contractual party from fulfilling his duties

- unless the third party knowingly frustrated the contract. This means that a cohabitant could not sue a third party who, for example, caused her partner's death or injured him such that he could no longer work and support her.
- It appears highly unlikely that a cohabitation contract setting out property division and support obligations could be read to include a duty of affection or fidelity which could support an action against a third party for adultery or enticement. Indeed, a contract purporting to include such things would probably be found to be unenforceable as a matter of public policy.
- Finally, cohabiting partners would appear to have no claim under common law for loss of support if the other partner is disabled or killed by the unlawful act of a third party, even if the cohabitants had previously entered into a contractual undertaking to support each other. The South African courts have held that establishing such a claim requires a legally enforceable duty of support on the part of the deceased *and* a demonstration that the right to such support is worthy of protection. Thus, it appears unlikely that a contract between cohabitants, on its own, would support a claim for loss of support.

Despite these caveats, an express cohabitation contract could provide some mechanism for regulating a cohabiting couple's financial affairs and sharing their assets upon the dissolution of the relationship, and it could create a contractual duty of mutual support during the existence of the relationship.

It is rare in practice for cohabiting partners to make an express agreement about their respective obligations. Furthermore, this is something which economically-weaker parties will probably be unable to insist upon, or unable to negotiate from an equal bargaining position. Uneducated parties who could not afford legal assistance would also probably struggle to craft an agreement which protected their respective interests adequately, even if their intentions were good.



5.3 Universal partnerships

Implied contracts establishing universal partnerships have been used in some cases to justify the distribution of assets between cohabiting partners. But establishing a universal partnership is difficult, and the outcome can be unpredictable.

Because express cohabitation agreements are a rarity, cohabitants have more often found themselves in the position of attempting to rely upon a tacit or implied agreement. The existence and terms of such an agreement must be proved by the person who is seeking to rely upon it, which can be very difficult in practice.

The law of contract includes a concept known as universal partnership, which has been applied to cohabiting partners. In general, a universal partnership is an express or implied partnership agreement where the parties agree to pool their property for their joint benefit. When the partnership comes to an end, the partnership assets are divided in proportion to each party's contribution – taking into account contributions in the form of capital, shares, labour or services. If it is not possible to determine the respective contributions of the parties, then – at least according to some cases – the assets are to be divided equally.



There are four basic requirements for establishing any universal partnership: (1) each partner must bring something into the partnership – usually money, labour or skill; (2) the partnership be carried on for the joint benefit of both parties; (3) the object of the partnership should be to profit; and (4) the contract between the parties should be a legitimate contract.

Establishing that a contract has been concluded tacitly is not easy; the test is a balance of probabilities, but courts have taken a cautious approach to inferring such contracts.

It is helpful to women that the courts have recognised that labour in the home and the provision of child care can constitute contributions for the purposes of such a partnership.

In practice, it may be more difficult for a person to establish an inferred partnership when the business in question is already established and flourishing when the relationship begins. This is a factor which could work against women cohabitants in a context where much income-generating economic activity is still dominated by men.

There is only one reported case in Namibia which addresses the concept of a universal partnership in a cohabitation relationship. In the *Frank* case, which dealt with the refusal by the Immigration Selection Board to grant permanent residence to a German citizen who was in a long-term lesbian relationship with a Namibian citizen, the High Court concluded that same-sex partners can establish a universal partnership in the same way as opposite-sex partners.⁴⁷ The Namibian Supreme Court overturned the High Court decision, but its discussion of universal partnership made it clear that cohabiting partners can in theory rely on this concept.⁴⁸

There are some drawbacks to the use of a universal partnership as the basis for the division of assets between cohabiting partners:

- Proving a universal partnership is difficult. The onus of proof lies with the person attempting to rely on the contract (which will almost always be the economically more vulnerable party); this partner has to prove both the existence of the implied partnership and the terms of the implied agreement.

⁴⁷ *Frank & Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC).

⁴⁸ *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC).

- If a cohabiting partner is married to someone else, it may be impossible to establish a universal partnership in respect of the cohabitation.
- This remedy provides no definite protection for vulnerable parties; it is unsure, unpredictable and largely limited to those with the financial resources to bring a civil action in court, meaning that it will not be a useful approach for the majority of Namibians.
- This approach has severe disadvantages if the main asset is the home where the parties lived together. Even if the surviving partner can prove a right to a half share in a universal partnership, this does not necessarily entitle her to a half share in the immovable property which formed part of the partnership's assets.⁴⁹
- It may be particularly complex to untangle what assets belong to a universal partnership between cohabiting partners in a case where one of the cohabiting parties was married at the same time to another party in community of property.

5.4 Unjust enrichment

The law governing unjust enrichment may be applied to cohabitation relationships to achieve fairness between the partners. This cause of action is still under development in Namibia and South Africa and has not yet been applied to cohabitants. But the concept of unjust enrichment has been applied to cohabitation in many other jurisdictions, including Zimbabwe, the Seychelles and Canada.

The law governing unjust enrichment is based on the general principle that one person should not be able to benefit unfairly at the expense of another. In theory, one cohabiting partner might be able to show that the other partner was enriched during the relationship by tangible improvements made to the property of the one partner by the other or by some other form of contribution such as services rendered.

There is no general unjust enrichment action in South African or Namibian law. However, courts may allow unjust enrichment claims in novel circumstances in which they deem it necessary for the promotion of justice. This is arguably the case where cohabiting partners must resort to common law remedies to ensure any form of equity upon the dissolution of the relationship.

Unjust enrichment cases in Namibia have not specified the requirements for an unjust enrichment claim, but it has been held in South Africa that any enrichment action must demonstrate the following elements: (a) the defendant must be enriched; (b) the plaintiff must

⁴⁹ In the case of *Botha NO v Deetlefs & Another* 2008 (3) SA 419 (N), the High Court found that there was no right to continued occupation of a couple's house by the surviving cohabitant after the death of the other partner. The Court held that in the absence of an agreement between the partners on how the dissolution of the partnership is to be achieved, the normal course of action is to appoint a receiver to liquidate the partnership.

be impoverished; (c) the defendant's enrichment must be at the expense of the plaintiff; and (d) the enrichment must be unjustified.

Namibian courts have only heard a handful of cases involving unjust enrichment claims, and none of these have involved cohabitation. But the Zimbabwean courts have already recognised a general action for unjust enrichment and applied it to the context of cohabitation. In the Seychelles, where unjust enrichment actions are covered by the Civil Code, the theory has also been applied to assist cohabiting partners. The application of the theory of unjust enrichment to cohabitation is particularly well-developed in Canadian law, where women who were cohabiting have successfully used this legal principle to argue that their domestic services entitled them to a share of the partner's assets or financial gains during the relationship. Some cases from United States jurisdictions have relied upon similar arguments.

Some jurisdictions, such as Finland, have proposed legislative changes which would allow a cohabiting partner to make an unjust enrichment claim for domestic services, even where these services did not directly contribute to the acquisition of, or improvement in, value of an asset. This might apply, for example, in a case where one partner contributed services which the other would otherwise have had to provide for himself, or pay to obtain from another source.

5.5 Putative marriages

A putative marriage is a marriage which is automatically void because the basic legal requirements for a marriage were never satisfied. However, there is some legal recourse for a party to such a 'marriage' who believed in good faith that the 'marriage' was valid. Some cohabitants may fit into this category.

A marriage will be automatically void if the basic requirements for a valid marriage were never met. In such circumstances, as far as the law is concerned, the marriage never existed. Generally, a marriage will be void if there was an impediment or defect in terms of the formalities of the marriage, or if one spouse was not legally permitted to enter into the marriage. This would occur if, for example, one spouse was already married or insane or a minor who did not have proper parental consent, or if the parties were too closely related. However, the common law provides some protection to parties who have entered into a void marriage if at least one of the parties believed in good faith that the marriage was valid. This situation is referred to as a "putative marriage".

The requirements of a putative marriage are (1) good faith, in the sense that one or both parties must have been ignorant of the impediment to the marriage; (2) the marriage must be duly solemnised; and (3) the marriage must have been considered lawful by the party who is alleging that he or she acted in good faith. Once a putative marriage is established, certain consequences of a valid marriage can attach to it despite its invalidity.

The major protection afforded in a putative marriage is the recognition of the legitimacy of any children of that marriage. However, now that most of the legal disadvantages which once applied to children born outside of marriage have been removed, this result will be less important than it once was in most cases. In fact, a recent Namibian case has questioned the continued usefulness of the doctrine of putative marriage on this basis.⁵⁰

However, a putative marriage can also provide certain property rights to the spouse who entered the marriage in good faith. The law assumes that the parties intended to be married in community of property, and if both parties acted in good faith, then both are entitled to a share in the property



of the marriage. However, if only one of the parties acted in good faith, community of property will be recognised only if it is to the advantage of the innocent party.

A recent South African High Court declined to recognise a putative marriage involving the second ‘wife’ of a man already in a pre-existing civil marriage in community of property, despite the fact that the second ‘wife’ entered the marriage in good faith, unaware of the pre-existing marriage. The Court awarded the joint estate to the first wife and denied any relief at all to the second ‘wife’.⁵¹

The Namibian High Court followed this South African precedent in a recent case where the spouse in the putative marriage was given no relief because the prior legal marriage was found to be in community of property. The Court held that there could be no putative marriage because there was already an existing community of property between the applicant and his first wife at the time. The Court suggested that the second ‘wife’ had other recourse, such as a claim for damages against the man who wrongfully induced her to enter into an invalid marriage to her prejudice.⁵²

This approach has been criticised, with one commentator has suggested that courts could reach a more equitable outcome by considering a “putative estate” consisting of the joint estate of the putative marriage – including the husband’s half-share from the joint estate of his first “legal” marriage – and dividing this “putative estate” in thirds amongst the husband, the first legal wife and the second putative wife, with any adjustments as equity might require.⁵³

In contrast, the Zimbabwean courts have awarded equitable shares of property to the putative spouse in several cases with similar facts.

⁵⁰ *S v S* (A 186/2009) [2010] NAHC 152 (12 October 2010).

⁵¹ *Zulu v Zulu and Others* 2008 (4) SA 12 (D).

⁵² *S v S* (A 186/2009) [2010] NAHC 152 (12 October 2010).

⁵³ Bradley S Smith, “The Development of South African Matrimonial Law With Specific Reference to the Need For and Application Of a Domestic Partnership Rubric”, doctoral thesis, University of the Free State, Bloemfontein, South Africa, 2009 at 427-432.

Cases such as these could have particular relevance in the area of cohabitation in Namibia, where customary marriage ceremonies historically used to conclude potentially polygamous customary marriages are often coupled with a church wedding which makes the marriage a monogamous civil one. An equitable approach is required to ensure that multiple wives are not punished for the dishonesty of husbands who knowingly conceal the legal consequences of their actions, and that parties who simply misunderstand the implications of customary versus civil marriage are treated fairly.

At least one commentator has suggested that the principles of putative marriage could permit intestate inheritance by a putative spouse if the other spouse dies without leaving a will, although there has yet to be a judicial decision that considers this issue.⁵⁴

5.6 Potential claims by cohabitants against third parties

There is some precedent in the Seychelles for allowing cohabitants to bring actions against third parties for pain and suffering caused by the wrongful death of the partner.

A cohabitant would not have a claim against a third party for loss of support after the wrongful death of a partner, because such claims must be based on a duty of support arising from law and not contract. However, in a 2007 case in the Seychelles, the Seychelles Supreme Court developed that country's common law to allow a long-term cohabitant a claim against a third party for damages for mental suffering following the wrongful death of the cohabiting partner. The Court relied on the provision on protection for the family in the Seychelles Constitution, stating that *"When moral damages are claimed in a delictual action in respect of grief and sorrow, mental agony, anxiety, and shock, there is no legal or moral jurisdiction to draw a distinction between a surviving married spouse, and an unmarried spouse."*⁵⁵

This approach would likely be impossible in South Africa or Namibia in the absence of some law reform, given the common law precedent which holds that a surviving cohabiting partner has no action for loss of support against third parties because there is no legal duty of support between unmarried cohabitants. Given that damages for loss of support for cohabitants are not permitted under the current common law, it is hard to see how non-pecuniary damages for loss and suffering would be allowed.



⁵⁴ June D Sinclair assisted by Jacqueline Heaton, *The Law of Marriage, Volume 1*, Kenwyn: Juta & Co, Ltd, 1996 at 409.

⁵⁵ *Joanneau and Others v Government of Seychelles and Others* [2007] SCSC 20 (19 January 2007).

5.7 Potential claims by a wronged spouse against a cohabiting partner

Where one cohabiting partner is married to someone else, the wronged spouse may be able to bring legal action against the other cohabiting partner, for adultery, enticement or harbouring. There may also be some recourse for the wronged spouse under the Married Persons Equality Act.

In some cases, a partner in a cohabitation relationship will have a subsisting marriage to another person. If the subsisting marriage is a civil marriage, this could potentially make the cohabiting partner liable to claims from the spouse. Cohabiting partners who put their cohabitation on record in an effort to secure assets or some other remedy might thus open themselves up to potential lawsuits from the other partner's spouse.

There are three common law claims which might be brought by a wronged spouse against the cohabiting partner in this regard: adultery, enticement, and harbouring. All are possible only where the defendant has acted in bad faith, knowing that his or her partner in cohabitation was married at the time of the offence. Any of these claims could result in an award of damages.

5.7.1 Adultery

A wronged spouse may bring a civil action seeking damages for adultery against the third party, but not against the unfaithful spouse. Both husbands and wives may sue for damages as a result of adultery. The third party is liable for damages only if he or she knew that the partner was married at the time of the indiscretion, or where he or she negligently arrived at the belief that a partner was unmarried.

Adultery cases are not common in Namibia, but they are certainly not obsolete. As recently as 2007, the Namibian High Court awarded damages of N\$30,000 in a suit by a wronged wife against her husband's lover.⁵⁶

5.7.2 Enticement

A spouse may sue a third party for damages if the third party alienates one spouse from the other and convinces him or her to leave the matrimonial home through persuasion or inducement. It must be shown that the third party actually caused the unfaithful spouse to leave the marriage partner, with an element of persuasion or coaxing on the part of the third party that goes beyond the lovers' mutual desire. An action for enticement will fail if the defendant enticed the spouse in good faith (for example, persuading the spouse to leave an abusive relationship).

⁵⁶ *Matthews v Ipinge* 2007 (1) NR 110 (HC).

5.7.3 Harboursing

The third common-law claim available to a wronged spouse is an action for harboursing, or giving accommodation to a spouse who has left the matrimonial home against the will of the other spouse. Harboursing does not require evidence of persuasion or coaxing. As in the case of enticement, if the defendant has acted in good faith (for example, by harboursing a spouse who has fled the marital home because of domestic abuse), then no damages are available. This claim is seldom encountered in modern law.

5.7.4 Cases involving claims against cohabitants

There are some South African examples of adultery cases in which the guilty parties were cohabiting. In the event that the wronged spouse is unable to allege a particular act of adultery between the cohabiting partners, South African precedent allows a court to infer adultery from the circumstances of cohabitation.

While adultery is the most straightforward claim against a third-party cohabitant, enticement and harboursing actions could also apply. As discussed above, enticement is particularly hard to prove because the claimant must show that the defendant actually persuaded the errant spouse to leave his or her partner. A 1987 Lesotho case, entertained claims for both enticement and harboursing against a cohabiting partner. The Court of Lesotho found no enticement but it did find that the defendant had harboured the plaintiff's wife after becoming aware that she had left her husband without his approval, holding that this warranted an award of damages and finding that the damages were aggravated by the defendant's cohabitation with the plaintiff's wife.⁵⁷

This range of possible actions shows that any person who interferes with the marriage relationship is potentially liable to the wronged spouse for damages, with a cohabiting partner being particularly vulnerable to suit because the court will likely infer adultery from a cohabiting relationship. Furthermore, in instances where one cohabiting partner is married to someone else, considerations of potential liability could dissuade the cohabiting partners from acknowledging or registering their relationship in order to take advantage of legal protections for cohabitation which might be enacted.

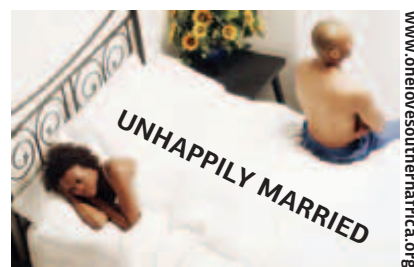
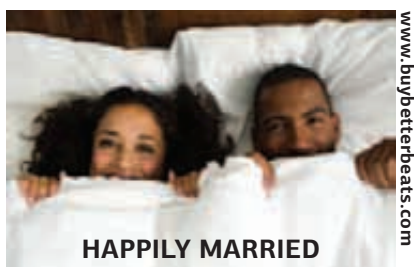
5.7.5 Claims in terms of the Married Persons Equality Act

The wronged spouse may also have a claim under the Married Persons Equality Act 1 of 1996. Generally, marriages in community of property require the consent of both spouses to dispose of property that is part of the joint estate. Thus, if the adulterous spouse uses jointly-held resources for the benefit of the cohabiting partner without the other spouse's consent, the wronged spouse may seek a remedy under the Act. If the cohabiting third party knows (or has reason to know) that the other spouse has not and will not consent, the cohabitant will probably be liable to the wronged spouse for damages.

⁵⁷ *Mojau v Kuena* [1987] LSCA 51 (16 April 1987).

A claim will also lie against the adulterous spouse, as the wronged spouse can ask the High Court for an adjustment to restore his or her half-share of the value of the lost property while the marriage is ongoing or when the estate is divided. It would also be possible for the wronged spouse to get a court order stripping the adulterous spouse of power over marital assets in general, or in relation to particular acts.

For marriages out of community of property, spouses are liable to contribute to the necessary expenses of the household *pro rata*, according to their respective means; if the wronged spouse is forced to contribute more than a fair pro rata share (for example, because the adulterous spouse is spending resources on the cohabiting third party), the adulterous spouse would be liable for damages.





Chapter 6

COHABITATION IN EXISTING NAMIBIAN STATUTES

One way of analysing whether cohabitants are catered for in legislation is to look at the definition sections of statutes, with reference to the definitions of dependants, spouses, marriage or partners.

6.1 Statutes with express provision for cohabiting partners

There are five Namibian statutes which already make some express provision for cohabiting partners:

- the Combating of Domestic Violence Act
- the Criminal Procedure Act
- the Employees' Compensation Act
- the Insolvency Act and
- the Anti-Corruption Act.

However, two of these – the Insolvency Act and the Anti-Corruption Act – include cohabiting partners as a protection against collusion and corruption, and not in an effort to protect their interests.

Three of the statutory provisions which expressly include cohabitants are designed to give some protection to vulnerable partners:

- The **Combating of Domestic Violence Act 4 of 2003** applies to “*domestic relationships*”, which are defined to include persons “*of different sexes*” who are or were living together in “*a relationship in the nature of marriage*”.⁵⁸ Thus, it explicitly covers opposite-sex cohabitation whilst excluding same-sex cohabitation.
- The provisions on special arrangements for vulnerable witnesses added to the **Criminal Procedure Act 51 of 1977** in 2003 equate spouses and cohabiting partners for the purpose of domestic violence cases; the special arrangements are available to any person against whom “*any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship*”.⁵⁹ However, the wording in the Criminal Procedure Act is broader than that in the Combating of Domestic Violence Act in that it would seem to include same-sex partners.
- The **Employees' Compensation Act 30 of 1941** makes opposite-sex cohabiting partners eligible to claim compensation in the case of injury, death or disablement of an employee. The definition of “*dependant*” in the Act refers to “*any person... with whom the employee was... living as man and wife at the time of the accident*”, and so extends eligibility for employees' compensation payments to dependants in cohabiting relationships resembling marriages. Cohabiting partners are not put on an entirely equal footing with spouses; surviving

⁵⁸ Combating of Domestic Violence Act 4 of 2003, section 3(1)(b).

⁵⁹ Criminal Procedure Act 51 of 1977, section 158A(3)(c) (added by Criminal Procedure Amendment Act 24 of 2003).

spouses and children of the employee will be deemed to be dependent on the employee for “*the necessities of life*”, but a cohabiting partner must prove that he or she was actually dependent on the employee for “*the necessities of life*” at the time of the accident.⁶⁰ However, an opposite-sex cohabiting partner is otherwise treated as a spouse so long as there is no other surviving spouse who was factually dependent on the employee, and given precedence along with children over other persons may have been dependent on the deceased employee.⁶¹

- The **Insolvency Act 24 of 1936** includes cohabiting partners, not for their own protection, but for the protection of their creditors. When the separate estate of an insolvent spouse is sequestrated, the estate of the solvent spouse also vests in the Master of the High Court as if the two separate estates were one and can secure the release of his or her separate property only by proving its independent status. The intent of the provision is to prevent collusion between the spouses to prevent property from being attached by creditors. For this purpose, the Act provides that the word “spouse” means “*not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another*”.⁶²
- The **Anti-Corruption Act 8 of 2003** covers opposite-sex cohabiting partners in its attempt to cast the net very wide for the offence of corruptly using an office or position in a public body to obtain gratification. This applies to an interest of the public officer, or any “relative” or associate. The definition of “relative” here has a very broad reference to cohabitation, covering “*a partner living with the public officer on a permanent basis as if they were married or with whom the public officer habitually cohabits*”.⁶³

Thus, Namibian legislation has in at least a few instances recognised the vulnerability of cohabiting partners by giving them protection analogous to that of surviving spouses in terms of compensation when their partners are injured or die, and when they suffer domestic violence.



Source: www.doyoninvestigating.com



⁶⁰ Employees’ Compensation Act 30 of 1941, section 4(1).

⁶¹ Id, section 40(1).

⁶² Insolvency Act 24 of 1936, sections 16 and 21.

⁶³ Anti-Corruption Act 8 of 2003, section 43(1)-(2).

6.2 Position of cohabiting partners under other statutes

Other statutes are inconsistent in their treatment of dependants, with some using this term without defining it. However, some include a definition of “dependant” of “family” which is broad enough to cover cohabitants who are in fact dependent on their partners. These include:

- the Veterans Act
- the Pension Funds Act
- the Government Service Pension Act
- the Medical Aid Fund Act
- some provisions in the Labour Act
- the Social Security Act.

6.2.1 Issues related to lawful presence in Namibia

Unlike marriage, cohabitation by a non-Namibian with a Namibian citizen is not a route to obtain citizenship, domicile, permanent residence, various temporary residence permits or refugee status. Although we recommend that the right to citizenship and refugee status should remain limited to spouses because of the potential for fraud, we suggest that certain provisions in the Immigration Control Act 7 of 1993 relating to domicile, various immigration permits and provisions pertaining to the effect of temporary absences from Namibia should be expanded to include cohabiting partners.

6.2.2 Issues related to duty of support

Many exclusions of cohabiting partners from the coverage of various statutes stem from the fact that cohabitants, in contrast to spouses, do not owe each other a legal duty of support. If a law reform changes this underlying principle, then a number of consequential amendments would be needed. However, even if cohabitants are not given a general mutual duty of support, we suggest the following changes:

- **Pension benefits** governed by various statutes should be payable to cohabiting partners who can show factual dependency at the time of the death of the pension recipient, or alternatively, the pension recipient should be given the opportunity to designate a beneficiary to receive the benefits upon his or her death.
- Cohabiting partners who were factually dependent on a deceased partner should be eligible to make claims from the **Motor Vehicle Accident Fund** under the Motor Vehicle Accidents Fund Act 10 of 2007 in the same way as they are eligible to receive employee

compensation in respect of an employee who dies from injuries received on the job in terms of the Employees' Compensation Act 30 of 1941.

- **Medical aid schemes** should be required by the Medical Aid Fund Act 23 of 1995 to allow the inclusion of cohabiting partners as dependants, rather than leaving this to the discretion of individual schemes as is now the case.
- The definition of “*dependant*” in **other statutes** should be examined for greater consistency, with an emphasis on factual dependency rather than the legal duty of support where necessary to prevent unfair hardship.

6.2.3 Succession

Cohabiting partners are currently excluded from intestate succession, whilst neither surviving spouses nor cohabiting partners may claim maintenance from a deceased estate. As discussed in the final chapter of this report in more detail, we recommend that cohabiting partners should be able to apply for inclusion as intestate heirs in appropriate cases.

6.2.4 Labour and social security

The Labour Act 11 of 2007 takes different approaches to the definition of “*family*” and “*dependants*” for different purposes; these inconsistencies should be harmonised to include cohabiting partners. The Social Security Act 33 of 1994 already takes account of cohabiting partners in its definition of “*dependant*”.

6.2.5 Tax and duties

There is no direct distinction between single persons and married persons in terms of Namibian income tax law in terms of the Income Tax Act 24 of 1981, but some exemptions in respect of various benefits under this law, certain transactions under the Value-Added Tax Act 10 of 2000 and fee exemptions under the Transfer Duty Act 14 of 1993 should be re-examined to see if cohabiting partners should be included in a manner similar to spouses.

6.2.6 Land rights

Cohabiting partners have no rights in respect of private land or communal land which is in the name of their partner. We recommend that cohabiting partners should have equal rights with surviving spouses in respect of communal land tenure under the Communal Land Reform Act 5 of 2002, particularly since cohabitation may be replacing formal polygamy in some communities.



Source: Dr Wolfgang Werner (Namibia)

6.2.7 Insurance

Married persons and single persons essentially have the same rights in respect of life insurance policies. However, the Long-term Insurance Act 5 of 1998 gives some special protection to insurance policies in favour of spouses and children against attachment as part of a civil judgment or inclusion in an insolvent estate, and some special rules for protecting life policies in respect of spouses or children where the policy-holder is struggling to pay the premiums. It would be advantageous to cohabiting partners to be covered by the same protections.

6.2.8 Married Persons Equality Act

The Married Persons Equality Act 1 of 1996 makes spouses married out of community of property jointly and severally liable for household necessities with both being obliged to contribute according to their respective means. As explained in detail in Chapter 11, it seems appropriate to apply the same rule to cohabiting partners as part of the proposed law reforms on such relationships.

6.2.9 Legal disabilities of married women

Until recently there were some legal disabilities for married women that may have given women in cohabitation relationships an advantage over married women, but many of these have been removed since independence. Once the proposed Recognition of Customary Marriage Bill becomes law, there will be no remaining legal disabilities for married women which would give an advantage to women in cohabitation relationships.

6.2.10 Criminal law and inquests

Spouses are protected from being compelled to testify against each other in criminal cases by Article 12(1)(f) of the Namibian Constitution and the Criminal Procedure Act 51 of 1977. (They are similarly protected against compelled to testify against each other in civil cases by the Civil Proceedings and Evidence Act 25 of 1965.)

The Criminal Procedure Act 25 of 2004 (passed by Parliament but not in force) introduces the innovation of a victim impact statement which is relevant for sentencing of convicted criminals and for compensation for crime victims. If a victim is incapable of preparing the victim impact statement, it can be done by (amongst others) the victim's spouse or any dependant or other relative of the victim. The definition of "*dependant*" would not cover cohabiting partners, who should logically be included in this provision. Similarly, compensation in respect of a deceased victim may be paid to the victim's dependants, including a spouse but not a cohabiting partner.

It would seem logical to include cohabiting partners in these provisions, as well as in the references to "*spouses*" in various procedural issues in the Criminal Procedure Act 51 of 1977 and the Inquests Act 9 of 1992.

6.2.11 Conflicts of interest

The provisions on conflicts of interest in various statutes are in need of general harmonisation and would benefit from being drawn broadly to include a wide range of associates, including cohabiting partners. Similarly, statutory provisions which extend the consequences of actions by one spouse to the other should be examined with a view to considering the inclusion of cohabiting partners. The general rule should be that extension of protections to cohabitants should be accompanied by the extension of legal responsibilities pertaining to such relationships.

6.2.12 Court challenges by cohabiting partners

There are no reported cases where a cohabitant has challenged the definition of spouse or dependant in a statute to enforce his or her rights to claim a benefit.



Chapter 7

CURRENT LAW ON COHABITATION AND CHILDREN

There is little difference between the legal position of children born inside and outside marriage because of previous law reforms – particularly the Maintenance Act and the Children's Status Act.

7.1 Maintenance

Marital status makes no difference to maintenance responsibilities for children. All parents have a legal duty to maintain their children in accordance with their financial resources.

The marital status of parents is irrelevant to maintenance responsibilities for children. The Maintenance Act 9 of 2003 is based on a set of guiding principles which make it clear that all children are to be treated equally, regardless of the marital status of their parents, the order of their birth or any contrary provisions of customary law.

Children born outside marriage also have the same right as children born within marriage to apply for maintenance from the estate of a deceased parent.

7.2 Parental rights and duties

The Children's Status Act has placed unmarried parents in a situation which is analogous to divorced parents. While this is appropriate for unmarried parents living apart, cohabiting parents are in a situation which is more similar to married parents. The law as it now stands is not very suitable for facilitating co-parenting by cohabiting parents.

The **Children's Status Act 6 of 2006** has removed most remaining discrimination against children born outside marriage, but without making any distinction between cohabiting parents and non-cohabiting parents.

Married parents have joint custody and equal guardianship of children born within the marriage. When married parents divorce, it is common for one parent to be granted sole custody, with the other parent usually retaining guardianship and access rights.

In terms of the Children's Status Act, where a child is born outside marriage, one parent must be the primary custodian and guardian of the child. The non-custodial parent has an automatic right of access. If the parents cannot agree on who will be the child's custodian, a children's court must decide on the basis of the child's best interests. Thus, unmarried parents – regardless of whether they are cohabiting or not – are treated in a manner similar to divorced parents.

Yet a cohabiting couple with a child is in a position which is arguably more similar to a married couple than to a divorced couple.

An early draft of the Children's Status Bill would have given cohabiting partners the option of making a written agreement that would put them in the same position as married partners for the duration of the cohabitation – making them equal guardians and joint custodians of their children. However, the draft provided that any such agreement would have to be examined by a court to see if it protected the best interests of the child before it could become legally binding. If the cohabitation ended, there would be no “divorce” proceeding to make decisions regarding the children, so the situation would automatically revert to that of other single parents, unless a court order stipulated otherwise.

The provisions that would have provided this option of co-parenting to cohabitants were deleted in the version of the bill that was presented to Parliament. If cohabitation is given greater legal recognition, it would be useful to consider adding such a scheme to the Children's Status Act.

7.3 Inheritance

Children born inside and outside marriage are treated identically with respect to inheritance in the eyes of the law. The Children's Status Act removed discrimination in respect of children born outside marriage for purposes of inheritance. This principle overrules any customary law to the contrary, but this is perhaps not yet well-known and observed in practice.

The Children's Status Act 6 of 2006 also provides that all children must be treated equally with respect to inheritance regardless of any contrary rule in any statute, common law or customary law. This means that children born outside of marriage can inherit from both parents without a will, and general terms like "children" or "issue" in wills will be deemed to include children born outside of marriage if there is no indication of a contrary intention.

However, many people determine family issues under customary law, without reference to the general law of Namibia. Furthermore, the Children's Status Act is not yet generally well-known or much used. Thus, it should not be assumed that children of cohabiting parents are fully protected by the recent law reforms as yet. This will require continuing community education.

7.4 Presumptions of paternity

The law on presumptions of paternity already takes the relevance of cohabitation into account.

Presumptions of paternity apply both where a putative mother and father were married or cohabiting at the approximate time of conception, by virtue of the Children's Status Act 6 of 2006.

7.5 Birth registration

The law on birth registration provides generally-appropriate avenues to register the birth of children born inside and outside marriage which are probably adequate for cohabiting parents.

In terms of the Births, Marriages and Deaths Registration Act 81 of 1963, married parents will both be registered as the child's parents in the birth certificate if either parent presents a marriage certificate. Where the parents are unmarried, the mother can register the child's birth in her name without any cooperation from the father (and without providing any information about his identity), whilst both mother and father can be listed as parents on the birth certificate if both consent to this. No changes to this system would appear to be needed to cater for cohabiting parents in particular.⁶⁴

7.6 Adoption

Unmarried persons cannot adopt a child jointly even if they are cohabitating. In practice, such couples utilise adoption by one partner as a single parent, but this leaves the other partner without any legal rights over the adopted child.

The current provisions on adoption in the Children's Act 33 of 1960 allow only husbands and wives to adopt a child jointly.⁶⁵ When unmarried couples want to adopt, one of them must apply for the adoption as a single person. This approach leaves the partner who is not an adoptive parent with complete insecurity regarding his or her association with the child.

One argument against allowing cohabiting couples to adopt is that such relationships may be less committed than marriages, and therefore less likely to last long-term. But the counterargument is that social workers could assess the stability of the relationship as they assess the general fitness of the applicants to adopt.

Since the Children's Status Act has introduced accessible procedures for resolving disputes about custody, guardianship and access with respect to children born outside marriage, these procedures would seem adequate to protect children adopted jointly by cohabiting partners. Therefore, it would make sense to allow partners in long-term, stable cohabiting relationships to adopt children jointly. This would be of particular benefit to same-sex couples who wish to adopt.

⁶⁴ The differential treatment of unmarried mothers and fathers raises constitutional issues and should be amended, but this problem is not particular to cohabiting parents.

⁶⁵ The same approach is taken in the draft Child Care and Protection Bill which is still under discussion at the time of writing.

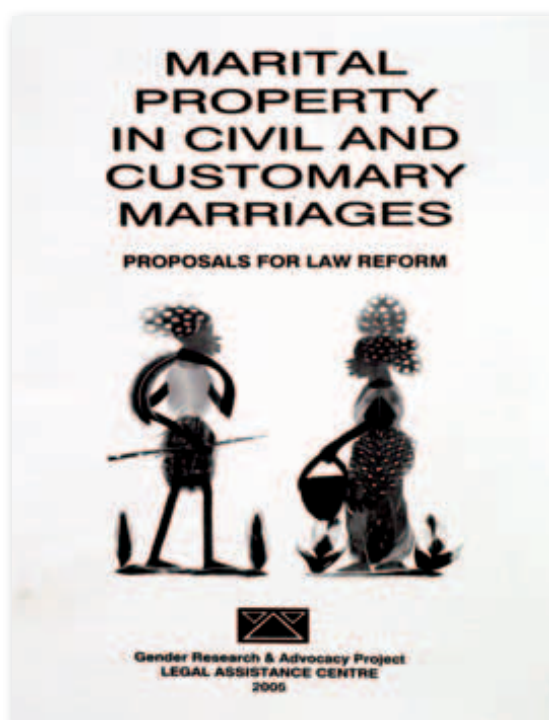


Chapter 8

COHABITATION AND CUSTOMARY MARRIAGE

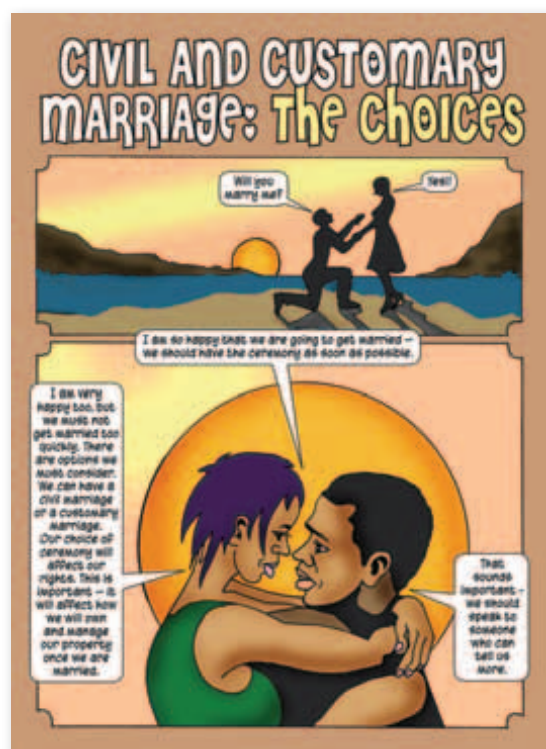
In contexts where a customary marriage is not recognised by law as a “marriage”, a law on cohabitation might usefully apply to such relationships – at least until such time as the proposed law reform recognising customary marriages for all purposes is in place.

Historically, neither the legislature nor the courts gave full recognition to customary marriages. The Namibian Constitution fails to define marriage overall, although it treats customary marriages in the same manner as civil marriages for some purposes. Individual statutes passed both before and after independence have recognised customary marriages as marriages for some specific purposes.



Namibia lacks jurisprudence on the treatment of customary marriages in areas of law where they are not yet fully recognised as marriages, so it is necessary to look to South African jurisprudence on this point. Generally, the limited recognition of customary marriages in South Africa sometimes led to severe hardship in that children were not regarded as legitimate and that wives of customary marriages were not given the same status as wives from civil marriages in matters of intestate succession, maintenance and claims against third parties for loss of support.

Many of the distinctions between ‘civil marriage’ and ‘customary union’ not yet rectified by statute would probably be unconstitutional in Namibia today.



However, one area of ongoing concern could still be the status of partners to a customary union which exists simultaneously with a civil marriage. A civil marriage to one spouse invalidates a pre-existing customary marriage to another spouse, and also makes a subsequent customary marriage to another spouse invalid. Another area of ongoing concern would be where parties who intended to enter into a customary marriage cannot claim the full benefits of marriage because of some fault in the customary marriage procedure – such as incomplete payment of *lobola* or some other flaw in the customary rituals.

In such situations the customary law spouses may be seen as being in a putative marriage or a cohabitation relationship if the customary marriage is ruled to be invalid.



Chapter 9

COHABITATION AND UNRECOGNISED RELIGIOUS MARRIAGES

Marriages conducted in terms of religions which allow polygamy may not be recognised as marriages for all legal purposes, meaning that such couples may be treated as cohabiting partners in some contexts.

Historically, some religious marriages – such as Muslim and Hindu marriages – have not been recognised as “marriages” in the eyes of the law because they were potentially polygamous or because they were performed by religious officials who were not registered as marriage officers under the Marriage Act.

It is possible for persons who solemnise Christian, Jewish, Muslim, Hindu and some other marriages to be registered as marriage officers in terms of the Marriage Act. However, problems arise where religious marriages do not satisfy all the criteria for a civil marriage (such as being polygamous) or because the person officiating at the marriage has not been designated as marriage officer.

The position of marriages concluded under religions other than Christianity has already been addressed by statutes in some specific contexts, such as the Pension Funds Act 24 of 1956 and the Combating of Domestic Violence Act 4 of 2003. However, as in the case of customary marriage, parties to an unrecognised religious marriage may find themselves in the same position as unmarried cohabitants for some legal purposes.



Chapter 10

FIELD RESEARCH ON COHABITATION IN NAMIBIA

KEY FINDINGS OF FIELD RESEARCH

The duration of cohabitation relationships reported during the field research varied widely, from 7 months to 35 years.

Most cohabiting couples live in a household with extended family members as well as the children they have together.

Financial considerations are often a catalyst for cohabitation. Many couples live together informally because they cannot afford the expenses associated with marriage, or because one partner (usually the man) is unwilling to marry, or is already married to someone else. Some remain unmarried because of family disapproval, or because of the woman's desire to maintain her financial or emotional independence or to distance herself from extended family involvement.

Many of the respondents indicated that there is a power imbalance in the cohabiting relationships with the male partner having greater control over assets. Many cohabiting couples live in the home of another family member, or in rented accommodation. However, where one of them owns the shared home, it is usually the man. About half of the cohabiting partners interviewed reported that they share household expenses with the other partner; in the other relationships it was most commonly the man who paid household expenses. Women are often left vulnerable because durable assets are placed in the man's name even though they may have contributed to their cost, or because they make non-monetary contributions such as child care. Many cohabiting partners also help to support persons outside the shared household, which can complicate efforts to allocate resources fairly.

Persons who were cohabiting cited various advantages and disadvantages to cohabitation. Advantages included the sharing of expenses, the flexibility of the relationship and greater independence from extended family members. However, some viewed these same factors as disadvantages, feeling that there is insufficient family respect for their relationships or feeling disadvantaged by the insecurity of the arrangement. Some women felt that there is insufficient financial support from their male partners. Although cohabiting relationships are often long-term relationships in Namibia, many respondents reported that a lack of trust in the relationship can lead to instability, tensions and abuse.

Many cohabiting partners have not discussed what would happen if their relationship ends in separation or death – although some said that this was unnecessary because the couple have no assets. Women were perceived as being particularly vulnerable if the relationship ends. Some felt that a resort to customary norms might protect vulnerable partners in this situation, but many others thought that women who survived their male partners would be likely to suffer from 'property-grabbing' by his family.

Fewer problems were cited regarding children of cohabitation relationships, although there was a wide range of perceptions of the position of children born to such relationships under customary law. Some felt that children born outside marriage continue to experience disadvantages because of their 'illegitimacy' (even though the Children's Status Act has removed discrimination against children born outside marriage in the law – including both the civil and customary law on inheritance).

The division of resources amongst multiple women in informal polygamous relationships can be particularly problematic, although in some instances this is

dealt with in a manner analogous to the allocation of property to different ‘houses’ in formal polygamy. Several persons interviewed acknowledged that there is likely to be conflict between the spouse and the cohabiting partner when the male partner dies. Many thought that the cohabiting partner would be the one who would be disadvantaged in this situation, and there were divergent opinions on what *should* happen in such cases.

Most of the people interviewed felt that people in their families or community disapproved of cohabitation, with many citing Christian morality as the basis for such disapproval, although some found that their situation was accepted. Negative community attitudes were particularly pronounced in the case of same-sex cohabiting couples.

10.1 Methodology

The research consists of a small-scale qualitative study with data collection in the form of 61 individual interviews with cohabitants and key informers and 10 focus group discussions. The data was collected by the Legal Assistance Centre in two periods of field research – one in 2002 and one in 2009. It is supplemented by a few questions about cohabitation included at the Legal Assistance Centre’s recommendation in a larger study of property and inheritance rights conducted by the University of Namibia in 2002.⁶⁶

Data source	Focus group discussions			Key informant interviews			Interviews with cohabiting individuals			Regions
	Men	Women	Total	Men	Women	Total	Men	Women	Total	
LAC 2002	0	0	0	6	5	11	9	13	22	8 (Caprivi, Kavango, Omusati, Oshana, Kunene, Erongo, Khomas, Karas)
LAC 2009	18	80	10 (98 people)	2	6	8	9	21	30	6 (Khomas, Karas, Hardap, Oshana, Omusati, Erongo)
Total	18	80	10 (98 people)	8	11	19	18	34	52	9 different regions

⁶⁶ Ethnic groups are noted in this report only where this could have some bearing on the views expressed, such as in the case of references to customary norms. Where relevant, names and identifying information have been changed to protect client confidentiality.

10.2 Perceptions of prevalence of cohabitation

In the 2002 field research, a strong majority of key informants reported that cohabitation was common in their community, with one woman stating that it is “*so common almost no one thinks about it*”. The 2009 field research reconfirmed cohabitation’s prevalence, as every participant in the focus group discussions, without exception, knew someone who was or had been in a cohabitation relationship.

Even though it is a sin, people cohabit anyway.

woman interviewed in 2002

10.3 Characteristics of cohabitation relationships

Relationship duration

The duration of the relationships reported by cohabiting respondents during the field research varied from 7 months to 35 years. There is no evidence to suggest that marriage occurs after a certain time-period – although many couples were cohabiting whilst saving up money for a wedding. There is also no indication that cohabitation relationships commonly end after any particular amount of time.

Household composition

A significant majority of cohabitants interviewed have children with their partners, and most live in a household with extended family members as well as the children they have together. Many live with children from their or their partner’s previous relationships or marriages, and a significant number reported living as a couple in the household of the parents of one of the partners. The household composition of cohabitants can be quite large and complicated.

Reasons for living together

Respondents offered a range of reasons as to how they had come to live together with their partners, with some of the reasons given suggesting that the move to live together might be taken more casually than a decision to marry. Many women indicated that the decision to live together had been the man’s choice. Some were vague, saying that they “*fell in love*” or “*just decided to live together*”.

For some, the move was essentially a financial decision—hoping to save money by sharing living costs or buying a house together. Some were inspired by employment issues – one interviewee

moved in with a partner who moved from South Africa to Namibia for work reasons, and one couple moved in together when they were both transferred by their employers to the same town. Migrancy for employment purposes is also a factor, with some men having a wife in a rural area and a cohabitant in the urban location where they work.

Married men from up North who have a wife come here to Windhoek for work and live with someone in Katutura and people don't even worry about it at all. His cohabitant is like his wife down here.

community activist interviewed in Windhoek, 2009

In several cases, the catalyst was the woman becoming pregnant. In some cases, cohabitation was described as a survival option which has little to do with emotion. For example, one focus group participant said, that poverty was a catalyst: “if she needs to eat she cohabits without reflecting on the future”. Another said, “People are forced by circumstances. An HIV positive woman's family will mistreat her and so if someone else wants her and will treat her any better, she will go.”

Reasons for not marrying

When cohabitants were asked why they had not married, the most frequent response given was financial constraints; cultural expectations and the formalities expected for a wedding make it unaffordable for many couples to wed. For example, one man from a small village near Outapi described his frustration; “It is too expensive to get married. In our culture before you can get married you need to pay lobola to the woman's family, usually in the form of cattle. I want to marry my partner, but first I need to get together the lobola and the money to pay for a wedding”.

Culturally you need at least two cows to marry. My boyfriend is working and we buy things for the house, but we cannot afford the cows.

woman interviewed in Swakopmund, 2009

The second most-cited response when respondents were asked why they were not married was that they are still planning on marrying. Again, some cited financial constraints, indicating that they would marry when they could afford the wedding. Many informants in focus group discussions suggested that a period of cohabitation was a good way to determine whether or not a relationship should progress to marriage.

I would love to be married. But there are cultural requirements for marrying. My partner wants the lengthy marriage process as opposed to a small wedding. It is very expensive. I would have to pay for my closest relative to come, the uncle I grew up with, and all the accommodation and then all the food etc for the party. It's too much.

man interviewed in Walvis Bay, 2009

The next biggest category of reasons marriage had not occurred was the reluctance or unavailability of the male partner. Some men reportedly avoid marriage as a way of avoiding responsibilities.

A high number of respondents admitted that they could not marry because the male partner was already married to someone else or had other girlfriends. Many female respondents said that they had received promises of marriage, but the man repeatedly postponed the wedding or later refused to marry altogether. Some women expressed a desire to be married but said that the man had not asked and they did not want to force the issue.

*Men always lie that they will marry you so
you are always living in that hope.*

woman interviewed in Swakopmund, 2009

*There is no future for you – you may still be hoping
he will marry you but there is no security.*

focus group participant in Rehoboth, 2009

Another frequently-cited reason for not marrying was family or community disapproval of the other partner or the relationship.

A small number of women reported that they prefer cohabitation as a way to retain financial and personal independence. For example, one woman from Windhoek said, “I am in this type of relationship by choice. I feel I can control my finances better this way. My reasons are personal not cultural. I am earning the most money.” However, this attitude appears to be the exception rather than the rule, with the trend of the data pointing towards male dominance over the status of the relationship.



A desire to remain financially and socially independent from the extended family was also mentioned as a reason why some chose cohabitation over marriage. The participants from one focus group discussion explained that some people cohabit rather than marry to reduce expectations from the in-laws that they can ask for money. Participants in a different focus group also discussed the social role of the extended family, explaining that by cohabiting, the couple are limiting the involvement of the extended family in their relationship; *“once you marry, the families have too much control”*. However participants from a third focus group discussion felt that the lack of family involvement could be a problem since extended family members can help to address violent situations.

A small number of persons interviewed said they did not want to marry because they were *“too young”*, *“too old”* or because it was *“not the right time”*.

Disturbingly, there were also a few women who did not want to marry because of the negative behaviour of their male partners – citing problems such as physical abuse or alcohol abuse.

A few interviewees cited lack of trust as a factor which discourages marriage, indicating that cohabitation is seen by some as involving less commitment than marriage.

*You don't trust each other because you are
not bound together like in marriage.*

focus group participant in Swakopmund, 2009

A few people did not want to marry formally because of the fact that they had children from previous relationships.

Two people in same-sex relationships cited the fact that there is no legal way for same-sex partners to marry.

Ownership of the joint residence

Many respondents did not own the home where they resided and lived in rented accommodation or on a family property. Where this was not the case, it was usual for the jointly-occupied property to be registered in the man's name alone. Eviction from the home has been one of the common problems cited by female clients approaching the Legal Assistance Centre for assistance related to cohabitation.

Contributions to the household

Approximately half of the cohabiting respondents in the LAC research said that both the man and the woman contribute to household expenses. Where both partners are not contributing, the research suggests that it is the man who usually pays the household expenses alone – which could be a result of the fact that women in Namibia are more likely to be unemployed than men, or that men are more likely to have access to cash income while women often make contributions to the household in the form of labour such as child-rearing, housework or subsistence agriculture.

I cohabited for a while and I came out fine. I moved into the guy's house and I knew the rules. Every time he would say "I want to buy something for the house," I would ask if he had budgeted for it and we would go shopping together. He would "forget" his chequebook and ask me to pay. I would lie and say I didn't have mine either. I saved my money because I was working. At the end of the relationship, he took everything but he had bought everything!

woman interviewed in Windhoek, 2009

I lived with him for 9 years and he didn't want me to buy anything to put in his house. He always said, just pay the electricity, food, water bills etc. Then when the relationship broke down I wasn't allowed to take anything with me. We got two kids together, but he married someone else in the end.

female participant in focus group discussion in Swakopmund, 2009

Financial support for people outside of the cohabitation household

A strong majority of cohabitants reported that they or their partner provide financial support to people outside the household, with slightly more men than women (though in many cases both partners) providing this support. The most common recipients cited were the parents of one or both partners or children from a previous relationship (usually the man's since the woman's children often live in the cohabitantes' household). This high degree of support for various family members outside the household indicates the potential complexities of trying to allocate assets amassed by the cohabiting couple fairly.



CASE STUDY

My partner and I have been in a relationship since 2003 and living together since 2007. We have two children together, aged 4 and 5 years old, who live with them. My mother, my two brothers and my three sisters live with us as well.

We are living together because it is too expensive to get married. In our culture before you can get married, you need to pay lobola to the woman's family, usually in the form of cattle. I want to marry my partner, but I first need to get together the lobola and the money to pay for a wedding.

I am employed by the government. I buy the food. My partner is unemployed and contributes to the household by buying school uniforms for all the children in the family (two boys and two girls). My partner also contributes to the household by cultivating the mahangu fields.

I am supporting my two grandmothers. My partner helps her relatives and my relatives by pounding mahangu, if she is called to do so.

The house we live in belongs to my grandfather's second wife. If our relationship broke up, there would be nothing to divide, only the bed and the blankets. Maybe my grandmother will give my partner some of the mahangu. But I don't foresee that we will break up. If we did, I would remain in the house and my partner would go back to her family. She knows that she must go back to her family. I told her when we were quarrelling.

We have not made a will. We have not discussed who will take the property or the house when one of us dies, because there is no property and we do not own a house. If we separate, I will draw up a will but I will not discuss it with my partner. If I die now, my kids will get my bed and blankets.

We experience some problems because of being unmarried. My grandmother wants me to get married because she does not want us to live in sin and go to hell. Some people want me to leave my partner because I am educated and she is not. But she is hardworking and I worry about what will happen to my kids when we separate.

At the beginning, people in our community did not like us living together. But we have been living together now for about three years and they have become used to it. The community did not approve of our relationship because it is against Christian values.

man interviewed in a village near Outapi, 2009

During the relationship

Interviewees disagreed as to whether there were particular problems for couples in cohabitation relationships compared to married relationships. While the cohabitation relationship is taking place, some people felt that the couple, and particularly the woman, gets no respect.

A few women complained about the lack of financial support from their male partners. One woman who was cohabiting with a married man in the Ohangwena Region said, *"He does not bring anything home; he even failed to pay his own accounts and I am now the one responsible for everything. I can say our life is in a very big mess."* A woman in a cohabitation relationship in the

Erongo Region emphasised the insecurity of the arrangement, saying *“Yes, we fight a lot, and it makes me very insecure, because I would not know what to do if he were to tell me that I should leave his house.”* Similarly, another woman reported that her partner threatened her during their frequent fights that she would walk away with *“nothing”*.

Several people cited noted problems with the male partner’s relatives. A Herero woman in Erongo Region said, *“I have problems with my partner’s family meddling in our relationship.”* A female traditional councillor in the Kunene Region said, *“Within the cohabitating relationship women are treated like guinea pigs. The man’s family decides whether the man should marry the women or they simply disapprove of the women. But because the couple loves each other, they just cohabit.”*

If the relationship ends

Many cohabiting partners had not discussed what would happen if their relationship ended in separation or death, but some had talked about this or even made wills. Several cohabiting partners said that such a discussion was irrelevant since the couple had virtually no assets of value; this was often the case where the couple were living in the home of another family member without any significant household items of their own. For example, one man in a village in the north who had been living in a relative’s house with his partner for three years said, *“There is nothing to divide, we have only the bed and the blankets”*.

Many persons reported that female cohabiting partners are usually the vulnerable ones if the relationship fails, standing to lose out on a fair share of the accumulated assets or even being left with nothing at all. As a woman from the Khomas Region put it, *“If the relationship breaks up, the woman usually loses out on everything especially when the house that they lived in belonged to the man.”*



One man suggested that customary norms would guide the division of property upon separation, but it is not clear that this would be sufficient to protect female partners in many communities – who do not receive the same recognition or respect as wives – and where wives are often dependent on property controlled by their husbands.

Breakups end badly. I know of a couple where the boyfriend burnt down the whole house after they broke up. The girlfriend and her sister's children were in the house and died. They had had an argument about breaking up earlier.

priest interviewed in the Erongo Region, 2009

CASE STUDY

I had been living together with my partner for 25 years, but we parted ways in 2008. We have 4 children together, now ages 23, 19, 15 and 13.

We were living with our children in the same household with other children from our previous relationships and some extended family members.

I wanted to get married, but my partner only kept on promising to marry me but it never happened. There were no cultural reasons why we could not get married.

When we were in the relationship, I did not work. My partner did not want me to work, I had to stay home and look after the family. My partner was the only one working, and he paid for all the household expenses. I contributed by cooking, cleaning and washing and ironing the clothes.

We had debts, which my partner paid since he was the only one working. At times my partner did not pay the debts, and for the last 3 years of the relationship he also did not bring his salary so we really suffered during that time.

The house was registered in my partner's name. The land we were farming on was communal land.

There was another woman involved, and the relationship became unbearable as my partner would become violent at times. When the relationship ended my partner kept the house and all the furniture. I left the house with nothing. We never discussed how we would divide the property should we part ways, because there were problems in the relationship from the start.

When the relationship ended my partner refused to give me the children, and with the help of the Women & Child Protection Unit I got custody of the children through a court order. The Women & Child Protection Unit also helped me to put in claims for child maintenance against my partner, but when we appeared for maintenance he said he had no problem maintaining his children (there was thus no court order for maintenance payment just a personal arrangement between us for the payment of maintenance). I struggle to get the maintenance payments out of him.

The Women & Child Protection Unit also issued me with a protection order against my partner when the relationship ended, for fear of violence.

When my partner and I started the relationship, we had no livestock. We started farming together. My partner would buy all the livestock because I did not have an income.

We had an agreement that every time my partner buys livestock, I would get a share. So say for instance, my partner would buy 20 sheep, I could earmark some of them for myself. If it was 20 I would earmark 5 for myself and leave the remaining 15 for my partner and the children. When the relationship ended my partner refused to give me the livestock that was earmarked for me. I obtained a court order from the Magistrate's to get the livestock from him, but to this day I am still struggling to get my livestock.

We did not make a will. We never discussed who would get the property and land should one of us die since the relationship was problematic from the start.

People were talking about us living together for so long and not getting married. If people would ask my boyfriend this question, he would get into fights with them. The children suffered, they wanted to see us married.

People in the community do not approve of this kind of relationship because of the suffering when the relationships end and because it is against our Christian values.

woman interviewed in Windhoek, 2009

CASE STUDY

I lived with my partner for 9 years, but we are not together any more. We have two children together. They are still small. No one else lives with us.

I was working at a company making blinds and curtains. He was working at sea. When he was not around, I bought food and things for the kids. I was supporting my mother and my younger brother who was in school. With his money, he was mostly drinking. He had three other kids in Katima Mulilo and he was supporting them with money from time to time

He paid rent and bought food sometimes, or he might give me N\$500 for toiletries. Then he would drink and want the money back. He'd take it back and be gone for two days.

That man was drinking, sleeping around, beating me in front of the children, and not letting me buy anything for myself. He said he wanted me to leave with nothing. When I left his room, I took my clothes and the kids' clothes. He has not seen the kids since. They want their fathers' love but he does not give them any love.

We were mostly fighting all the time over money and everything. He would always say I'd walk away with nothing. Neighbours would come to stop the fight.

My mother kept pushing us for marriage. People in the community disapproved of the relationship because of the fighting that always happened at night. In the morning I was so shy and disappointed in myself. People would look at us when we went to the shops. In the morning he'd ask to be forgiven and try to be a good boyfriend and ask me to go to the shops with him. I could feel all of the people talking behind my back. There is a strong link to alcohol abuse in these relationships. He'd force sex on me and if I refused we were in his room and where could I go in the middle of the night? This was when he came home drunk.

I walked away with nothing.

woman interviewed in Swakopmund, 2009

When one partner dies

As discussed above, an unmarried partner has no legal claim to any of the property of the deceased partner in the absence of a will. Furthermore, the Communal Land Reform Act 5 of 2002 makes provision for surviving *spouses* to remain on communal land which had been allocated to the deceased, but is silent on cohabiting partners.

Some people felt that cohabiting partners might be able to resort to customary norms, with the help of extended families or traditional authorities, to secure some portion of the couple's assets, but others disagreed. Given that wives in many Namibian communities lose assets to 'property-grabbing' upon the death of their husbands, cohabiting partners are likely to be even more vulnerable. Many persons interviewed spoke about this concern.

On the death of one of the partners then the family of the deceased comes and gets the property of their child. The surviving partner usually loses the property.

man interviewed in the Kavango Region, 2002

I know of a friend of mine who lived together with a man without being married for almost six years and the man died in a car accident. She did not get anything. She lost everything they bought together. The boyfriend's mother moved into the house and she was chased out of the house, and the mother inherited all the property.

woman interviewed in the Khomas Region, 2002

I know of a woman who bought a washing machine and a bed together with her boyfriend and then he died. She got nothing.

focus group participant in Keetmanshoop, 2009

The issue of dividing assets upon the death of one partner seems to get more complicated when the deceased had both an unmarried partner and a married partner.

CASE STUDY

I know of a case here where a man was divorced and lived with a girlfriend. He died leaving two cars and a nice house. There were children with the ex-wife and the girlfriend. The wife and the children from his marriage came to take the house and the two cars. Now the girlfriend has had to go to her family in the location with her children. They say the girlfriend never liked them anyway. The girlfriend wasn't working so she won't get anything. She has sewed and cooked but nothing is hers.

social worker interviewed in Swakopmund, 2009

10.4 Children of cohabiting parents

Interviewees gave very mixed responses when asked whether children experienced problems as a result of their parents' cohabitation relationship, with approximately equal numbers suggesting that there were difficulties as those stating that they had experienced none.

CONTRASTING CASE STUDIES

Naomi lived with her boyfriend Filemon in an informal settlement near Katutura. They had a child who was still a minor. When Filemon died, his brothers and sister chased Naomi and the child out of their shack. Filemon had taken out a number of insurance policies naming the child as the beneficiary. Filemon's brother tried to claim the proceeds of one policy, but was stopped from doing so by the insurance company. The brothers are now threatening Naomi to try and get her to sign the claim form so that they can get the payout. The Legal Assistance Centre is attempting to assist Naomi to safeguard the assets of her and Filemon's child.

as related by "Naomi" to the Legal Assistance Centre, 2010

Gladys was living with her boyfriend Petrus in an informal settlement, where they were part of a community savings scheme. They had one child together named Ruben. When Ruben was age six, Petrus died. In the agreement with the savings scheme, Petrus had named the child Ruben as the person who should stand in his shoes if he died. In the agreement, Petrus had also named his 16-year-old sister, who was living with him and Gladys, to act as Ruben's caretaker. However, after Petrus died, his sister reportedly kicked both Gladys and Ruben out of the house. The committee that runs the savings scheme and the extended family stepped in to the case to try and resolve matters. It was agreed that Gladys and Ruben and Petrus' sister will all live in the house together, and they have agreed to stop quarrelling. An extended family member who lives nearby will monitor the situation. All have confirmed that the house is intended for the benefit of Ruben, and that they will do their best to support his interests.

account based on Legal Assistance Centre discussions with various persons involved, 2010

Of those who believed that such children experience problems, a common theme was the 'legitimacy' of the child. Surnames were sometimes contentious, with parents arguing over whose surname the child should have; some fathers apparently did not want the 'illegitimate' child to have their surnames, and sometimes the woman's family would not approve of the child having his father's surname after the relationship ends. Problems were also reported in registering the birth of the child, where the father does not want to recognise the child as his. Later down the line, the father may refuse to pay school fees for the 'illegitimate' child because he is saving to pay for his legitimate children. Some thought that children of cohabitation relationships experience discrimination because of their 'illegitimate' status.

Other reported difficulties included that children of a female partner from a previous relationship may be subjected to sexual abuse by the cohabiting male partner, that parents who want to put

money aside for the children will be asked for a marriage certificate, and that fighting frequently occurs in front of the children as cohabiting parents vie for control of them. Furthermore there were suggestions in one focus group that some men move from woman to woman looking for childcare and that the children involved are consequently unhappy and confused.

Although there is little remaining distinction under general law between children born inside and outside marriage, there are distinctions between children born inside and outside marriage in terms of customary norms in Namibia which may not have been replaced in practice by the recent law reforms intended to equalise their position.

The range of cultural perceptions about cohabitation and the children of cohabiting parents adds to the challenge of proposing a law reform that will be workable for Namibia as a whole.

10.5 Informal polygamous relationships

One important point raised by many individuals is that often people do not know that their partner is involved in another relationship. As key informants pointed out, married men from rural areas who travel to Windhoek or other urban centres for work often take a partner in their new location, splitting their lives between one woman back home and another one in the city. The research suggests that in such situations, some but not all girlfriends are aware that the man has a wife, and some but not all married women are aware that their husband simultaneously cohabits with another partner.

Most of the married migrant labourers cohabitating to another woman in the urban area do not tell this thing to their wives, it remains a secret. But both cohabitating partners know that they are not legally together. They know they are cheating their one in the rural areas.

female pastor interviewed in the Oshana Region, 2002

The anecdotes given by female partners suggest that they sometimes become aware that the man is married once it is 'too late' to leave the relationship. For example, one female cohabitant said, "I do not share a household with the married woman, but the married wife knows about me...I had to tell her because I fell pregnant. I did not know he was married, I even wanted to abort the baby but he refused. I am not very happy, it upsets me a lot considering the fact that he never told me that he was married, and I am pregnant now."

Dividing resources between multiple female partners

The question of how a man with multiple female partners divides his resources between these partners was met with mixed responses from the informants. Some said that the male partner will support both households, whilst there were wives who felt that their husbands had abandoned them emotionally and financially for the newer cohabiting partner. It appears that not all men share their resources equitably between multiple partners.

My wife knows I work far from home. She takes care of the land and children in the North. I send her money. She understands, if she feels bad she doesn't tell me. I send money to the North for the wife and children. Most of my money I send to them. But I also help out with paying for the house and all the other things with my lover.

married man cohabiting with another woman

Whenever he is with us, he pays for something. Otherwise he gives us nothing.

wife of a man with a girlfriend

CASE STUDY

My husband and I have been married for 7 years. We were married in church and under customary law. We have four children together. They all live with me. They are 16, 13, 10, and 6 months old. He has been living with his girlfriend for 5 years. They have 2 children, ages 8 and 4. Maybe for two days a month he comes to us and then he is gone. Whenever he is with us, he pays for something. Otherwise he gives us nothing.

The other relationship affects our marriage a lot because I have children and he has children in the other relationship too. It takes the father's love from my children too and affects the whole household. I suffer from loneliness and feel empty. I had chosen someone to be with for life and now he is gone.

But I don't have a problem at all with her. She came from a village and my husband told her lies. She accepted him. I greet her when I see her and we talk. It is not from her fault—she did not know him and found out he was married later on.

woman interviewed in Keetmanshoop, 2009

CASE STUDY

My husband and I are married but he is living with another woman in Windhoek. We have been married for 15 years. We have two children together but they are all grown up. He has been living with the other woman for the past year. It has completely ruined my marriage, I have lost my husband. My children are all grown up so I live alone.

He does not spend anytime with me at all, and he does not assist me or our children financially. It hurts me a lot because this woman that he is with is a cousin to me, I do not like their relationship.

I don't know if my husband has a will or not but since we are still married all the belongings should be for me. I don't think the partner that is not married should get anything. Protecting that kind of relationship would harm society as more women would feel like they can be with married men.

woman interviewed in Keetmanshoop, 2009

Inheritance issues in informal polygamous relationships

There was insufficient information from interviews with those involved in informal polygamous relationships to draw conclusions about how assets are divided in the event of the death of a man who has both a wife and one or more 'girlfriends', although the comments made by various individuals give some indication of general concerns about this issue.

Individuals interviewed generally thought that the married partner should or will get the majority of the property, while the cohabiting partner should or will be disadvantaged. Several suggested that the cohabiting woman will only get the children born from the relationship and nothing else. Others worried about the children of the cohabiting partner being left with nothing. Some placed inheritance in this situation in the context of polygamy under customary law, suggesting that the women will be treated in the same way as senior and junior customary wives. Several acknowledged that there is likely to be conflict between the spouse and the cohabiting partner.

There were three separate sets of opinion as to what *should* happen when a man in an informal polygamous relationship dies. Firstly, many participants believed that the wife should get everything. A second opinion was that the attitudes of the deceased's family should be decisive in determining the division of the property. The third body of opinion was that the girlfriend 'deserves' to be able to keep her possessions and those she shared with the deceased, and perhaps the property she lived in, if the relationship was enduring. Justifications for this view usually centred on the time and effort the girlfriend put into the relationship, her role making the deceased happy and her financial input into purchases the couple made.

CASE STUDY

A 58-year-old elderly woman, Ruth, is on the verge of losing her homestead in the Oshana Region after the death of her husband, Joseph, who passed away in 2006. She was like a wife to him after he separated from his wedded wife, Mary, approximately 35 years ago. Mary relocated back to her village in around 1971. Joseph lived single for many years before he decided to settle down with Ruth. In the meantime Joseph had many children with various women and as the children became more he knew he needed to make a home for them. Although Joseph was working for a mining company at the time he was separated, he needed to make a house in the village where he could retire and live with all his children and produce food.

It was around that time in the late 1980's when he asked Ruth who was working at a local high school to leave her job and go start a home with him at a nearby village. Ruth's mother was not in support of the idea, mainly due to two things: firstly Joseph was once married although separated with his wife, and secondly, Ruth had a permanent job which she could not just leave as she was the breadwinner of her family. With some elders' advice, Ruth's mother asked Joseph to ask permission from the church to take Ruth. In addition, in honour of tradition when a man takes a lady to go make a home with her, called "elugo", a cow was given to Ruth's mother as a token of appreciation

for giving her daughter. It was delivered by one of Joseph's brothers. Ruth and the late Joseph started their new home together to produce food for their children. They had two children. Ruth cleared the land single handed while Joseph was at work. After harvest, Ruth would go to Oranjemund to visit Joseph and the children and to rest after a year of hard work. The food she produced she would continuously send to in Oranjemund, seeing that omahangu was the family's staple food.

When the late Joseph retired in 2000, he moved permanently to his home at the village and continued to live with Ruth up to the time of his death in 2006. Ruth was at Joseph's bedside in hospital when he died. Their children made arrangements and took care of all expenses to bury Joseph.

The day after burial, as per tradition, relatives of the late Joseph turned the house upside down and destroyed a family that was still mourning - regardless of the fact that Joseph had a will which he wrote in 2002 and made it clear to his children that it should be followed through as per his wishes.

A few family members of the late Joseph refused to honour his wishes and went to great lengths to ensure that the will was not followed. The late Joseph's wishes were shattered and his property destroyed. To justify their actions, some relatives accused Joseph's children of actually writing their father's will. Abusive language was thrown towards Ruth as if she had no human rights or any dignity. Some relatives even wanted to physically throw her out. However Ruth, being a strong woman, stood by what she believed existed due to her hard work. Her fruits in the house were visible for all to see. It is due to her hard work that Joseph could proudly say he was a man with a village home that produced food, and had cows and goats like all other men.

The worst was still to come, a month down the line. Ruth had an unexpected visit by a number of her late husband's family members. The visit included Mary, the wedded wife of Joseph who had been separated from him for approximately 35 years. Their mission was to remove Ruth out of her homestead and put Mary in there. They were determined to remove her that day, and some of them wanted to physically fight the old woman, calling her dirty names and stating that she had to go as she was only a slave to the late Joseph and since he was no longer there she had to leave. They took all the field tools and locked them up, ordered her not to work the field as the wedded wife was going to come work the field herself.

The local headman has made his decision that the land would remain in Ruth's name, to live there with all the children, as he had not known any other women to have been living in the house as the late Joseph's wife. He would in addition prefer to honour the will of the deceased as tradition normally does not allow one to go against the deceased's words.

From the children's side, they are totally devastated by the actions of their father's family. They maintain that their father was a good man who loved everyone, loved order and hated friction among those that were close to him...

What good is a piece of marriage certificate that was not honoured in any way while alive but now is the most important document after death? Is Mary now coming to marry her husband in death? In reality this is what the family of the late Joseph is trying to do. If they so loved each other that the two of them should continue honouring their vows, should this not have been done while he was still alive?

Nowhere in the will of the late Joseph did he mention the name of this now seen to be important wedded wife; most of his belongings he had left for the wife he had been with and who looked after him for half of his life, Ruth. We now ask your good centre to please help Ruth to fight for what we believe is rightfully hers...

from a statement provided to the Legal Assistance Centre
by two adult children of "Ruth" and "Joseph", 2009

CASE STUDY

Maria lived with Elton since 1993 as a result of a customary union. Maria was then involved in a car accident and admitted to the hospital's intensive care unit for three months whereafter the Motor Vehicle Accident Fund paid her a substantial amount in respect of her injuries. She used the money to pay off the house which she inhabited jointly with Elton. She settled all Elton's debts and bought a bakkie which Elton drove. In less than four days almost all of the Motor Vehicle Accident Fund payment had been spent.

In 2004 Elton overturned the bakkie and died on the spot. The vehicle was written off. After the burial, one of the Elton's sons was appointed as executor and at a family meeting it was decided that Maria should retain the house since it was the only asset in the estate, because she had made substantial payments towards the joint assets and because of her injuries in the car accident.

A second woman, Johanna, then appeared and claimed that she was married to Elton in a civil marriage in 1980. Johanna was then appointed as executor. She took legal action seeking to evict Maria from the house, and steps to transfer the house into her own name.

Johanna will probably argue that the customary marriage between Maria and Elton is invalid because of the pre-existing monogamous civil marriage, which would place Maria in the position of a cohabitant.

from a statement provided to the Legal Assistance Centre by "Maria", 2009



The man's family mostly only cares for the children born in marriage. Children, born from cohabitation relationships, are neglected. They don't share in the property or livestock of their father.

woman interviewed in the Kunene Region, 2009

We used to have issues with children born out of wedlock but the law changed and we don't have these any more.

female social worker, Swakopmund, 2009

10.6 Community attitudes towards cohabitation

Most of the people interviewed by LAC felt that people in their families or community disapproved of cohabitation, although some found that their situation was accepted. Christian morality was often cited as the basis for the disapproval of others.

Examples of positive attitudes

We do not experience any problems because we are not married. We do not have people gossiping about us. The children are not made fun of at school. The other reason that the community does not point a finger is because many people live together although not married. [Nama woman in a cohabitation relationship, Karas Region, 2002]

I think older people do not approve, but younger people like my friends do not have a problem with us. [Herero/Owambo woman in a cohabitation relationship, Erongo Region, 2002]

Nowadays people approve more than they used to. Times are changing. [man interviewed in Windhoek, 2009]

Examples of neutral attitudes

If the couple has children then the family will tolerate cohabitation. [Damara man, Kunene Region, 2002]

When one partner is already married, Christian values make this a hard subject, but she may be more of a wife than the real wife, since he may not have seen his wife in years. [focus group participants, Katutura, 2009]

People don't have time to approve or disapprove because everybody is worried about their own household matters. [woman in a cohabitation relationship, Swakopmund, 2009]

Examples of negative attitudes

In some cases the relatives of the man will accuse the woman of being a witch and would not take her into the family. People in cohabiting relationships do not get respect in the community. They are not considered as people with status. [Ruwangali man, Kavango Region, 2002]

In our tradition the goodness of a family and respect is looked at by how many children are married in that family. Churches are reluctant to baptise children born outside marriage. [Damara man in a cohabitation relationship, Kunene Region, 2002]

Cohabitation was never a part of our cultural system. It always creates family conflicts. Culturally, if a girl has been found to be sexually active, she would be advised to undergo traditional marriage. To avoid chaos in the community, people who are not married should be encouraged to do so. A woman will have no dignity in the eyes of the community until she gets someone to marry her. [Owambo female pastor, Oshana Region, 2002]

My family is not happy that I am living with a married man. [woman in a cohabitation relationship, Erongo Region, 2002]

No one approves of us living together, people gossip that he is with me because I bewitched him, and he is more with me than his wife. [woman in a cohabitation relationship, Erongo Region, 2002]

It is against the law of the Lord. [focus group participants, Swakopmund, 2009]

The relationship between the man's family and the woman will be bad, as they will not show her respect. [focus groups participants, Ongwediva, 2009]

There is a lack of respect in these relationships. People are not worried about the laws. Most of the domestic violence is because of financial stress or because there are other partners who find out about each other and this leads to domestic violence. In marriage there is commitment and respect. [social worker interviewed in Swakopmund, 2009]

Negative attitudes were particularly pronounced in the case of same-sex cohabiting couples:

It is abnormal and not God's wish. Protecting the couple means encouraging same sex relationships. [female traditional councillor, Kunene Region, 2002]

Many community members disapproved. Some neighbours got to know us as people, and we had no problems with them. The larger community was not supportive. My family eventually accepted it, but his [family] had a hard time believing this he was in this type of relationship. [man in a same-sex cohabitation relationship, Keetmanshoop, 2009]

Despite the prevalence of cohabitation, the examples cited indicate that Namibian communities have mixed opinions about the practice with the main objections being violation of religious tenets or customary norms.

10.7 Advantages and disadvantages of cohabitation

Advantages

When asked about the main advantages of cohabitation, the most frequent answers from focus group participants related to the financial incentives of living with a partner. The second most commonly-reported advantage of cohabitation is that it is easier and ‘better’ for parents to raise children together. Love and emotional support were the third most often-cited benefits of cohabitation. The idea that marriage would follow from a period of cohabitation was the next most-mentioned ‘advantage’ of cohabitation.

Other advantages of cohabitation identified by multiple focus group participants were that it is easier to leave a cohabitation relationship than a marriage if the relationship fares badly, that household chores may be shared by cohabitees, that cohabiting encourages monogamy (and therefore reduces the spread of HIV), that cohabitation is preferable to an expensive wedding and finally that moving out to cohabit with a partner relieves pressure on an over-crowded family household.

Disadvantages

While many problems were cited, some felt that there was no real difference between the problems found in cohabitation relationships and those found in a marriage.

Several persons interviewed focused on the problems which occur when a cohabitation relationship breaks up, noting that the woman usually loses any access to the property accumulated during the relationship. Most focus group participants agreed that if the house is not registered in a woman’s name, she would typically leave taking nothing but her clothes – regardless of her financial input during the relationship. One woman thought that there is often destruction of property after a break-up and that the children may be left without anything. A woman from Windhoek said: *“If the relationship breaks up, the woman usually loses out on everything especially when the house that they lived in belonged to the man.”*

A related problem is the issue of the emotional and financial control that may be exerted by one partner over the other, trapping the latter in the relationship. A number of respondents said that where there has been no marriage, women are often in a vulnerable position and are therefore forced to comply with the wishes of the male partner or be thrown out, taking nothing with them. There is reportedly a high incidence of threats and domestic violence in such relationships.

These relationships close things off for women and make them more dependent. Often these men ask women to quit work and the women lose some bonds with their own family as they follow these men... Then the family cuts them off and they can't return to them.

community activist interviewed in Windhoek, 2009

If I'm the breadwinner, she is dependent on me. I'll force her to do things she doesn't want to do. I may make her have sex with me. Maybe I will emotionally abuse her if she is hanging out with a friend I don't like.

male cohabitant, 2009

A Namibian study of domestic violence published in 2003 found that women who were cohabiting with partners were more likely than married women to suffer domestic violence. This study also found that abused women in cohabitation relationships were reluctant to seek help from church leaders because of the fear of being reprimanded to "go and sin no more".

Ministry of Health and Social Services (MoHSS),

An Assessment of the Nature and Consequences of Intimate Male-Partner Violence in Windhoek, Namibia: A sub-study of the WHO multi-Country Study on Women's Health and Domestic Violence, Windhoek: MoHSS, 2003



If the male partner dies during the relationship, many respondents claimed that the man's extended family will often engage in property grabbing and the surviving partner may be "chased out" with her children, without a means of support. Another difficulty mentioned in the event of death of the male partner was that the deceased's family may refuse to provide the partner with the death certificate, which will in turn prevent her from claiming certain benefits.

Problems associated with cheating and a lack of trust were also mentioned. The lack of commitment in the relationship can mean that partners are very possessive. A related issue frequently raised was the transmission of HIV because of unfaithfulness, and also because of the lack of stability in the relationship, or the lack of a sense of responsibility for the other partner.

Within these types of relationships, "extra" relationships happen more than in marriage and there is nothing you can do about it.

community activist interviewed in Windhoek, 2009

CASE STUDY

I lived with my partner for 5 years, but now it's over.

We were going to get to know each other and then get married. Then I found out he was cheating and that was the end of the relationship. In the beginning we were both thinking of marriage.

We have one child who still lives with me.

When we were living together, he paid the rent and I did electricity. We both did the food. When we bought big things we both contributed. I was also supporting my older daughter and my mother.

The house was in his name. When we broke up, he took everything and stayed in the house. I took only my clothes. We never had a chance to talk about what would happen if the relationship ended. It came up all of a sudden because I found out he was cheating and we split up.

We experienced problems because according to our religion and tradition we cannot be recognised. Our families did not support us. It wasn't pleasant. My mother was always talking to me and so was the church. I was ashamed.

My daughter today has problems because she has her father's surname. People are asking her to change it and she doesn't know the whole story.

We were not welcome in some places. People gossip. It's against our religion and our tradition. The elders say that this is not a nice thing.

woman interviewed in Swakopmund, 2009

Another problem frequently cited by informants in focus groups was family and community interference in the relationships of cohabiting partners. A woman from the Erongo Region provided a typical example of this when she said, "No one approves of us living together, people gossip that he is with me because I bewitched him, and he is more with me than his wife." Some

respondents said the man's family will have a bad relationship with the woman as they will not respect her. Others said community censure is strong. Religious, especially Christian, views on cohabitation were frequently cited as being sources of negative attitudes towards cohabitation relationships. Many respondents reported that it is difficult or impossible to get a child born outside of marriage baptised, and others said that the unborn child of a cohabiting couple will be cursed.

People would tell me I was living in sin about once per month.

woman in cohabitation relationship, 2009

The final disadvantage of cohabitation relationships frequently offered by focus group participants is that women end up 'wasting time' with someone who will not marry them, reflecting a cynicism towards the idea that cohabitation could be a valuable precursor to a marriage between the partners.

Noteworthy, though less commonly cited, reasons why respondents said cohabitation is problematic included difficulty convincing men to pay for their children's school fees since the men were saving to pay for their 'legitimate' children, problems with getting cohabiting partners or children of such relationships on employee or other benefit schemes and the sexual abuse of children by male cohabitants living in a household with their partner's children from a previous relationship.

One reason frequently offered by the participants as to why long-term cohabitation partnerships are not taken seriously is the lack of "papers" which seems to be perceived as synonymous with a lack of legitimacy.

The following chart lists problems which arise in cohabitation relationships. Many of the same problems can manifest in any relationship, including a marriage, but most participants thought that some of these problems are more difficult in the cohabitation context – especially those problems arising when the relationship ends.

PROBLEMS WITH COHABITATION

Problems during relationship

- Lack of respect from others, especially for the woman
- Lack of financial support from male partner
- Families of the couple do not approve
- Woman feels insecure because of the instability of the relationship
- Man often has other partners and children
- Violence within relationship
- No protection from the police if victim of domestic violence
- Lots of fights
- "No love" in a cohabitation relationship
- The man does not take care of the children

- Unmarried father has fewer rights over the children⁶⁷
- Man spends most of his money on his other girlfriends
- Cohabitation is considered to be a sin
- Cannot receive any medical aid or pension benefits from partner if not married
- Psychological problems for partners and children
- Cheating and jealousy
- Not same sense of commitment / life planning as marriage
- Domestic violence
- Men demand that women take care of them like a wife would
- Hard to figure out how to divide finances and chores
- Dependency: Man will force you to stop working and will control you
- Partners mistreat each other's property or sell it without permission
- More HIV transmission because of lack of commitment to each other
- Alcohol and drug abuse
- Threats and blackmail
- Don't have own space or independence
- No family planning
- Feel guilty because of not having money to marry girlfriend
- Problems with supporting her family as well as his
- No work benefits
- Family interference with or disapproval of relationship
- Against Christian values
- Community disapproval
- No community support when relationship breaks up or one person dies
- Children suffer during relationship
- Children suffer if relationship breaks up
- Man will not pay school fees
- Sexual abuse of children by non-biological family members
- Children will be cursed by God

Problems when relationship ends

- Financial disadvantages because of lack of procedure for property division
- Discrimination against women in respect of property, especially when male partner dies
- Remaining partner may struggle to raise children alone
- You wasted your time when he ends up marrying someone else
- "Left with nothing" when you break up
- Property-grabbing by man's family
- Easy to get kicked out of house or must obey to avoid being kicked out
- Hard to figure out who gets what since no laws cover this
- Woman's parents may not support her if her boyfriend kicks her out
- If man dies, his family will not give the woman his death certificate
- Hard to get out of relationship
- Cohabitants are promiscuous after they break up
- If you do get married, the relationship will be cursed
- If man dies of HIV, family will blame girlfriend for witchcraft

⁶⁷ This was true at the time of the interview, but has been ameliorated since then by the Children's Status Act 6 of 2006.



Chapter 11

OPTIONS AND RECOMMENDATIONS FOR LAW REFORM

11.1 Should the law intervene?

A strong majority of the persons consulted by the Legal Assistance Centre in both 2002 and 2009 were in favour of some sort of legal protection for cohabitating partners. Participants felt particularly strongly that there should be some mechanism for fair distribution of property division, with more mixed opinions on maintenance. One woman summed up the key argument for protection in a 2009 focus group discussion, saying *“I know of a couple together more than 10 years. They have five children. The man does not want to marry the woman. She is not working. The government should protect people like this.”*

This new cohabitation law needs to be done very quickly. We women are suffering.

focus group participant in Keetmanshoop, 2009

Some legal protection for cohabitation appears to be a Constitutional imperative – to protect equality, dignity and diverse forms of “family”. Some form of protection also appears to be mandated by Namibia’s international commitments, particularly under the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination Against Women.

One counterargument is that some people choose cohabitation precisely to avoid legal responsibilities, but this point is weak in the context of a society where gender equality means that men and women generally approach cohabitation from unequal social positions with unequal levels of bargaining power. Furthermore, the law should protect weak and vulnerable members of society from unfair exploitation by others.

Will legal protection for cohabitation undermine marriage? We think not. The rate of marriage in Namibia is already low because of economic considerations. Providing some legal protection to cohabitation is essentially responding to a situation which already exists. Legal protection for cohabitants need not make the results of cohabitation equivalent to marriage, so it is entirely possible to protect cohabitants while ensuring that marriage will continue to have a special status in society.

Will legal protection for cohabitation be contrary to tradition or religion? Despite differing cultural attitudes and religious disapproval, cohabitation is present in all regions of Namibia. Even if there is cultural or religious disapproval of the practice, this does not justify denying recognition and protection to the significant numbers of people who live in this type of family arrangement. The recognition of cohabiting relationships will in no way affect the choice couples can make to marry according to their religious beliefs; therefore the two options are in effect mutually exclusive. If religious leaders are concerned that the number of people marrying may be reduced, the logical recommendation would be for churches to strengthen their teachings about the importance of marriage to their congregations rather than blocking alternatives.

When asked whether protecting cohabitation relationships would harm or improve the position of women in society, most respondents in the study said that it would improve women’s position.

RECOMMENDATION:

On balance, policy considerations point to the need to provide some legal protection for cohabitation to protect economically vulnerable parties from unfair exploitation.

11.2 What types of relationships warrant legal protection?

Part of what is challenging about crafting a new law on cohabitation is deciding what relationships warrant legal protection.

11.2.1 Intimate relationships versus other types of relationships

A distinction can be drawn between persons who live together in an intimate relationship which resembles marriage in at least some respects and persons who share a household and undertake certain responsibilities to each other without being in an intimate relationship. The second category could include, for example, parents living with their adult children, a group of siblings, a family unit which includes children from various relationships, various extended family members or even completely unrelated housemates. Some countries give various forms of legal protection to a range of domestic relationships.

One argument in favour of giving protection exclusively to marriage-like relationships is that these are particularly likely to be influenced by prevailing gender stereotypes which can unfairly disadvantage women. In such relationships, women are likely to perform roles such as child-rearing, housework and other unpaid labour, whilst men are more likely to make contributions to the household in the form of cash and therefore more likely to have nominal ownership of key assets. On the other hand, other family-like relationships may also be influenced by gender stereotypes – such as households where grandmothers look after large numbers of grandchildren, or where they share their pensions with other members of the household and may be more vulnerable to exploitation on this basis than male pensioners.

Another concern is the legitimate or reasonable expectations of the parties. Particularly when it comes to automatic legal protections, the law should be connected to the reasonable expectations of the persons involved in such relationships. To give an extreme example, persons who rent rooms in their houses to strangers as a source of income would have no reason to expect that this might produce a cohabitation relationship with legal consequences which go beyond those of landlord and tenant – whilst, at the other end of the spectrum, persons who live in a manner resembling marriage and make contributions to a shared household would probably be less surprised to find that the law requires that the assets of that joint household must be equitably shared on the basis of the parties' respective contributions.

On the question of applying increased legal protections to situations where the parties who share a household are related by blood (such as siblings, grandparents and grandchildren, or parents with children from several different relationships), one issue of concern is how far the law needs to intervene in normal family relationships of dependency and reciprocity. Family relationships such as these, which may involve multiple persons in complex ways, did not form part of the current research, and the specific vulnerabilities in other relationships which

might warrant legal intervention would need identification and study before appropriate recommendations could be made.

Furthermore, it would probably be unnecessarily complex and cumbersome to try to protect all forms of family under a single law. If there are forms of family groupings other than cohabitation which need legal protection, it might well be best to deal with them in separate laws which address specific needs and vulnerabilities. Providing new legal protections to cohabiting partners could be a first step towards providing legal protection to vulnerable persons in a wider range of family groupings. In the meantime, we suggest that the trend of defining “dependants” broadly and factually for specific purposes, especially for social safety nets such as social security, medical aid and pensions, should be continued as this will help protect people in non-traditional family forms.

RECOMMENDATION:

Limit legal protection for the current law reform on cohabitation to persons living in intimate relationships. If other family forms need legal protections, address them in separate laws aimed at their particular needs after specific study of the problems which need to be addressed. In particular, continue the trend towards broad, fact-based definitions of “dependants” in appropriate statutes, as this will assist families which do not fit traditional profiles.

11.2.2 Opposite-sex versus same-sex relationships

Cohabitation in the sense of an intimate relationship can take place between two persons of the same sex or two persons of the opposite sex. These situations are often treated differently in the eyes of the law, as (under most legal regimes) same-sex partners do not have the choice of entering into marriage. In contrast, a couple made up of a man and a woman generally do have the option of marriage – if one of them is not already a partner in a civil marriage to someone else or suffering from some other bar to marriage, such as a prohibitively close blood relation or a lack of parental consent (for minors wishing to marry).

The Legal Assistance Centre would recommend extending the same protection to all couples, regardless of sexual orientation. This is an evolving issue worldwide, including in Africa where South Africa recently became the first country in Africa to provide for same-sex marriage even though some other African countries condemn homosexuality.

Public opinion in Namibia is, predictably, split on this issue. We would assert, with respect, that the *Frank* case was incorrect in its statement that the equality clause in the Namibian Constitution does not encompass discrimination on the basis of sexual orientation, and that equal protection of opposite-sex and same-sex relationships is a Constitutional imperative. However, given the political unlikelihood that a proposed law on cohabitation which covers same-sex couples would be enacted, it should be noted that the general proposals on law reform in this study would not be affected by the inclusion or exclusion of same-sex couples.

RECOMMENDATION:

Give legal protection to cohabiting couples regardless of sexual orientation, to fulfil Namibia's constitutional and international obligations against discrimination. (However, should this not be politically possible at this stage, the recommendations proposed could in theory be applied only to opposite-sex partnerships.)

11.2.3 Monogamous versus polygamous relationships

Some countries give protection to cohabitation only in situations where neither partner is already married. This is often the case where cohabitation of certain duration, or the registration of a cohabitation relationship, produces all the effects of a marriage.

However, in Namibia, historical and economic factors (such as pre- and post-independence labour migration), combined with customary acceptance of polygamy in many Namibian communities, mean that there are in practice many concurrent relationships. Failure to give any protection to such relationships would simply leave the vulnerable women and children in such arrangements more vulnerable.

It may be argued that giving any protection to informal polygamous relationships will create a conflict of rights between the lawful spouse and the domestic partner. However, it should be possible to protect all the women affected – through the customary law concept of property allocated to each “house”, or in the case of a civil marriage, by allocating to the cohabiting partner only a portion of the man’s independent property or a portion of his half of the joint estate. Thus, protecting the informal partner need not unfairly disadvantage the lawful spouse.

A question has been raised about fairness to third parties if multiple marriage and cohabitation relationships are recognised. For example, this approach might mean that a third party must provide medical aid benefits to multiple spouses/partners. But this is already the case where customary marriages are polygamous. Furthermore, most benefits which would be affected – such as medical aid, pensions, employees’ compensation or social security – have a built-in cap on total benefits. So the potential recognition of multiple relationships would not generally increase the size of the pie, but would more likely result in smaller pieces of the same pie for each partner – and where there are concurrent relationships, this will probably accord with relative degrees of factual dependency.

RECOMMENDATION:

Legal protection for cohabitation should include informal polygamous relationships which meet the threshold requirements for legal protection, whilst also ensuring that lawful spouses are not unfairly disadvantaged in any allocation of assets.

11.2.4 Adults versus minors

Many laws limit protection for cohabitation to relationships between adults. Refusing to give any protection to such relationships involving minors – in situations which often involve adult men and minor girls – could be detrimental to vulnerable young girls. On the other hand, it would be problematic for the law to appear to sanction the involvement of children in such relationships, especially where this might be illegal under the Combating of Rape Act or the Combating of Immoral Practices Act. Furthermore, providing legal protection to such relationships might also have the effect of presenting informal cohabitation as a viable option for a child who was too young to conclude a civil or customary marriage. It might also provide a financial incentive to minors to enter “sugar daddy” or “sugar mommy” relationships which are already motivated by the younger partner’s desire to get access to financial resources.

RECOMMENDATION:

Limit legal recognition and protection to cohabitation relationships involving persons 18 years of age or older, to parallel the age at which persons may marry without state permission.

11.3 What legal protection?

Before taking the question of criteria any further, it is necessary to consider what type and degree of legal protection will be offered.

The degree of protection must be considered in conjunction with the route to qualify for legal protection. There are also essentially two different routes to legal protection, which can be used alone or in combination with each other. The two basic approaches are: (1) some form of **automatic protection** which applies to couples who fulfil the criteria for “cohabitation” set by law (such as living together for a certain time period); and (2) some form of **agreement between the parties**, manifested by registration or contract, which has the effect of providing them with certain legal protections.

There are many variations within these two basic approaches. For example, some jurisdictions which provide automatic protections allow couples to “opt out” of them if they wish, whilst other jurisdictions do not. When it comes to agreements, there are varying levels of state intervention. For example, some systems provide registration frameworks which require the couple to go through specified dissolution procedures to end the cohabitation, whilst other registration systems function more simply as proof that the relationship existed as from a particular date. Some



jurisdictions provide a fairly fixed set of consequences for registered cohabitation relationships, whilst others provide couples with a framework for making agreements about the consequences of their relationship between themselves.

These two basic approaches can be used in combination, such as by providing a minimal degree of automatic protection and making a higher level of protection available if the couple make an agreement to this effect.

ROUTES TO LEGAL PROTECTION FOR COHABITATION

AUTOMATIC

- **automatic protection** for cohabiting couples who satisfy certain criteria
- **automatic protection with opt-out:** automatic protection with a provision allowing couples to opt-out of the legal framework by private agreement

BY AGREEMENT

- **opt-in by registration:** protection only for registered partnerships
- **opt-in by contract:** protection only for partners who conclude express contracts, which could be private agreements between the parties or officially registered

COMBINATIONS

- some combination of protections

RECOMMENDATION:

We suggest a basic level of automatic protection which can be supplemented by agreement between domestic partners if they wish.

11.3.1 Automatic protection

Equating long-term cohabitation with marriage?

Several African countries – including Tanzania, Kenya and Malawi – have adopted models which transform some instances of cohabitation into marriage, purely on the basis of the parties' conduct.

In the LAC research, many respondents initially said that cohabiting couples should be treated as if they are married in these circumstances. However, it is not entirely clear that the analogy between cohabitation and marriage was thoroughly considered by these interviewees, as some

who said that cohabitation should be treated equivalent to marriage after a certain time period subsequently gave inconsistent answers to related questions – such as whether cohabiting partners should have a right of intestate inheritance or a duty to maintain each other. Some persons agreed with the suggestion of giving cohabiting partners only *some* of the rights that married people benefit from.

There would be potential Constitutional problems with ‘common-law marriage’ where living together for a certain time period (or satisfying other criteria) automatically transforms a relationship into a marriage. Article 14(2) states that “*Marriage shall be entered into only with the free and full consent of the intending spouses*”. It would seem contrary to this notion to allow informal relationships to become marriages without a clear and informed decision on the part of both partners.

There is also no need to provide a secular alternative to marriage for those who do not want to involve religion, as it is already possible to conclude a civil marriage before a magistrate without any religious connotations, or to enter into a customary marriage which is also of secular nature. Furthermore, equating cohabitation with marriage is likely to raise religious objections in Namibia as it has done in other African countries.

There would arguably be no logic in automatically transforming cohabitation relationships into marriages since this would seem to create an unnecessary duplication in the law – as well as introducing a mechanism which approximates a change in the status of individuals without the formalities and safeguards supplied by the law in respect of marriage and divorce.

Additionally, since the law already protects children born outside marriage, it is not necessary to equate cohabitation with marriage for the purpose of protecting children of such relationships.

RECOMMENDATION:

We do NOT propose that couples who cohabit for a minimum time period should be treated as if they are married. Marriage is a status which should be consciously and knowingly chosen, and there are other mechanisms which can be used to protect cohabiting couples.

A basic level of automatic protection

Several countries have a basic level of automatic protection which provides minimal equity to cohabiting partners, combined with a supplementary system for registered relationships or the alternative of allowing individual couples to replace the general rules with their own private agreements.

Most of those who took part in the 2002 LAC field research favoured some form of agreement or registration over automatic protection, but many interviewees and focus group discussions in the 2009 LAC field research supported some form of automatic protection.

Many of those interviewed thought that a cohabitation relationship should come within the ambit of legal protection once the relationship has lasted for a minimum amount of time. Some thought that automatic protection would be important for persons who would probably be unable to register a cohabitation relationship because their partner was already married to someone else.

Those who were opposed to automatic protection focussed on freedom of choice. Some focus group participants also worried that people would not respect a law which provided automatic protection. Some worried about how a system of automatic protection would work in practice. Because the accessibility of courts and law is generally problematic in Namibia, some people thought that proving relationships before a magistrate would be a hardship on cohabitants. A few focus group participants also worried that automatic coverage would discourage marriage, especially if there were no real differences between cohabitation and marriage.

Recognition and legal coverage of domestic partnerships should not be dependent on any formalities (such as registration or a written contract of partnership). Such formalities are unrealistic... where many people are illiterate, have little knowledge of the law and even less access to it. There is also the issue of unequal power relationships between men and women, which means that women may not be able to insist on registration... The situation can be likened to that of labour law where the freedom to contract has been curtailed by the imposition of rules that regulate fairness in the employment relationship. This is based on the recognition of an unequal power relationship between employees and employers in most situations.

Beth Goldblatt,

Cohabitation and Gender in the South African Context – Implications for Law Reform,
Johannesburg: Centre for Applied Legal Studies (CALS), University of the Witwatersrand,
2001 Z at paragraph 4.1.3 (emphasis and brackets omitted).

Some critics argue that automatic consequences unfairly reduce people's autonomy and freedom to contract. Others argue against automatic protection on the grounds that the "private sphere" should be protected from government interference, asserting that government should not intervene in cohabitation relationships since they are private. However, as discussed above, the idea of choice is problematic since both partners may not have the same degree of choice in societies marked by gender inequality. Furthermore, the entire field of family law already infringes upon the "private sphere" in order to protect vulnerable persons against unfairness. Additionally, in a country like Namibia where there is a predominately rural population with a low level of legal literacy, it is unlikely that the public interest will be adequately served by a legal framework which provides protection only to registered cohabitation relationships.



RECOMMENDATION:

We propose a basic level of automatic protection for cohabiting couples who meet specified criteria. Applying some automatic protection is the best way to protect vulnerable partners who may be in a weak negotiating position, or those who may remain unaware of the need to register such relationships even after a law reform allows for this possibility.

Opting out of automatic protection

Some legal schemes provide automatic protections, but allow couples to make an agreement to “opt out” of this system if they choose.

An opt-out option cures many of the alleged defects in the informal system by preserving freedom of contract. This type of provision would be especially relevant to parties who are of equal bargaining power and have freely chosen not to marry. However, those who criticise formal systems requiring opt-in registration see similar problems with including an opt-out option in a system of automatic protection, particularly in the more common case where the partners do not enjoy equal bargaining power.

The persons consulted in the field research were divided on this question, with many persons expressing concerns for vulnerable partners if opting out is allowed. For example, a male participant in a Rehoboth focus group discussion spoke against an opt-out provision, asserting that “women will lose out because guys will force them to accept opting”, while one woman said that “no-one should be able to opt out because the other party will lose out in the process”. Several people made comments to the effect that “you shouldn’t be able to escape the law”. One woman warned that “it would bring a lot of violence and confusion if people thought they could escape it or get out of it”.

Speaking in favour of opting out, one man typically stated that “*it is stripping people of the right to choose*” – saying further than cohabiting couples should be able to choose in the same way that married couples can pick their marital property regime. One key informant suggested that sometimes it is a woman’s financial status that would be protected by allowing her to opt out of automatic protection, such as an affluent widow who might otherwise be subject to insincere male attention.

Several people spoke in favour of some sort of qualified opt-out provision. One man felt that opting out might be possible only if a clause remained that ensured that there would be continual maintenance of both partners and the children. One woman felt that opting-out should be possible only if the alternative agreement would provide better benefits for each partner.

We assert that the automatic protections provided to cohabiting relationships should be at a very rudimentary basic level and so need not be subject to opting out, in the same way that employer and employees cannot make an agreement waiving the basic conditions of employment provided to workers by labour legislation. Furthermore, if both parties are in agreement about the desire to avoid automatic protections, they can both simply ignore the law – with the possible exception of action by heirs after the death of one partner.

RECOMMENDATION:

There is no real need to include an opt-out provision for basic automatic protections. After all, if *both* cohabiting partners do not want to take advantage of the legal protections available to them, they can escape coverage merely by declining to take any steps to access such protections.

11.3.2 Registration

There are a range of options for registration. For purposes of discussion, we can identify three useful models:

- (1) **Model 1:** registration of a domestic partnership with consequences similar to marriage and a dissolution procedure similar to divorce;
- (2) **Model 2:** registered declaration of a domestic partnership primarily as proof of the relationship, with automatic termination of the relationship when it ceases to exist because of death or abandonment by one or both partners;
- (3) **Model 3:** optional registration of private agreements between partners, with registration designed merely to facilitate enforcement of the agreement.

Pros and cons of registration

Many people are critical of a formal system requiring registration, on the grounds that such a system would be unlikely to protect those who most need it – usually women, who frequently

have unequal bargaining power and reduced freedom of choice in such relationships. Some argue that a formal system requiring registration would simply create an additional, unnecessary layer of family law rules that would be inaccessible to the most vulnerable persons. If a system of formal registration were implemented, perhaps some cohabitants would opt into it – but a cohabitant who can convince her partner to register is a person who already has some degree of power and is therefore less vulnerable than those who would not be aided by such a system. However, a system of formal registration of cohabitation relationships could be a useful supplement to a basic level of automatic protection.

The concept of registration was very popular among interviewees and in focus group discussions. Perhaps the most common reason that people endorsed registration (as opposed to a more informal system) was because they wanted tangible evidence of the relationship and of the law. Many of the participants spoke of the benefits of having the ‘*paper*’ that registration would entail, suggesting that they perceived registration as lending legitimacy to the relationship.

Others were in favour of a registration system because it would help those people who wish to marry but cannot because of cultural or financial constraints. Some women supported registration because it could serve as a ‘bargaining chip’ for women, by “*taking the relationship to the next level*”.

Some were in favour of registration, but felt that couples should be allowed to register only after meeting certain criteria, such as living together for at least two years and having an indication of serious commitment to each other.

The most common arguments in favour of registration were to ensure protection of both partners and their children, or to provide proof that the relationship exists.

When asked *where* they thought couples should register, many interviewees suggested that magistrates’ courts would be an appropriate venue. Others suggested churches, police stations, government departments, lawyers, social workers and the Legal Assistance Centre. A number of respondents said that this power should be extended to traditional leaders in rural areas.

Several interviewees also expressed some reservations about registration. For example, some of the same people who spoke in favour of registration also said that the law should provide protection that no one should be able to avoid. For example, one person said that automatic protection “*seems like a good idea in case one doesn’t want to register*”. Similarly, a Nama couple in Karas Region felt couples should be *allowed* to register their relationship at relevant institutions (such as the Social Security Commission and the Ministry of Home Affairs) in order to qualify for specific benefits, but felt that it should not be a prerequisite to legal protection. Only a few people clearly favoured registration as the sole basis for legal protection, such as one man who said “*Forget all the automatic stuff. Registration should be the only way*”. Most of those who spoke on registration and automatic protection cannot be said to have expressed a clear preference between these two options and often favoured both. It seems that people were most interested in ensuring that there was some legal protection.



A woman in a same-sex cohabitation relationship in Erongo Region felt that registration should be allowed but not required, especially if it included same-sex couples, because of fears of victimisation.

Others were concerned that registration would not be possible where one cohabitating partner was already married to someone else, or refused to register.

There is also some doubt as to whether financially stronger partners in cohabitation relationships would be willing to agree to registration. Indeed, most of the cohabiting women interviewed in 2009 indicated that they would register as cohabitants if the law allowed them to do so, but only a small minority of them believed that their partners would definitely want to register. In one focus group, many participants favoured registration as a trigger for legal consequences, but then when they thought about the situation where one partner is unwilling to register, they decided that automatic coverage should also be an option.

Requiring a termination procedure similar to divorce for cohabitation relationships would seem to be particularly problematic. It would seem to make sense to focus primarily on protecting vulnerable parties by providing legal recourse to parties *who have a dispute* about finances or children when a relationship ends, rather than requiring a dissolution procedure for the termination of *all* cohabitation relationships.

Yet another argument against registration is that setting up a system of cohabitation registration parallel to marriage registration would require a greater degree of administration and expense. In fact, it should be noted that Namibia has no accessible national record of marriage and divorces as yet. Against this background, it would be unrealistic to expect a record of registered cohabitation agreements to be more comprehensive and accessible than the current record of marriages.

Pros and cons of contracts

One form of registration would be the registration of optional contracts between cohabiting couples.

One drawback to the use of express contracts is that contract law is premised on equal bargaining power and is less well-suited to relationships involving dependency. However, this concern would be offset to some extent by a legal framework which presents the option of voluntary contracts against a background of automatic protection for the most basic issues of fairness.

Many persons interviewed thought that cohabiting couples should be allowed to make their own property arrangements, but this was often suggested as only one of several options for protecting such relationships.

Most people who did not agree with the use of contracts felt that certain rights must be dictated and not provided merely as an optional choice.

RECOMMENDATION:

Supplement automatic protection with a system which allows couples to register the existence of their relationship to facilitate proof if they wish to do so, with registration resulting in the issue of a certificate of registration.

Allow couples to register a contract between themselves at the same time (or later) if they wish to do so, and encourage this with a simple template accompanied by accessible educational material on what issues should be considered. This could be accompanied by a popularisation campaign encouraging cohabiting couples to make contracts and wills. But authorise courts to depart from the provisions of such private contracts to take into account changed circumstances or to prevent manifest unfairness.

Provide for termination of registered relationships without official intervention upon the death of one partner or when one partner ceases to fulfil one of the requirements for registration – such as by abandoning the relationship or ceasing to occupy a mutual residence.

Additionally allow both partners to file for termination to facilitate proof that the partnership has ended. Official termination should be recorded on a certificate of termination.

Allow aggrieved partners to approach the courts for appropriate financial redress, regardless of whether the partnership was registered – or if registered, regardless of whether it was officially terminated.

11.3.3 Hybrid systems

This paper essentially recommends a hybrid system which includes automatic protection along with optional registration and the facilitation of private contracts which can also be registered if the cohabiting couple wishes to do so. This combination attempts to combine a basic level of protection for vulnerable parties with a system which gives cohabiting couples a significant degree of free choice on how to organise their relationships.

Other countries have also adopted similar hybrid systems. For example, the Domestic Partnerships Bill 2008 under discussion in **South Africa** proposes a two-tier system, with one set of rules for registered domestic partnerships and another set of automatic protections for unregistered domestic partnerships.

SOUTH AFRICA'S DOMESTIC PARTNERSHIPS BILL 2008

The South African Domestic Partnerships Bill 2008, which is still in draft form, provides for two forms of domestic partnership: registered and unregistered.

Registered domestic partnerships

Entering into a registered domestic partnership would involve a public commitment in the form of a formal registration process open to couples (regardless of sex) who are not married or in a registered domestic partnership with anyone else. Certain government officials would be designated as “registration officers”. The partners who are cohabiting (or intending to cohabit) would both declare their willingness to register their domestic partnership by signing the prescribed documents in the presence of the registration officer who would then give them a “registration certificate”.

The consequences of a registered partnership would be:

- registered partners would have a mutual duty of support
- both would have a right to occupy the joint home, regardless of who owns or leases it
- each partner would be able to deal in joint property only with the written consent of the other partner.

A registered couple has the option of concluding an agreement between themselves – called a “registered domestic partnership agreement” – which would say how they will deal with their property and other financial resources, including pension schemes and similar benefits. Registered partnerships would essentially have to be analogous to marriage “out of community of property”. The Bill would not allow domestic partnership agreements to establish “in community of property” regimes, but the couple could have some jointly-owned property such as their home and household goods.

If a couple wish to terminate their relationship, they must both declare their desire to do so by signing a “termination agreement” in the presence of a registration officer. This agreement can provide for maintenance, the division of any joint property, what will happen to the family home and other financial matters. If there is a dispute on financial issues, they must approach a High Court or a family court. If there was a registered domestic partnership agreement in place, the court would have reference to it but would not be bound to apply it if proved to be unfair. Couples with minor children must terminate their partnership by means of a court order, so that the court can ensure that the welfare of the children is properly protected.

If the partnership terminates by death, the surviving registered domestic partner would qualify for intestate succession and maintenance from the deceased’s estate on the same basis as a spouse.

Unregistered domestic partnerships

The draft bill gives protection to unregistered partnerships only after the relationship comes to an end by separation or the death of one partner. If a partner approached the High Court or a family court for assistance, the court would first look to a set of specified criteria (such as duration and degree of financial dependence) to see if the relationship qualifies for protection. If so, the partner who approaches the court could apply for an order for an equitable distribution of the joint or separate property of the partners, for ‘spousal’ maintenance or for intestate succession.

RECOMMENDATION:

Adopt a two-step approach: (1) Provide a basic level of automatic protection for cohabiting couples who satisfy certain criteria. (2) Provide for optional registration of the cohabitation relationship which can be accompanied by a cohabitation agreement giving greater detail to the arrangements between the parties if they choose.



Source: <http://images.askmen.com>



Source: www.cartoonstock.com

"WE TRIED LIVING TOGETHER, BUT THAT DIDN'T WORK, SO WE'VE DECIDED TO GET MARRIED."

11.4 Detailed criteria and protections

This paper has recommended a two-step approach: (1) a basic level or automatic protection for cohabiting couples who satisfy certain criteria and (2) optional registration of the relationship which can be accompanied by a cohabitation agreement between the parties if they choose. Within that approach, it is necessary to decide on –

- what criteria should invoke automatic protection;
- what form automatic protection should take;
- the mechanics of optional registration; and
- additional amendments to existing statutes to protect cohabitants.

11.4.1 Criteria for automatic protection

During the field research, people tended to define cohabitation as some variation on “*people who are living together as husband and wife*” or “*a couple staying together*”. An overwhelming majority of participants thought that cohabiting couples should only fall within the ambit of legal protection once their relationship had lasted for a minimum amount of time – with most participants suggesting a threshold of duration between 1 and 5 years.

Opinion was equally divided on whether it was necessary to factor in whether the relationship is continuous and whether the couple reside together all or only part of the time – with several mentioning migrant labour.

A strong majority of respondents believed that the existence of a sexual relationship between the partners should *not* be a relevant consideration in defining cohabitation for legal protection purposes, saying things like “*love is not sex*” or “*How would you check?*”.

The majority of interviewees spoke in favour of the other proposed factors, including

- care and support of any children;
- if the couple have a commitment to a shared life;
- whether the couple own, use or buy property together;
- how the partners financially support one another;
- how the couple divide household duties; and
- the reputation and public aspects of the relationship - whether, for example, people think of them as a ‘couple’.

One focus group participant summed up the idea of using a range of criteria well, saying “*The government should look at how long they have been together and what type of relationship they have, as well as the things they have together.*”

Most of the discussions centred around couples who were living together. However, one focus group raised the issue of couples who are boyfriend/girlfriend, but do not live together,

pondering whether or not the law should protect such relationships. The group reported that these relationships were common, saying that often the woman would perform chores such as washing the man's clothes, but would not sleep at his house each night because she did not want to displease her parents. However, the group felt that couples living apart would be unlikely to share property and so were not sure if these relationships deserved protection.

Although financial dependence and interdependence could occur without cohabitation, sharing a home seems to be a useful dividing line for automatic protection because it is a good indicator of when the intermingling of property and finances are most likely to become complex.

After considering the field research and comparative examples, we suggest using the term “domestic partnership” and defining it as “a permanent, intimate relationship between two adult persons of the same or opposite sex who have shared a common residence for a significant amount of time”.

Because of the need for the law to give clarity which can minimise the need to resort to courts, we suggest that the automatic protection should apply to intimate relationships between two persons who are aged 18 or over and who have shared a common residence for at least two years, whether continually or on a habitual basis.

- The qualification on residence is necessary to capture the situation where migrant workers have a wife or partner in one area and another partner in another place.
- The reference to “intimate” relationships is intended to capture those relationships between couples which resemble the community of life which occurs in a marriage, but it is not intended to necessarily include sexual relations as it seems an invasion of privacy to require a demonstration of this aspect of a relationship. An alternative wording might be living together “as a couple” or “in a relationship in the nature of marriage”.
- Two years is a suggested duration which could easily be changed, but we would suggest a maximum of three years. A time period of 2-3 years is consistent with legislation on duration in other countries such as Tanzania, Kenya, South Australia, New Zealand and Canada.

We suggest further that it should be possible for a court to find a cohabitation relationship of a shorter duration worthy of protection, after considering the following criteria

- (a) the duration and nature of the relationship;
- (b) the nature and extent of common residence;
- (c) the degree of financial dependence or interdependence between the parties;
- (d) the degree of mutual commitment to a shared life;
- (e) the arrangements for care and support of any children in the household;
- (f) the performance of household duties; and
- (g) the reputation and public aspects of the relationship.

Allowing for this possibility might prevent unfairness where a relationship has ended just short of the minimum duration specified, by coincidence or by design of one of the parties who is seeking to avoid legal obligation.

We do not suggest that monogamy be a requirement, since this would not suit the Namibian reality and would exclude women in need of legal protection; as one focus group participant said, *“In Namibia it is acceptable to have one long relationship and lots of others starting and stopping along the way, so the requirement of monogamy should not be applied to the Namibian context”*.

We suggest that the law should be structured to provide a rebuttable presumption that an intimate relationship of the specified duration was a cohabitation relationship, with rebuttal being possible by showing that the relationship did not sufficiently fit the listed criteria.

Finally, we propose that a domestic partnership which has been registered should automatically fall within the automatic protection, regardless of duration and regardless of the applicability of the specified criteria. (Even if a registered partnership has been terminated, its past existence will still be relevant.)

RECOMMENDATION:

Automatic protections should apply to

- persons who have lived together as a couple for at least 2 years (unless they can show that their relationship should not be treated as a domestic partnership);
- persons who have lived together as a couple for a shorter time period but warrant treatment as a domestic relationship in light of specified criteria; and
- persons who have registered their relationship as a domestic partnership.



Source: www.gutsglamgrace.com



Source: www.accessfx.com

11.4.2 Contents of automatic protection

We propose three main forms of automatic protection for consideration:

- a mutual duty of support;
- a right to equitable division of property if the relationship ends; and
- where the partnership is terminated by death, a right to be considered for an equitable share of intestate succession, and a right to maintenance from the deceased estate (should the underlying law be changed to allow for spousal maintenance from a deceased estate).

Examples from other countries are summarised in the table below.

South Africa (proposed bill)	<ul style="list-style-type: none">• equitable distribution of joint or separate property of the partners upon termination of relationship• maintenance upon termination of relationship• intestate succession
Sweden	<ul style="list-style-type: none">• consent requirement for dealing with joint home and joint furniture or other household goods during relationship• right to equal division of the joint home and joint furniture or other household goods when relationship ends (adjusted if necessary for fairness)
New Zealand	<ul style="list-style-type: none">• right to equal division of “relationship property” upon termination of relationship
New South Wales, Australia	<ul style="list-style-type: none">• right to equitable property division upon termination of relationship• limited right to maintenance upon termination of relationship• right to intestate inheritance and maintenance from the deceased estate• right to make certain claims against third parties in respect of the injury or death of a partner
Scotland	<ul style="list-style-type: none">• equitable division of property upon termination of relationship• limited right to maintenance for cohabiting partner who was financially disadvantaged during the relationship• right to apply for intestate inheritance

Providing for a right to live in the shared residence during the existence of a domestic partnership which can be terminated without any formalities would not seem to be very helpful. If there were a dispute, the person who owns or leases the home could simply declare that the relationship is at an end. Since it is the fact of living together which gives rise to the domestic partnership in the first place, it would not seem to make sense for the law to *require* that the partners continue living together – how would a partner then ever end a cohabitation relationship if the other partner wanted it to continue?

We also believe that automatic application of a complete “marital property regime” would go farther than can reasonably be inferred from the conduct of the parties since cohabitation

takes place in such a variety of circumstances, and since there may be a spouse simultaneously in the picture.

In discussing issues pertaining to maintenance, it should be noted that there is no need for any law reforms pertaining to child maintenance since children are already fully catered for regardless of their parent's marital status. Thus, it is only the possibility of providing for maintenance between partners which requires consideration.

Mutual duty of support during the relationship

Providing for a legal duty of support would technically entitle a domestic partner to apply for a maintenance order under the Maintenance Act if financial responsibilities were not being fairly shared between the partners – just as spouses can theoretically do now. However, it is uncommon for spouses to take this step, and it would probably be even more uncommon for cohabitating partners to do so. Having to resort to legal assistance during a relationship would usually be a sign that the relationship is breaking down, and it is more likely that the focus would be fairness between the parties upon the termination of the relationship.

More importantly, providing for a legal duty of mutual support would be important, not just between cohabitants, but with respect to third parties. For example, this would give a surviving partner the ability to claim damages for loss of support if the deceased partner were negligently killed in an accident caused by the third party – since a contractual duty is not sufficient to found such a claim. It would also give clearer entitlements to domestic partners to benefits such as coverage under medical aid schemes. In fact, this concern is probably the strongest argument in favour of providing for a mutual duty of support during a relationship.

We would also assert that there should be a joint liability, in proportion to the partners' respective means, to contribute to household necessities – just as there is in the case of marriages out of community of property. (There is no need for such a liability in the case of marriages in community of property since the assets of the partners form a joint estate in that situation.) This might seldom be applied in practical terms, given that there are few court cases on this issue involving married couples, but it would provide an important benchmark for notions of fairness in cohabitation relationships. It should be noted in this regard that "household necessities" would extend only to normal and reasonable necessities, determined in light of the circumstances of the couple, and would normally encompass only such things as food, utilities and household appliances and furnishings.

The majority of persons consulted on this issue in Namibia thought that there should be some protection in this regard to prevent women and children suffering in such relationships. One Nama woman in Karas Region elaborated: *"There should be a legal duty upon the partners to support each other equally. Because we live together as if we are married and maintain each other, we should be allowed to put each other on each others' medical aid schemes."* A Nama couple in Karas Region concurred: *"There should be a duty to support each other when living together, because the woman already takes care of the house even if she is also working. The man should support the woman financially as a sign of appreciation and as 'paying for services rendered.'" However, some persons*

consulted offered notes of caution. One participant thought that it is already difficult to get men to pay maintenance for their children, so it will be nearly impossible to get them to pay “*cohabitant maintenance*”. Another thought that a man or a woman must put work into the household in order to deserve something.

RECOMMENDATION:

Provide for a mutual duty of support during the existence of a domestic partnership which will give domestic partners entitlements to appropriate benefits and a right to make claims against third parties for loss of support.

This would enable partners to make use of the Maintenance Act in the same way as spouses, but this would probably be uncommon as the need to resort to a court for maintenance would probably signal an imminent relationship breakdown.

Provide additionally that cohabiting partners are liable to contribute to household necessities (basic furnishings and supplies) in proportion to their respective financial means, in the same way as spouses.

Maintenance after the partners separate

A mutual duty of support can logically give rise to a request for maintenance payments after the relationship breaks up. In the case of a marriage, a spouse can ask for maintenance payment at the time of the divorce – but the mutual duty of support comes to an end upon divorce, and there can be no request for maintenance later on if no spousal maintenance was included in the divorce order. Spousal maintenance is in fact rare in divorce cases in Namibia. In general, courts are increasingly reluctant to award spousal maintenance in divorce cases, preferring to achieve equity between the parties through an appropriate division of property where this is possible.

Persons consulted were split on the issue of post-relationship maintenance for the financially weaker partner, with men being particularly opposed to the idea. For example, one young man said, “*If the relationship ends, then it ends.*” Participants in one focus group worried that allowing for post-relationship maintenance would cause problems: “*Girls will leave guys for maintenance money and then come back to them again. They will not learn to be independent and it will become a money-making scheme.*” A woman who was opposed to maintenance after the end of the relationship said, “*Even if they have been together for 20 years, she should not get anything like this. It is not the man’s fault that I don’t get a job and support myself.*”

Others spoke in favour of allowing for post-relationship maintenance. For example, one woman said, “*Raising children is work! Why shouldn’t she be compensated for that? Especially after she has been raising his children to please him and maybe even treating them better than her own.*” Similar concerns about unremunerated effort in housework and child-rearing were raised by many participants. One focus group suggested that a once-off payment to compensate for this kind

of contribution would be better than ongoing maintenance. There was some suggestion that women are often forced not to work, so when the relationship ends they have no immediate income and no means of supporting themselves. Some thought that the financially-weaker partner, who would usually be the woman, should have a limited right to maintenance - such as maintenance for only a specified amount of time or until this partner enters a new relationship or becomes financially self-sufficient.

You have to pay if you leave so you can't just throw a woman away.

female focus group participant

But I would just keep cheating and not leave if I knew I had to pay.

male focus group participant

After considering the pros and cons, we suggest that maintenance should be available only where an equitable division of relationship assets will be, in the court's view, insufficient to compensate for the financial inequalities resulting from the relationship. For example, this might be appropriate in a case where a woman was unable to take on full-time employment because she assumed the bulk of the housework or child care responsibilities in the relationship, and the resulting inequities cannot be addressed through the allocation of assets between the partners – such as in a case where there are few or no relationship assets.

Before considering maintenance for a partner, a court should be required to take into account each partner's respective financial obligations and responsibilities. This would mean that any financial duties to a spouse of one of the partners would be taken into consideration, as well as responsibilities for maintaining children of the domestic partnership or any other relationships.

RECOMMENDATION:

Provide a limited possibility for partner maintenance after the end of a domestic partnership, only to cater for situations where there is a need to account for the partners' respective contributions to the relationship, or for some economic disadvantage which one partner suffered as a result of the relationship, where this cannot be accomplished through a division of assets.

Division of assets and liabilities upon termination of relationship other than by death

A fair division of assets and liabilities is probably the key component needed to ensure equity between cohabiting partners when the relationship comes to an end, and it would address a concern that was frequently cited in the field research. However, there are a number of different options for how assets could be divided and how property could be shared. Several simplified models were proposed to the persons interviewed to elicit responses.

OPTIONS FOR PROPERTY DIVISION

In the 2009 field research, the following options were put to the persons interviewed.

Should cohabitating partners be able to share the property (including land) when the couple breaks up?

- a. **Option 1:** If a couple breaks up, the partners would divide equally any items that were bought for their shared use or benefit while they were living together. They would each keep things that they owned before they began living together. They would also keep items they bought while they were living together for their sole use or benefit (such as their own clothing). Does this seem fair? Why or why not?
- b. **Option 2:** If a couple breaks up, the partners would divide equally all items that were bought while they were living together. They would each keep things they owned before the couple began living together. Does this seem fair? Why or why not?
- c. **Option 3:** If a couple breaks up, all items that the partners owned before they started living together and anything that either of them buys while they are living together is divided in half once they break up. Does this seem fair? Why or why not?
- d. **Percent contribution:** In some places, property is divided according to the amount that a partner contributed to buying it. So, if Thomas put in \$80 and Veronica put in \$20, 80% of the property will go to Thomas and 20% of the property will go to Veronica if they break up. If it is not possible to determine how much they each contributed, their contributions will be considered equal.
 - i. Would a system like this one work well in Namibia? Why or why not?
 - ii. **Household work:** If this system is adopted, should work done in the household count as contribution toward owning property?

Most participants agreed that cohabiting partners should be able to share property (including land) if the couple separates. A number of personal stories were offered by the participants indicating that women often contribute financially in a way which means that no property would fall to them without legal intervention – such as by paying for consumable goods like food and utilities while the male partner buys durable goods such as furniture and appliances.

When given various options as to how property could be divided, the most popular were (a) the partners should divide equally any items bought for their shared use or benefit while they were living together, with each partner keeping belongings they owned before they began living together, and (b) all items owned before the couple started living together and anything that either of them buys while they are living together should be divided in half once they break up (as in a marriage in community of property). However, the extent to which many of the participants understood all of the options being presented to them was unclear, especially since some individuals thought all of the different options suggested were ‘fair’ or ‘good’ despite the distinctions between them.

What came through strongly from the responses was that the persons consulted generally believed property should be divided “50/50”, and it seemed that they selected their preferences based on their understanding of whether the options presented to them achieved this. Many participants felt that contribution towards household work should be taken into account in any system which divided the couple’s assets according to the contribution made by each partner towards their attainment. A typical example of this opinion came from a woman from the Erongo Region who said, “I do not work but I also contribute to the maintenance of the household because I do the cooking, laundry, ironing and cleaning. If I were employed, we would have been paying someone to do these chores. I therefore feel that I should at least have a share of the assets from our relationship”.

One focus group participant said she and her boyfriend bought a refrigerator in her partner’s name, but she made all of the payments. When they broke up, she went to the police for help to get her refrigerator back, but they said she could get nothing because it was in his name. The problem is compounded by the fact that usually men are the breadwinners, and so shared property has to be in their names.

notes of focus group facilitator, Katutura, 2009

Despite the preference of a majority of persons consulted for a 50/50 split of assets, we would not recommend applying such a rule to a cohabitation relationship where the couple have made no clear agreement about division of property and may even be unaware that living together has property consequences. We suggest apportioning assets in the manner applied to universal partnerships, where partnership assets are divided in proportion to each party’s contribution – taking into account contributions in the form of capital, shares, labour or services – or dividing assets equally where it is not possible to determine the respective contributions of the parties. This approach would also have some similarities to the accrual system which is one marital property regime used in Namibia, albeit not a common one.

Under the recommended approach, assets owned independently by either partner prior to the partnership would remain the separate property of that partner, and each partner would remain independently responsible for liabilities incurred before or during the relationship. The only assets to be shared would be those which accrued to either partner during the existence of the partnership – excluding any inherited assets – since these are the only ones which can fairly be seen to result from the contributions of both partners. There would be a presumption that any such gains will be equally shared, unless either partner can show that it would be more equitable to share such gains in some other proportion to reflect the respective contributions of the partners.

We also propose a time limit of one year for requesting a division of assets accrued during a domestic partnership, so that partners can confidently move on with their lives.

We do not propose that parties in a domestic partnership should be required to obtain each other’s consent before dealing with their separate property during the relationship, unless

they have made an explicit agreement to this effect – on the theory that requiring consent for transactions in separate property would seem to go beyond valid inference from the mere conduct of cohabiting.

RECOMMENDATION:

We suggest the following approach, which is modelled loosely on the division of assets in a universal partnership and on the accrual system as applied to marriages:

- Parties remain responsible for their own liabilities.
- The assets of each partner prior to the establishment of the partnership remain the separate property of each partner.
- Assets inherited by either partner during the subsistence of the partnership remain the separate property of that partner.
- Divide other assets accrued during the course of the relationship in accordance with each party's respective contributions, taking into account contributions in the form of housework, child care and other unpaid labour.
- If the partners' respective contributions cannot be proved, then the assets accrued during the course of the relationship will be divided equally between the partners.
- A request for a division of property between cohabiting partners must be made within one year of the termination of the cohabitation.

This [requiring a division of assets] might make people marry, which is a good thing. If they knew that there was no use to just living together since they would have to share everything anyway, that might just get married.

focus group participant in Keetmanshoop, 2009

Not everyone you date is 'the one'. Marriage is more important. There should be compensation for children, property, and time, but you can't get in too much legal trouble every time you break up with someone.

focus group participant in Khomasdal, 2009

If there is also a spouse

Persons consulted were about evenly divided on the question of whether a cohabiting partner should have some rights over the assets of the relationship when it comes to an end if the other partner also has a spouse. Amongst those who believed that the cohabiting partner should have some claim in this situation, the most common suggestion was that she should be able to keep the house she was living in as well as her own possessions. This view probably has its origins in the customary law practice of assigning assets to the 'houses' of different wives in formal polygamy.

If a married cohabitant dies, the girlfriend should only have a right to the things she and he own together, and not the wife's property. She [the girlfriend] deserves this. The wife cannot come claim her things. Under tradition, she would not get anything.

focus group participant in Ongwediva, 2009

The recommendations already put forward for equitable sharing of assets would be consistent with protecting the interests of the spouse of either cohabiting partner. Dividing only assets accrued during the subsistence of the relationship would work well when there is also a spouse who is separated from one of the partners, and a division based on each partner's respective contributions would work best to achieve equity where there is a spouse who still has an active relationship with one of the partners.

RECOMMENDATION:

To ensure that the rights of any spouse of a domestic partners are fully protected, we recommend a provision stating that the division of assets in such circumstances must come only out of the married partner's separate property (if the marriage is out of community of property), or out of the married partner's half share of the joint estate (if the marriage is out of community of property) with a corresponding adjustment at the time of the dissolution of the marriage. However, the court should also be given the power to make an appropriate adjustment in the case of a marriage which has ceased to exist in all but name prior to the existence of the domestic partnership.

Division of assets and liabilities upon termination of relationship by death

When people were asked whether a surviving partner should have rights to some or all of the property belonging to a cohabiting partner who died without a will, results were divided into two main groups. The most popular answer was that the surviving partner should inherit all of the property of the deceased. Perhaps unsurprisingly, this answer was overwhelmingly favoured by female participants. The second most frequent response was that the surviving partner should inherit some of the property of the deceased. There was support for this proposition by both male and female respondents. Of those who supported this view, the most common suggestion was that half of the property should be given to the surviving partner and the remaining half should go to the family of the deceased. Only one participant believed the surviving partner should not inherit any property at all.

The question of intestate inheritance is particularly difficult because the underlying law on this issue is in also in the process of being revised at the time of writing.

One key issue will be whether or not the new law on intestate inheritance will make provision for the maintenance of dependants from the deceased's estate, as this would be one way

to ensure fairness between different parties. Under the current law, only children of the deceased (whether born inside or outside marriage) can apply for such maintenance. The Legal Assistance Centre recommends that anyone who was in fact dependent upon the deceased at the time of the deceased's death should be able to apply for maintenance from a deceased the estate. If this proposal is adopted, domestic partners would be able to apply for maintenance if they were in fact dependent on the deceased partner.

Looking beyond maintenance to division of the estate, the treatment of the surviving domestic partner upon the death of the other partner should be based on what would happen if the relationship otherwise terminated. Therefore, we suggest that the law must be flexible in such a case, so that the same factors could be taken into account as on termination of the relationship other than by death. We suggest further that that the surviving partner should have two avenues of recourse in the event of the other partner's death:

- (1) **The surviving partner could assert rights to some of the assets of the deceased in advance of the distribution of the estate, in the same way as if the relationship had terminated other than by death.** So, for example, if the surviving partner could show that he or she had actually made all of the payments for a car which was registered in the name of the deceased, then the surviving partner should be able to take that car or its value rather than having it become part of the estate for distribution amongst the heirs. This is consistent with the approach taken in respect of marriage, where the estate of a deceased spouse who was married in community of property would consist only of that spouse's share of the joint marital property; the surviving spouse's share of the joint marital property is allocated to the surviving spouse before the estate can devolve upon the heirs.
- (2) **Once the contents of the deceased estate are settled, the surviving partner should be able to apply (a) to be treated as a spouse for purposes of intestate inheritance, or (b) to be granted a fair and equitable share of the deceased's estate in light of the nature and duration of the domestic partnership and the legitimate interests of any other intestate heirs.** (The latter alternative would be particularly appropriate when there was also a spouse.) This would be the fairest approach, although possibly the most burdensome to administer.

We suggest that the practicality of these proposals should be discussed in connection with the forthcoming law reforms on intestate inheritance which are currently under consideration.

If there is also a spouse

Respondents in the Namibian field research were also asked what they thought should happen when one partner dies, leaving behind both a cohabiting partner and a married spouse. A narrow majority of respondents believed that the cohabiting partner should inherit nothing from the deceased partner in this circumstance. Most of these participants believed the wife should inherit everything, though a significant number believed that provision should be made for all children of the deceased. Just under half of the respondents believed that the

cohabiting partner should inherit something in this situation. But ideas varied on what this 'something' should entail. Some thought that this question should be decided by the family of the deceased. Another common suggestion was that the wife and partner should inherit in equal proportions, or that the assets should be divided between the wife, the partner and all of the deceased's children. A number of participants thought that the law should stipulate a certain percentage of the deceased's property to go to the partner. Other less popular suggestions were that the partner should keep the house she was living in, or that the partner should inherit everything to the detriment of the 'estranged wife'.

We submit that the proposal outlined above in respect of intestate inheritance by surviving cohabitants would be sufficiently flexible to give proper account to the interests of any spouses of the same deceased.

RECOMMENDATION:

Include domestic partners in any future law reform allowing spouses or dependants to apply for maintenance from the deceased's estate.

Allow the surviving domestic partner to apply for (1) a division of property in accordance with the section on termination of the partnership other than by death, before the estate is distributed and (2) to be treated in the same manner as a spouse for purposes of intestate inheritance, unless (a) there is a surviving spouse of the deceased or (b) there are reasonable objections from any of the other intestate heirs, in which case the surviving partner shall be granted a fair and equitable share of the deceased's estate in light of the nature and duration of the domestic partnership and the legitimate interests of any other intestate heirs.



Source: <http://www.1888toys.com>



Source: www.cartoonstock.com

"Darling, who shall we leave our debts to?"

11.4.3 Optional declaration and registration of cohabitation relationships

The recommendations on this topic are fairly straightforward and self-explanatory. Some good examples of simple educational material and templates for cohabitation agreements can be found in the UK, such as the ones below which come from the organisation *Advice Now*.⁶⁸ Such materials, adapted for the Namibian context, could be very useful in Namibia to help ensure that people understand their rights in cohabiting relationships and think clearly about their respective financial contributions.

%%

7. OWNING THE HOME

[Choose the clause that describes what you want to do and delete the others. It is important that you take legal advice about what you intend to do with the Home. If you make a mistake at this stage it could prove very expensive later on.]

- We [will] own the Home in our joint names as a joint tenancy. We intend to continue to have equal shares in the Home even if we do not make equal contributions.
- We [will] own the Home in our joint names as a tenancy in common.
 - We [will] own equal shares and we intend to continue to have equal shares in the Home even if we do not make equal contributions OR
 - We [will] own the following shares:
 -%
.....%¹
- owns [will own] the Home in his/her sole name and [the name of the non-owner] understands that s/he will not get any share in the Home or any rights over the property even if s/he makes a contribution to paying for the Home or the household.

%%

It may help you to indicate whether you both agree to the rules that are set out here:

- If you owned something before you got together, it belongs to you. YES / NO
- If you bought something with your own money it belongs to you. YES / NO
- If you inherited something, or it was given to you by someone else, it belongs to you. YES / NO
- If one of you buys something and gives it to the other it belongs to the person to whom it is given. YES / NO
- If you buy something out of a joint bank account it belongs to you equally, unless you have agreed to own the account in different shares. If you have, you own the object in those shares. YES / NO
- If you buy something together but each contribute different amounts to the price, you own it in the shares in which you contributed. YES / NO

⁶⁸ See *Advice Now* website: <www.advicenow.org.uk/living-together>.



**CHILDREN: WHO IS GOING TO TAKE
RESPONSIBILITY AND PAY FOR THEM?**

RECOMMENDATION:

Supplement automatic protection with a system which allows couples to register the existence of their relationship to facilitate proof if they wish to do so, with registration resulting in the issue of a certificate of registration.

Allow couples to register a contract between themselves at the same time (or later) if they wish to do so, and encourage this with a simple template accompanied by accessible educational material on what issues should be considered. This could be accompanied by a popularisation campaign encouraging cohabiting couples to make contracts and wills. But authorise courts to depart from the provisions of such private contracts to take into account changed circumstances or to prevent manifest unfairness.

Provide for termination of registered relationships without official intervention upon the death of one partner or when one partner ceases to fulfil one of the requirements for registration – such as by abandoning the relationship or ceasing to occupy a mutual residence. Additionally allow both partners to file for termination to facilitate proof that the partnership has ended. Official termination should be recorded on a certificate of termination.

Allow aggrieved partners to approach the courts for appropriate financial redress, regardless of whether the partnership was registered – or if registered, regardless of whether it was officially terminated.

11.4.4 Forum

The question of forum is a vexed one. On the one hand, it is important for remedies to be accessible if they are to have any positive effect other than as a backdrop which may influence private action and agreement. On the other hand, if redress in the case of cohabitation is more accessible than for marriage, this may have the undesired effect of making cohabitation more attractive than marriage – for the wrong reasons.

Therefore, since law reform on divorce is also under consideration, we would propose that both be adjudicated in varying forums which are dependent on the amounts involved – with partners and spouses with total assets below a set amount being entitled to adjudicate their cases in either community courts or magistrates' courts, as they prefer, whilst those with total assets above the set amount must adjudicate their cases in the High Court.

The reasoning is that the larger the amount at stake, the more likely that the parties will be able to engage legal assistance to assist them with High Court procedures. It is also more likely that higher assets will be correlated with more complex financial issues.

RECOMMENDATION:

Allow cohabiting partners with total assets below a set amount to adjudicate their cases in either community courts or magistrates' courts, as they prefer. Require those with total assets above the set amount to adjudicate their cases in the High Court.

To avoid encouraging parties to choose cohabitation over marriage simply because of the accessibility of the forum, make similar law reforms in respect of the forum for divorces.

11.4.5 Joint responsibility for children

As has been explained, there are few reforms required in respect of cohabiting partners and their children since the treatment of children born inside and outside marriage has already been harmonised. However, as explained above, one area of concern is the current inability of cohabiting parents to assume true joint responsibility for their children.

RECOMMENDATION:

Make it possible for cohabiting parents to be joint custodians and equal guardians during the subsistence of the cohabitation relationship. Should the cohabitation terminate, such parents would fall under the provisions of the Children's Status Act which apply to unmarried parents.

11.4.6 Consequential amendments

If the law allows an equitable division of assets between all affected parties where a domestic partnership which exists simultaneously with a civil or customary marriage, it would be unfair to treat putative marriages more restrictively. Recent cases in Namibia, South Africa and Zimbabwe have taken varying approaches to this issue, so it would be useful to have statutory clarification on this issue. We recommend that the approach proposed for the co-existence of a marriage and a domestic partnership be applied to putative marriages.

RECOMMENDATION:

Apply the recommendations on the division of assets where there is a simultaneous marriage and domestic partnership to the situation where there is a simultaneous marriage and a putative marriage.

11.4.7 Amendments to existing statutes

The following recommendations pertain to statutory provisions which should be amended to meet the needs of domestic partnerships.

RECOMMENDATION:

Amend section 70(1) of the Children's Act 33 of 1960 (or the provisions on adoption in the forthcoming Child Care and Protection Act) to allow domestic partners *who have registered their partnership* to adopt children jointly, provided that a social worker investigation has confirmed that the partnership is a stable one. *Note that this is one of the few instances where we suggest that registered domestic partners should be treated any differently from unregistered domestic partners.*

Amend the definition of "domestic relationship" in section 3(1) of the Domestic Violence Act 4 of 2003, the definition of "dependant" in section 4(1) of the Employees' Compensation Act 30 of 1941 and the definition of "spouse" in the Insolvency Act 24 of 1936, to include cohabiting partners of the same or opposite sexes.

Amend the Judges' Pensions Act 28 of 1990 to provide for the payment of benefits to a domestic partner or to remove the Minister's discretion to overrule a judge's designation of a specific beneficiary. Amend the Former Presidents' Pension and Other Benefits Act 18 of 2004 to provide for the payment of benefits to a domestic partner.

If the recommendation to give domestic partners a mutual duty of support is adopted, then the Motor Vehicle Accidents Fund Act 10 of 2007 would cover

cohabitants as it stands. However, to leave no doubt, amend the definition of “dependant” to explicitly include domestic partners.

Amend section 1 of the Medical Aid Fund Act 23 of 1995 to require coverage of domestic partners in the same manner as spouses, rather than leaving this to the rules of the particular fund, and make other statutes which refer to medical aid schemes consistent with this change.

Define spouse in the Administration of Estates Act 66 of 1965 and the Wills Act 7 of 1953 to include a domestic partner.

Amend the Labour Act 11 of 2007 to include domestic partners in the definition of dependant and family in sections section 5(1)(c) (family responsibilities), section 25 (compassionate leave), section 28 (in connection with employees residing on agricultural land) and section 35 (severance pay).

Amend the Social Security Act 34 of 1994 to provide for the division of benefits between a surviving spouse and a domestic partner as appropriate.

After consultation with persons with specific tax expertise, amend the references to “spouse” and “relative” in the Income Tax Act 24 of 1981, Value-Added Tax Act 10 of 2000 and the Transfer Duty Act 14 of 1993 to include domestic partners, and make any maintenance payments to a domestic partner in terms of a court order following the termination of the partnership tax exempt in the same way as maintenance paid in terms of a divorce order.

Define spouse in the Communal Land Reform Act 5 of 2002 to include a domestic partner for purposes of having the right to remain on land which was occupied together with the other partner after that partner’s death.

Amend sections 47 and 50 of the Long-term Insurance Act 5 of 1998 to treat domestic partners in the same way as spouses for the purpose of protecting insurance policies in favour of domestic partners against attachment as part of a civil judgment or inclusion in an insolvent estate, and protecting life policies in respect of domestic partners where the policy-holder is struggling to pay the premiums.

Amend section 195-196 and 198-199 of the Criminal Procedure Act 51 of 1977 and sections 219-220 and 223-224 of the Criminal Procedure Act 25 of 2004 (passed by Parliament but not in force) to include domestic partners in the same manner as spouses for purposes of marital privilege. Amend sections 10-12 of the Civil Proceedings and Evidence Act 25 of 1965 in the same way (re: marital privilege in civil cases). Amend the definition of “dependant” in section 1 of the Criminal Procedure Act 25 of 2004 to include a domestic partner (in connection with victim impact statements). Consider also including domestic partners in the provisions on private prosecutions in section 7(1)(b)-(c) of the Criminal Procedure Act 51 of 1977 and section 5(1)(b)-(c) of the Criminal Procedure Act 25 of 2004.

Include surviving domestic partners in section 9(1) of the Inquests Act 9 of 1992 (regarding notice of an inquest).

Re-examine the various provisions on conflicts of interest outlined in Chapter 6 to harmonise them and include domestic partners as appropriate, using the broad coverage of section 43(3)(a) of the Anti-Corruption Act 8 of 2003 as a benchmark. Similarly, consider including domestic partners in the various statutory provisions outlined in Chapter 6 which extend the consequences of actions by one spouse to the other spouse – such as in the case of exemptions, presumptions and limitations of liability.

APPENDIX

DRAFT BILL ON DOMESTIC PARTNERSHIPS

INTRODUCTORY

1. Forum

(1) For purposes of this Act, except where a children's court is specified, "court" shall mean either a community court or a magistrate's court in any case involving total assets of less than the prescribed amount, and the High Court in any case involving total assets of less than the prescribed amount.

(2) The Minister of Justice may prescribe an amount for the purposes of subsection (1) from time to time by notice in the *Government Gazette*.

PART 1 – AUTOMATIC PROTECTION

2. Establishing a domestic partnership

(1) The provisions of this Part apply to any persons who are or were in a domestic partnership, provided that their relationship does not constitute incest.

(2) For the purposes of this Part, a domestic partnership is an intimate relationship between two persons aged 18 or older of the same or opposite sex, who have shared a common residence for a significant amount of time.

(3) A domestic partnership shall be presumed to exist between two persons who –

- (a) are both aged 18 years or older; and
- (b) have an intimate relationship; and
- (c) have shared a common residence for at least two years, whether continually or on an habitual basis,

Provided that either partner may rebut this presumption by showing that the relationship should not be considered to be a domestic partnership with reference to the criteria in subsection (4).

(4) A court may on application make a declaration that a domestic partnership exists between two persons aged 18 years or older in an intimate relationship who have shared a common residence, whether continually or on an habitual basis, for a period of less than two years, after consideration of the following factors:

- (a) the duration and nature of the relationship;
- (b) the nature and extent of common residence;
- (c) the degree of financial dependence or interdependence between the parties;
- (d) the degree of mutual commitment to a shared life;
- (e) the arrangements for care and support of any children in the household;
- (f) the performance of household duties; and
- (g) the reputation and public aspects of the relationship.

Provided that no finding in respect of any of the matters mentioned in this subsection, or in respect of any combination of them, is to be regarded as necessary for the existence of a domestic partnership, and a court determining whether such a partnership exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(5) Any domestic partnership registered under section 7 shall automatically be subject to this part.

3. Mutual duty of support during existence of domestic partnership

(1) Domestic partners owe each other a duty of support during the existence of the relationship in accordance with their respective financial means and needs.

(2) Domestic partners are jointly and severally liable to third parties for all debts incurred by either of them in respect of necessities for the joint household.

(3) Unless the domestic partners agree otherwise, a domestic partner is liable after the commencement of this Act to contribute to necessities for the joint household pro rata according to his or her financial means.

(4) Where a domestic partner can show that he or she has contributed more in respect of necessities for the joint household than for which he or she is liable in terms of subsection (3), this may be taken into consideration in an application for division of assets in terms of section 4.

4. Division of assets when domestic partnership terminates other than by death

(1) Regardless of whether the existence of a domestic partnership or its termination has been registered in terms of Part 2, one or both domestic partners may apply to court within one year of the termination of a domestic partnership other than by the death of a partner, for an order to divide any assets accrued during the existence of the domestic partnership jointly, or separately by either partner, after allowing for the liabilities of both partners.

(2) Upon an application for the division of assets, a court may order any division of assets which it deems fair and equitable in accordance with each party's respective contributions to the accrual of such assets, taking into account direct and indirect contributions in the form

of money and labour, including housework, child care and other unpaid labour and any other relevant factors.

(3) If the party's respective contributions to the assets accrued during the existence of the partnership cannot be proved, then such assets will be divided equally between the partners.

(4) Any money or property acquired by either party by bequest or inheritance during the course of the domestic partnership, or any assets acquired in exchange for such money or property, shall be excluded from the application of this section.

- (5) (a) If either partner has a spouse or spouses during the existence of the domestic partnership, then a division of property in terms of this section shall be made only in respect of that partner's separate property or that partner's half-share of any joint estate and a spouse of that partner shall have a right to request an appropriate corresponding adjustment in the division of property upon the dissolution of the marriage.
- (b) Notwithstanding subsection (a), where a marriage of one of the domestic partners exists but the spouses have lived completely separately and operated their finances independently for a substantial period of time, the court may deem that a marital property regime involving community of property or accrual between the spouses shall be considered to have terminated upon a date identified by the court, and the court may divide assets accrued after that date without reference to the marital property regime if this would be fair and equitable to all parties concerned.

5. Maintenance for partner after end of relationship

(1) Where a domestic partnership ends other than by the death of a partner, a partner may in an application for the allocation of assets in terms of section 4 also make a request for maintenance payments for a specified period from the other partner.

(2) The court may make an order for maintenance payments for a specified period only if –

- (a) the partner requesting maintenance was in some way economically disadvantaged by the roles or responsibilities assumed by the respective partners to the relationship;
- (b) the allocation of assets between the partners will be insufficient to compensate for such disadvantage; and
- (c) the financial position of the partner making the request is significantly weaker than that of the other party, taking into account the economic circumstances of each spouse at the time the partnership ends, including their respective income, earning capacity, assets and other financial resources, and their respective financial obligations.

6. Surviving partner's rights when domestic partnership terminates by death

(1) Regardless of whether the existence of a domestic partnership or its termination has been registered in terms of Part 2, when a domestic partner dies, a surviving domestic

partner may apply to [the Master of the High Court / the court] for a division of assets accrued during the existence of the domestic partnership jointly, or separately by either partner, after allowing for the liabilities of both partners, on the same basis as under section 4.

(2) A surviving domestic partner may also apply to [the Master of the High Court / the court] to be treated in the same manner as a spouse for purposes of intestate inheritance: Provided that –

- (a) where there is a surviving spouse of the deceased; or
- (b) where there is a reasonable objection from any of the other intestate heirs;

the surviving partner shall be granted a fair and equitable share of the deceased's estate in light of the nature and duration of the domestic partnership and the legitimate interests of any other intestate heirs including any surviving spouse or spouses.

PART 2 – OPTIONAL REGISTRATION OF DOMESTIC PARTNERSHIPS

7. Registration of declaration of domestic partnership

(1) Any two persons aged 18 or older of the same or opposite sex who have an intimate relationship and share or intend to share a common residence, provided that their relationship does not constitute incest, may appear before a clerk of court and complete a declaration of a domestic partnership in the prescribed form, setting forth the date on which the domestic partnership began or shall begin.

(2) This declaration shall be entered by the clerk of court into the prescribed register if he or she is satisfied that it is being made freely and voluntarily.

(3) The clerk of court shall provide partners who have registered a declaration of a domestic partnership with a registration certificate in the prescribed form.

(4) Any such declaration shall constitute prima facie proof of the existence of a domestic partnership and the date on which such partnership came into existence for the purpose of this or any other relevant law.

8. Termination of a registered domestic partnership

- (1) A registered domestic partnership shall terminate automatically when –
- (a) one or both of the partners dies, on the date of death
 - (b) the partners cease to share a common residence, on the day after the last date on which they shared such a common residence.

(2) Both domestic partners may appear before a clerk of court and complete a declaration of termination of a domestic partnership in the prescribed form, setting forth the date on which the domestic partnership has ended.

(3) This declaration of termination shall be entered by the clerk of court into the prescribed register.

(4) A declaration of termination may be registered by the clerk of court even if it was not preceded by a declaration of domestic partnership.

(5) The clerk of court shall provide partners who have registered a declaration of a domestic partnership with a termination certificate in the prescribed form.

(6) A declaration of termination shall constitute prima facie proof of the termination of a domestic partnership and the date on which such partnership was terminated for the purpose of this or any other relevant law.

PART 3 – OPTIONAL DOMESTIC PARTNERSHIP AGREEMENTS

9. Domestic partnership agreements

(1) Any two persons aged 18 or older of the same or opposite sex who have an intimate relationship and who are or intend to become partners in a domestic relationship, provided that their relationship does not constitute incest, may conclude a written domestic partnership agreement between themselves concerning maintenance of each other, the sharing of property and assets and any other financial matters pertaining to the partnership which they wish to regulate.

(2) An agreement made in terms of subsection (1) may be amended or terminated by mutual agreement, in the same manner.

(3) Where such an agreement has been signed by both partners in the presence of two witnesses, it will be enforceable between them to the extent that it is not inconsistent with any of the provisions of Part 1.

10. Registration of domestic partnership agreements

(1) Where a domestic partnership has been registered in terms of section 7, the partners may appear jointly before the clerk of the court, at the same time as registering the domestic partnership or subsequently, to register a domestic partnership agreement concluded in terms of section 9.

(2) If the clerk of court is satisfied that the agreement has been made freely and voluntarily, he or she shall enter a notation of the agreement in the prescribed register and file a copy of the agreement as prescribed.

(3) Where a domestic partnership agreement is registered with the clerk of the court in terms of this section, any amendment or termination of the agreement by the partners becomes enforceable only if such amendment or termination is registered with the clerk of the court in the same manner.

11. Effect of agreements

(1) One or both domestic partners may approach a court for enforcement of a domestic partnership agreement pursuant to this section.

(2) A court shall not enforce any provision of such an agreement which purports to waive any of the rights set forth in Part 1.

(3) In the event of –

- (a) a dispute pertaining to a domestic partnership, or
- (b) an application for division of property under section 4, or
- (c) an application for a division of property or a right of intestate inheritance under section 6, a court [and/or the Master of the High Court] is not obliged to give effect to any such agreement if it would be unjust to do so, considering –
 - (i) the provisions of the agreement;
 - (ii) the time that has elapsed since the agreement was made;
 - (iii) whether, in light of the circumstances existing at the time the agreement was made, the agreement is unfair or unreasonable;
 - (iv) whether any changes in circumstances since the agreement was made (whether or not such changes were contemplated by the parties) render the agreement unfair or unreasonable; and
 - (v) any other matter which it considers relevant to any proceedings.

(4) Except in so far as a domestic relationship agreement provides otherwise, the provisions of such an agreement relating to maintenance, property or assets may, on the death of one of the partners, be enforced on behalf of, or against, the estate of the deceased party.

12. Children of parents in a domestic partnership

(1) The parents of a child born outside of marriage who are cohabiting may make a written agreement between themselves before or after the birth of the child which establishes joint custody and equal guardianship between themselves for the duration of their cohabitation, and may petition the children's court to make this agreement an order of court if the court is of the opinion that it will be in the best interests of the child.

(2) An agreement made in terms of subsection (1) shall become valid only when it is made into an order of a children's court.

(3) Where the parents are sharing a common home, there shall be a rebuttable presumption for the purposes of subsection (a) that joint custody and equal guardianship are in the best interests of the child.

(4) If the parents of the child cease to cohabit, custody and guardianship of the child shall be determined in accordance with the Children's Status Act, unless a competent court directs otherwise.

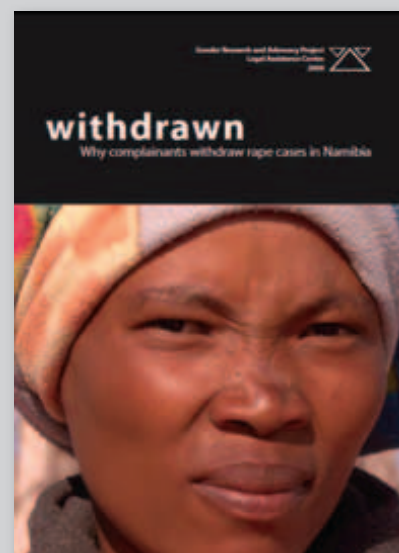
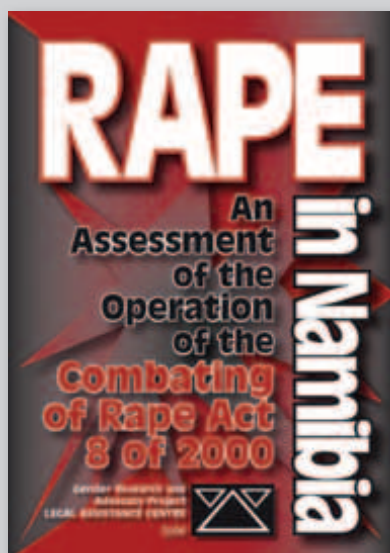
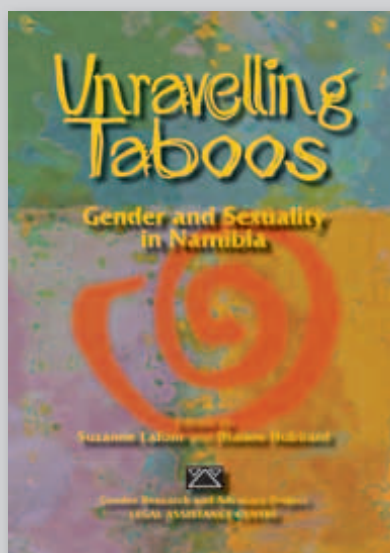
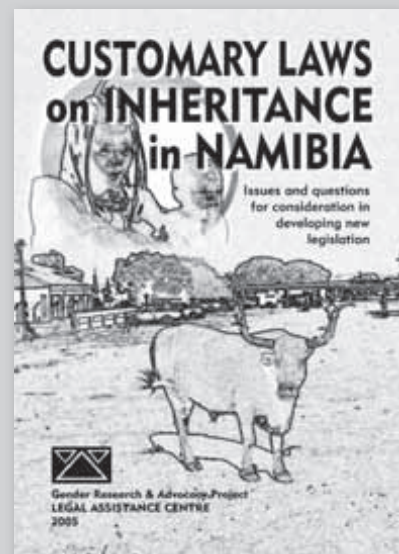
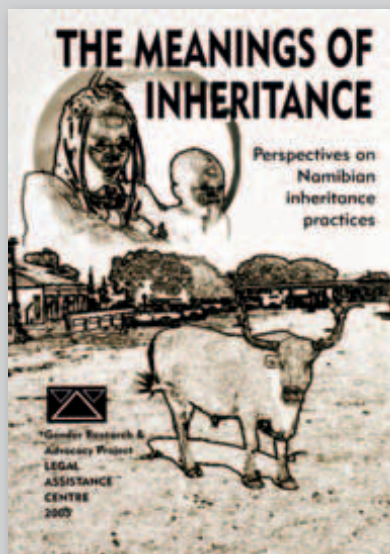
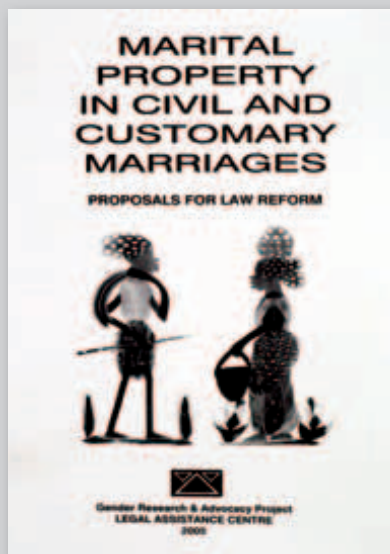
13. Putative marriages

The provisions of section 4(5) and section 6(2) shall apply with the necessary changes to a situation where one or both partners to a putative marriage have another spouse or spouses.

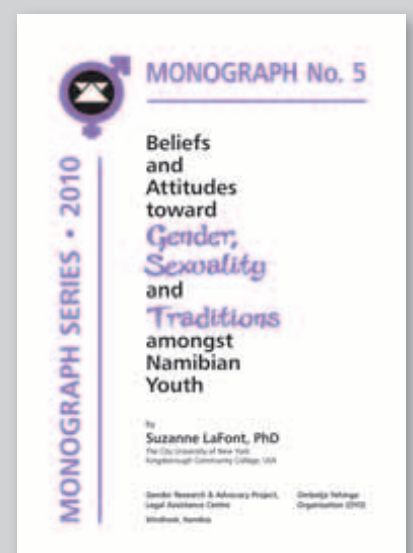
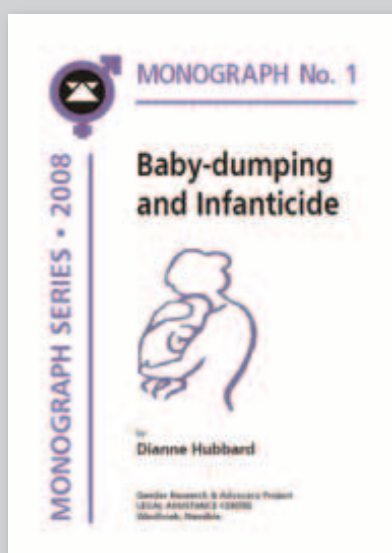
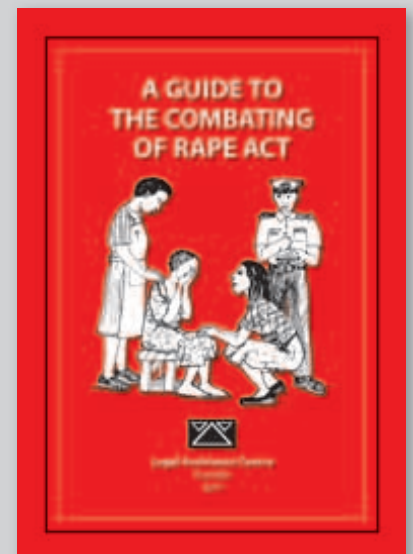
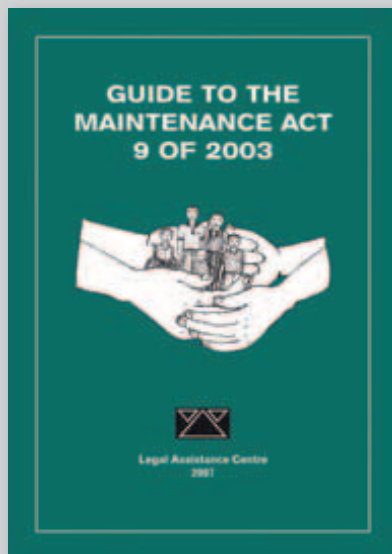
SCHEDULE

The Schedule would contain amendments to existing laws based on the recommendations in section 11.4.7 of the report.

A sample of the many other publications of the Gender Research & Advocacy Project of the Legal Assistance Centre



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www.lac.org.na





"... loving partners and parents have the right to live together as a family with their children without being married."

High Court of Namibia, 2007

"This new cohabitation law needs to be done very quickly. We women are suffering."

focus group participant, 2009



Gender Research and Advocacy Project
LEGAL ASSISTANCE CENTRE
2010