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A Comparative Analysis on Cohabitation Regulation: Placing Scotland, South Africa and France on the Autonomy/Protection Continuum

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Table of Contents

1 Introduction

The legal conversation pertaining to the extent of legal recognition to be afforded to long-term cohabitants has been nothing short of a contentious issue. However, cohabitation as a legal institution has transformed from "being infrequent and stigmatised to being comparatively extensive and generally accepted as a social institution"[1] and as such jurisdictions have responded to attempt to clarify the uncertainties linked to the position of the parties upon relationship termination. On face value, it appears that the reasons for a jurisdiction's apprehension regarding legal intervention into these informal relationships are threefold. Firstly, the nature of commitment associated to these relationships is predominantly private, a factor weighing against legal intervention, compared to a public declaration of commitment as is the case with marriage.[2] Secondly, heterogeneity is a core characteristic of these relationships and by its very nature, cohabitation does not come in a "neat package"[3]. Consequently, the diversity of parties who cohabit and their choice for doing so, creates obstacles for the law to sufficiently grasp the needs of these parties.[4] Lastly, and arguably the most prevalent reason for the law's avoidance tactic in interfering with these relationships is the fear of undermining the privileged position of marriage[5] – an institution which has long been the heart of family law.

Upon closer inspection it is revealed that two predominant (and often contradictory) policy considerations inform a jurisdiction's approach to regulating these relationships – this further complicates the issue. I argue that the considerations of respecting party autonomy and family law's role in protecting vulnerable parties[6] can be conceptualised as a continuum and as such will inform the scope of this dissertation, as it will be

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[1] John Haskey, 'Demographic Aspects of Cohabitation in Great Britain' (2001) 15 *Int. J. Law Policy Fam.* 51-67.

[2] Simon Duncan, Anne Barlow and Grace James, 'Why don't they marry – Cohabitation, Commitment and DIY Marriage' (2005) 17 *CFLQ* 19, 31.

[3] Elaine Sutherland, 'Unmarried Cohabitation' in J Eekelaar and R George (eds), *Routledge Handbook of Family Law and Policy* (2nd edn, Routledge 2020), 71.

[4] Charlotte Mol, 'Reasons for Regulating Informal Relationships: A Comparison of Nine European Jurisdictions' (2016) 12(2) *Utrecht L Rev*, 98–113.

[5] Sutherland (n 3), 66.

[6] Considerations pertaining to respecting party autonomy and the protective function of the law are often juxtaposed in legal commentary. See for example Kate Whiting, 'Cohabitation in England & Wales and Scotland: The Case for Granting Equal Rights to Marital and Non-Marital Cohabitants' (2020) 4 *Edinburgh Student L.Rev.* 52, 52; Fae Garland, 'Gender Imbalances, Economic Vulnerability and Cohabitation: Evaluating the Gendered Impact of Section 28 of the Family Law (Scotland) Act 2006' (2015) 19(3) *Edinburgh L.Rev*. 311, 311; Scottish Law Commission *Report on Cohabitation* (Scot Law Com No. 261, 2022), para 1.13.

determined where on the continuum the three relevant jurisdictions fall. I utilise this continuum as each side represents a type of long-term intimate relationship that is equally deserving of legal recognition. On the one end of the autonomy/protection continuum is the notion that the parties' choice in opting out of the invariable consequences of marriage should be honoured and as such the parties should be permitted to arrange their own affairs within the existing legal framework. I argue that parties in these relationships generally have equal bargaining power and as such their choice is presumed to be full and informed. The other end of the continuum represents the lived reality of many partners where their choice is an illusory concept,[7] and that it is these relationships which are most likely to create relationship-induced dependency[8] and require a greater extent of legal protection upon relationship termination.

The rationale behind conducting the comparative analysis between France, Scotland and South Africa is associated to the express acknowledgement, judicial or legislative, that the nature of a long-term intimate partnership is fundamentally different from marriage.[9] Moreover, the jurisdictions follow distinct approaches to the regulation of these relationships, which may prove useful for purposes of the analysis. In France, the intention of the legislature is to recognise three different forms of unions with legal frameworks dedicated to each of them – marriage, cohabitation ("*concinubage")* and the *pacte civil de solidarite* ("PACS").[10] The latter will be the focus of this dissertation regarding the French approach. In France, very limited recognition is afforded to parties who do not formalise their relationship[11] and as such the PACS illustrates an example of the "opt-in" system, as per the law of 15 November 1999.[12] Scotland has been described as utilising a "compromise approach"[13] which provides financial

[7] John Eekelaar and Rob George, *Routledge Handbook of Family Law and Policy* (Routledge 2014), 65.
[8] Amanda Barratt, '"In Which the Partners Undertook Reciprocal Duties of Support" – A Discussion of the Phrase as Used in Bwanya v Master of the High Court, Cape Town' (2022) 25 *PELJ*, 1, 18-19.
[9] Policy Memorandum for the Family Law (Scotland) Bill, SPBill 36B, 18, Session (2005) ["Policy Memorandum Family Law (Scotland) Bill"], para 70; *Bwanya v Master of the High Court, Cape Town* 2022 3 SA 250 (CC), para 53.
[10] *Conseil constitionnel* Decision No. 2011-155 QPC 29 July 2011: http://www.conseilconstitutionnel.fr/decision/2011/2011-155-qpc/decision-n-2011-155-qpc-du-29-juillet2011.99251.html [last accessed on 23 June 2023].
[11] Joanna Miles, 'Unmarried Cohabitation in a European Perspective' in Jens M. Scherpe (ed), *European Family Law Volume III: Family Law in a European Perspective* (Edward Elgar 2016), 106
[12] Created by Law no 99-944.
[13] Sutherland (n 3), 70.

remedies once certain criteria in the Family Law (Scotland) Act 2006 ("FLSA") have been met. The South African legal position regarding life partnerships[14] has been described as being a "patchwork of laws that [do] not express a coherent set of family law rules".[15] However, life partnerships have been recognised through the extension of spousal benefits through patchy case law and the partners' use of contracts and wills.[16] It is relevant to note that although a Draft Domestic Partnership Bill has been published on 14 January 2008, it has not yet been promulgated and has been gathering dust for the last 15 years.[17] As such, judicial decisions will inform the scope of the remedies available to life partners in South Africa.

The purpose of this dissertation is not to propose that cohabitation relationships be placed on an equal footing as marriage. However, I believe that it is necessary to acknowledge that in both relationships there is a chance of vulnerability arising from caring for one another as well as a need to clarify the position after ending a relationship "predicated on the commitment of sharing".[18] In this regard, it can be concluded that a partner may face adversity in the absence of a right to claim from a deceased partner's intestate estate,[19] and/or socio-economic vulnerability without a remedy to claim a property share when the relationship ends through dissolution.[20] Intestate succession in particular is a core theme to address the deficiencies in this context, as it unrealistic to assume that "thinking and executing wills comes to people's minds"[21]. In limiting the scope of the discussion to financial issues, in itself the autonomy of the parties is respected by only discussing matters which may exacerbate or mitigate the position of the parties – i.e., where legal intervention at the cost of autonomy is justified.

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[14] "Life partnerships" is the South African terminology used, which bears the same meaning as 'cohabitants' in Scotland.
[15] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC), para 125.
[16] RJ Mochela & Bradley Smith, '"Mind the Gap(s)": Legal Differentiation between Same-Sex and Heterosexual Cohabitees regarding Intestate Succession - Options for Reform and Comparative Insights into the Regulation of "Polygamous" Life Partnerships (Part 1)' (2020) 3 *J S Afr L*, 480, 490.
[17] For a discussion of the 2008 Bill, see Bradley Smith, 'The Interplay between Registered and Unregistered Domestic Partnerships under the Draft Domestic Partnerships Bill, 2008 and the Potential Role of the Putative Marriage Doctrine' (2011) 128 *SALJ*, 560.
[18] Anne Bottomley & Simone Wong, 'Introduction - Changing Contours of Domestic Life, Family and Law: Caring and Sharing in Anne Bottomley & Simone Wong (eds.) Changing Contours of Domestic Life, Family and Law: Caring and Sharing (Hart Publishing 2009), 3.
[19] Sutherland (n 3), 69.
[20] Elsje Bonthuys, 'Proving Express and Tacit Universal Partnership Agreements in Unmarried Intimate Relationships' (2017) 134 *SALJ* 263, 263.
[21] *Bwanya v Master of the High Court, Cape Town* 2022 3 SA 250 (CC), para 72.

The analysis will be conducted in three parts. In Part One, preliminary issues regarding the subject of cohabitation in general will be addressed. The starting point in considering the autonomy/protection continuum is setting out the two poles and addressing the nuances of choice and the reality of interdependence and labour division in relationships. When it comes to a broad overview of regulatory approaches generally utilised in the cohabitation context, there is often a trade-off that occurs between preferring certainty in the form of a comprehensive legislative framework and taking a broader approach in the interests of flexibility. The French opt-in system of registration with a core in contract law, the South African piecemeal approach with its heavy reliance on judicial discretion and the statutory framework of the FLSA will inform the discussion regarding this trade-off in the cohabitation context. The threshold criteria concerning access to each jurisdiction's cohabitation regime will conclude Part One, as it is necessary to inquire what factors the relevant jurisdiction regards weighing in favour of eligibility.

In Part Two, I will consider each jurisdiction's response to relationship termination through the lens of the continuum. In the first instance, the discussion regarding financial remedies upon the dissolution of the relationship will be informed by sections 26 to 28 of the FLSA; South Africa's use of universal partnerships; and the relevant provisions of the French Code Civil. In the second instance, the topic of intestate succession will be addressed with reference to the discretionary approach followed in section 29 of the FLSA; the piecemeal recognition by the Constitutional Court in terms of the Intestate Succession Act[22] and the Maintenance of Surviving Spouses Act[23] and the limited approach in France. It should be noted that in each jurisdiction,[24] the financial remedy of unjustified enrichment is available to either party. However, given the complexity of the remedy[25] and its inability to recognise non-financial domestic contributions,[26] it will not be discussed for purposes of this dissertation.

[22] 81 of 1987.
[23] 27 of 1998.
[24] Rebecca Probert 'From lack of status to contract: assessing the French Pacte Civil de Solidarité' (2001) 23(3) *J. Soc. Welf. Fam*., 256, 261; Ewa Kabza 'Three different legal attitudes towards non-marital CH in Europe' (2021) 27 *Comp. Law Rev.* 255, 271; Jacqueline Heaton and Hanneretha Kruger, *South African Family Law* (4th ed., LexisNexis 2015), 259-260.
[25] Garland (n 6), 313
[26] Kabza (n 24), 268; Xavier Labbee*, Les Rapports Juridiques dans le Couple sont-ils contractuels?* (Presses Universitaires du Septentrion 1996), translated by Probert (n 24), 263.

In the last instance, Part Three will serve as a platform for determining where the jurisdictions lie on the continuum. Additionally, it will be considered whether each approach is justified in the relevant jurisdiction. This will be done by investigating the characteristics and practical realities of the beneficiaries of each regime and concluding whether each jurisdiction's approach adequately meets the needs of such beneficiaries.

Part One

2 Preliminary issues

2 1 Introducing the continuum

2 1 1 The autonomy justification and the nuances of choice

Cohabitation can be symbolic of a "corner of freedom where parties can escape family law".[27] As such, the predominant justification for the law keeping a firm distance in piercing the private sphere of intimate relationships is a result of the argument that couples have expressly rejected marriage and as such any interference into their relationship would infringe upon their freedom of choice.[28] The notion of choice can manifest itself in various ways. Choosing cohabitation over marriage is often linked to the rejection of the latter institution's religious and patriarchal foundations.[29] Alternatively, the parties may also dismiss marriage on the basis that the legal consequences are ill-fitted to their individual needs, as it might be the case that a legal regime rejects any deviation from such rules.[30] Consequently, cohabitation represents a preferred option for parties who wished to enter into a long-term relationship in the absence of paternalistically imposed rules, which often had the consequence of high costs upon dissolution.[31] Both of these examples have at their core that parties actually exercise a choice in favour of cohabiting, instead of solemnising a marriage. It goes without saying that this is not always the case.

The choice argument has no bearing on the reality of parties that are unable to access marriage-like consequences at all, for instance where the jurisdiction does not permit

[27] Ruth Lynn Deech, 'The Case against Legal Recognition of Cohabitation' in John Eekelaar and Sanford Katz (eds) *Marriage and Cohabitation in Contemporary Societies* (Butterworths 1980), 302
[28] Margaret Mahoney, 'Forces Shaping the Law of Cohabitation for Opposite Sex Couples' (2005) 7(1) *J.L. & Fam. Stud.*,134, 200; Robert Leckey & Yann Favier, 'Cohabitation's Boundaries and the confines of tradition' (2016) 25 *Soc & Leg Stud* 525, 526.
[29] Sutherland (n 3), 65.
[30] Miles (n 11), 99.
[31] Duncan (n 2), 35.

same-sex marriage. However, this example falls outside of the scope of this dissertation, as all three jurisdictions have extended marriage-like to same-sex partners.[32] An effect flowing from the presence of asymmetry in a relationship is that one partner has the exclusive ability to make a meaningful choice.[33] Lastly, in many cases couples simply fall into cohabitation and fail to consider any consequences flowing from their relationship. The example in the Scottish context is that cohabitants are in general unaware of their rights in terms of the FLSA or still believe in the "common law marriage myth"[34]. In the absence of legal protection parties are left to their own fate,[35] as existing property law remedies are generally unsuitable for application to intimate relationships.[36] This issue will be expanded on at a later stage.

This illustration of the heterogeneity of cohabitation relationships shows how dependent the autonomy argument is on the extent and reality of choice. Despite the argument being "intellectually and morally persuasive,"[37] unjust outcomes would arise if a legal remedy assumed that full and informed choice[38] is available to all parties involved. The choice model is thus an inappropriate foundation for the autonomy argument. In its original form, the argument only considers an "objective legal impediment to marriage" and disregards the reality that economic and social factors can have the implication of removing choice in its entirety.[39] Moreover, autonomy is an individualistic concept and does not necessarily take into account the experiences that encompass mutuality and dependence that are core components that comprise family life.[40] Consequently, blind adherence to the choice argument would only promote the autonomy of the stronger party in the context of an asymmetrical relationship.[41] Given the nuances of conceptualising the autonomy argument,

[32] Same-sex marriage was introduced in French law by Law Act no. 2013-404 of 17 May 2013; Marriage and Civil Partnership (Scotland) Act 2014; Civil Union Act 17 of 2006 (South Africa).
[33] Sutherland (n 3), 66.
[34] Scottish Law Commission *Report on Cohabitation* (Scot Law Com No. 261, 2022), para 1.6.
[35] Sutherland (n 3), 69.
[36] Mustafa El-Mumin, 'Comparative Study of Cohabitation: UK, Scotland, France, and Australia' (2016) 44 *QMLJ* 44, 48.
[37] Sutherland (n 2) 68.
[38] Miles (n 11), 97.
[39] Lawrence Schäfer 'Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships' (2006) 123 SALJ 626, 640-641.
[40] Bottomley (n 18), 1.
[41] Craig Lind, 'Domestic Partnerships and Marital Status Discrimination' (2005) *AJ* 108, 123.

attention must be given to the ability of both parties to make a choice and whether that choice would in reality be exercised as per the will of each individual.

2 1 2 Family law's protective function

Family law is described as a vessel for ensuring fair financial compensation,[42] and the protection of vulnerable members in family disputes.[43] Consequently, the intention behind a jurisdiction's approach in dedicating a legal framework to informal relationships is generally to eliminate the harsh and unfair consequences upon termination that can be attributed to the asymmetrical division of power.[44] This is not necessarily gender specific. However, in most heterosexual relationships, the "nature of division of labour and the genderised patterns of remuneration" entail that women continue to undertake the majority share of care-giving responsibilities, leaving them "particularly vulnerable to exploitation"[45] - a situation which can potentially be exacerbated upon relationship termination. Assuming a domestic role[46] can therefore have a detrimental impact on the ability to earn money, career progression and the acquisition of assets.[47]

Although asymmetry in relationships have a frequent occurrence, it cannot necessarily be assumed that this is always the case. It may be that one of the partners has the economic upper hand, but this power may not necessarily be used to exploit their partner.[48] Moreover, women may also be enriched and empowered by their relationships.[49] Consequently, vulnerability cannot simply be conceptualised as one

[42] Sabine Aeshlimann, 'Financial Compensation Upon the Ending of Informal Relationships: A Comparison of Different Approaches to Ensure the Protection of the Weaker Party', in Katharina Boele-Woelki (ed), *Common Core and Better Law in European Family Law* (Intersentia 2005), 255.
[43] Beth Goldblatt 'Regulating Domestic Partnerships: A Necessary Step in the Development of South African Family Law' (2003) 120 *SALJ,* 610, 616.
[44] Elaine Sutherland, 'From 'Bidie-in' to 'Cohabitant' in Scotland: The Perils of Legislative Compromise' (2013) 27(2) *IJLPF* 143, 145-146; Scottish Law Commission, *Report on Family Law,* (Scot Law Com No. 135, 1992), para 16.1.
[45] Pierre de Vos, 'Still out in the cold? The Domestic Partnership Bill and the (non)protection of marginalized woman' in Julia Sloth-Nielsen & Zenobia du Toit (eds) *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* (Juta and Company Ltd 2008),129.
[46] Richard Breen & Lynn Cooke, 'The persistence of the gendered division of domestic labour' (2005) 21(1) *Eur. Sociol. Rev.* 43, 43.
[47] Amanda Barratt, 'Private Contract or Automatic Court Discretion - Current Trends in Legal Regulation of Permanent Life-Partnerships' (2015) 26 *Stellenbosch L Rev* 110, 111-112.
[48] Probert (n 24), 263
[49] Bottomley (n 18), 4.; *Bwanya v Master of the High Court, Cape Town* 2022 3 SA 250 (CC), para 128.

size fits all, but it is crucial to keep the gendered dimension of intimate relationships in mind when considering a jurisdiction's response to the issue.

2 2 Regulatory approaches

2 2 1 The trade-off between certainty and flexibility

A legislative framework, as is the case in Scotland and France, has the effect of creating relative certainty[50] by alerting the parties to what the consequences of their relationship are. A clear right in legislation would benefit parties who cannot afford to litigate,[51] and would reduce the likelihood of economically vulnerable partners being "unfairly taken advantage of"[52]. Recognition of the relationship in black and white puts the legislature in a comfortable position crafting far-reaching protective consequences without negating party autonomy considerations.[53] In this regard, the additional clarity associated to a system of registration, as in France, regarding the commencement date and expectations of the parties would reduce the chances of conflict and aid the court in the event that the matter requires judicial intervention.

From the outset therefore, it can be said that at its core, a system of registration promotes autonomy as it is in the hands of the parties to act if they wish to have legal consequences flowing from their relationship. However, despite the advantages related to certainty enshrined in a registration system, the approach is unsatisfactory for several reasons. As registration requires positive conduct, the process neglects to address the needs of parties who are unaware of the requirement of registration or parties who suffer from "optimism bias"[54] and fail to consider the legal consequences of their relationship ending. Consequently, the dominant concern regarding the registration requirement is the automatic exclusion of "misinformed, uninformed and inertia" partners.[55] Moreover, if a partner is unsuccessful in persuading the other to register, it leads to an undesirable position.[56] In essence, this approach would fail to

[50] Kabza (n 24), 269.
[51] Elsje Bonthuys, 'Developing the Common Law of Breach of Promise and Universal Partnerships: Rights to Property Sharing for All Cohabitants' (2015) 132 *SALJ* 76, 99.
[52] *Volks NO v Robinson* 2005 5 BCLR 446 (CC), para 65.
[53] Jens Scherpe, "The Legal Status of Cohabitants-Requirements for Legal Recognition", in Common Core and Better Law in European Family Law, European Family Law Series (Intersentia 2005), 285
[54] Miles (n 11), 98.
[55] Sutherland (n 3), 70.
[56] Miles (n 11), 105-106.

protect vulnerable partners who would be most in need of a comprehensive legal framework.

In this regard, it has been argued that the interests of fairness might require a degree of uncertainty,[57] and that a core characteristic of family law is its adaptability,[58] which may be achieved by leaving the matter up to the discretion of a judge. This approach is prevalent in the Scottish context. Judicial discretion is centred around flexibility, as it permits a wider scope of considering financial and non-financial contributions[59] and contemplating the individual circumstances of the relationship. However, allowing the fate of the partners up to judicial discretion may lead to uncertain outcomes, especially in the absence of guiding principles.[60] Moreover, a retrospective analysis of the nature of the relationship may lead to unpredictability, especially as the judge's perspective on the relationship may be incompatible with the will of the parties.[61] The consequence may be a financial order that was not contemplated nor desired by the parties.[62] As such, this approach inherently favours protection, often at the cost of respecting autonomy.

The last approach necessary to contemplate, which forms the basis of both the South African and French approaches, is the use of contract law. A contract model is premised on the assumption that two rational, equal adults are entering into an agreement based on their own individual interests.[63] Consequently, with this assumption in mind, this model would be most successful in promoting autonomy. However, when it comes to partners utilising a contract to determine the consequences of their relationship, it may be unlikely for partners to be psychologically equipped and willing to do so,[64] as parties often lack "sense" and "rationality" during

[57] El-Mumin (n 36), 50.
[58] Lawrence Terminal, 'Registered Partnerships in France' in Jens Scherpe & Andy Hayward (eds.) *The Future of Registered Partnerships: Family Recognition Beyond Marriage?* (Intersentia 2017), 184.
[59] Simone Wong 'Caring and Sharing: Interdependency as a Basis for Property Redistribution' in Anne Bottomley & Simone Wong (eds.) *Changing Contours of Domestic Life, Family and Law* (Hart Publishing 2009), 61.
[60] Sutherland (n 44), 144.
[61] Kabza (n 23), 272.
[62] Barrat (n 47), 119.
[63] Probert (n 24), 263.
[64] Brian Tobin, "The regulation of cohabitation in Ireland: achieving equilibrium between protection and paternalism?" (2013) 35:3 *J. Soc. Welf. Fam.* 279, 287.

intimate relationships.[65] Moreover, issues pertaining to the inequality of bargaining power are relevant in this regard, as rejecting an explicit legislative framework and purely relying on freedom of contract may be a disguised defence of patriarchal exploitation.[66] As such, utilising a contractual framework in the context of financial remedies at relationship termination has been held to "obscure gender inequality behind a smokescreen of formally equal partners concluding agreements at arms' length"[67]. Another issue present in this context is that remedies will be sought and granted on a case-by-case basis, reserving contract law mechanisms for the parties who can afford to litigate.[68] If this is the case, it not only puts a vulnerable party in a precarious position, but also places an additional burden on the state to care for the unsupported party.[69] In contrast with the judicial discretion approach, the contract model therefore favours autonomy at the cost of providing protection to the individuals who need it most.

This illustrates the difficulty of attempting to strike a balance between flexibility and certainty, two considerations that are arguably of equal importance when it comes to the regulation of long-term, intimate relationships. Similarly, a clear definition or a set of eligibility criteria that sets out the parameters of the law may have two different outcomes – either casting the net too wide to include parties who reject legal protection,[70] or excluding partners who fail to meet the requirements, thus leaving them vulnerable.[71]

2 2 2 Eligibility criteria

The starting point for evaluating intimate long-term relationships is the existence and extent of eligibility criteria, as it predominantly acts as a gatekeeper to legal remedies. Utilising eligibility criteria may serve one out of two functions. Firstly, if the criteria serve a practical function, the intention would be to include relationships with a likelihood of inducing dependency and requiring remedies on relationship termination,[72] thus pointing more to the protection side of the continuum. On the other hand, if the

[65] Anne Barlow and Simon Duncan, 'Supporting Families? New Labour's Communitarianism and the "Rationality Mistake" Part 2' (2000) 22 *JSWFL* 129.
[66] Robert Leckey, 'Cohabitation and Comparative Method' (2009) 72 *Mod L Rev* 48, 54.
[67] Bonthuys (n 51), 98.
[68] Botnhuys (n 51), 98.
[69] Whiting (n 6), 62
[70] Kabza (n 24), 272.
[71] Miles (n 11), 96.
[72] Miles (n 11), 96.

eligibility criteria serve a normative function, the purpose is rather to act as a qualifying mechanism for relationships "earning" access to the scheme based on demonstrating an appropriate level of commitment by opting in.[73] This gatekeeping function therefore favours autonomy. By its very nature, eligibility is contentious as "cohabitants are more easily recognised than defined",[74] and as such it is relevant to identify markers of eligibility and how the jurisdictions deal with such markers.

Definition

The existence of a definition determining who benefits from the relevant scheme may either shed light on the matter or cause confusion as to the scope of the regime. The PACS is defined as "a contract that can be entered into by two individuals over the age of 18, of opposite or of same sex, to organise their life in common."[75] The "life in common" element is indicative of a normative function as that the relationship requires conjugality[76] as it has been interpreted to mean a "life as a couple"[77]. The "contract" element encompasses autonomy, as it is the parties' choice on what to regulate in the agreement.[78] As with any contract, consent is an essential requirement and must be effective, without the presence of mistake, duress and deceit.[79] Consequently, the substantive conditions necessary for a contract under French legal provisions are applicable to PACS.[80] Despite the content of the agreement not being subject to scrutiny by any authority,[81] it is a requirement that parties to a PACS must "enshrine the future organisation of their lives in common regarding property"[82] and to provide

[73] Miles (n 11), 96.
[74] *MB v. JB* [2014] ScotSC 89 [27].
[75] Art. 515-1 Civil Code.
[76] Ji Hyun Kim, Scott A. Oliver & Margaret Ryznar, 'The Rise of PACS: A New Type of Commitment from the City of Love' (2017) 56 *Washburn LJ* 69, 83.
[77] Daniel Borrillo, 'The "pacte Civil de Solidarite" in France: Midway Between Marriage and Cohabitation', in (Robert Wintemute & Mads Andenas eds.) *Legal Recognition of Same-Sex Partnerships. A Study of National, European And International Law* (Bloomsbury 2001), 485.
[78] Gérard Cornu, *Droit civil. La Famille* (8th ed., Montchrestien 2003), 106. Parties must satisfy the legal conditions for contractual competency, as per Art 1109 Civil Code.
[79] Art. 1109 Civil Code.
[80] Conseil Const., 9th November 1999, Decision No. 99-149, *JO*, 16th November 1999; Art. 1128 Civil Code.
[81] Bram Braat, 'Nieuw Frans relatierecht: de PACS' (2000) *FJR*, 75, 77.
[82] Art. 513-3 Civil Code.

each other with "mutual and material assistance"[83]. The extent of the maintenance obligation is determined in accordance with each partner's financial capabilities.[84]

Therefore, it can be deduced form the French definition that the approach is predominantly autonomy orientated.

The Scottish approach requires compliance with elements to trigger eligibility for purposes of applying the provisions of the FLSA and defines a cohabitant as a person of any sex who lives with another person as if they are spouses or civil partners.[85] Additionally, section 25(2) sets out factors[86] for a court to consider in determining whether the parties "share a life", which encompasses interdependence, but ultimately leaving it up to the court to exercise its discretion to ensure flexibility and fair outcomes.[87] The relationship between the definition and the section 25(2) factors has described as being "intellectually incoherent",[88] especially as it is unclear how the factors should interact with one another and the definition.[89] The Scottish Law Commission ("SLC") in the 2022 Cohabitation Report[90] ("The Report") responded to criticism with the provision of a non-exhaustive list of factors to assist the court in making an objective assessment.[91] The absence of an "checklist" opens the door to a larger number of applicants that seek redress in terms of the Act,[92] which is indicative of a preference for protection.

The "marriage yardstick"

[83] Art 515-4 Civil Code. The obligatory nature of the latter requirement has been confirmed by the French Constitutional Court. Conseil Const., 9th November 1999, Decision No. 99-149, *JO*, 16th November 1999, § 31. JL Vivier, *Le pacte civil de solidarité. Un nouveau contrat* (L'Harmattan 2001), 32.

[84] Art. 515-4 Civil Code.

[85] Family Law (Scotland) Act ("FLSA"), s 25(1).

[86] These factors are: (a) the length of the period during which A and B have been living together (or lived together); (b) the nature of their relationship during that period; and (c) the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.

[87] Policy Memorandum for the Family Law (Scotland) Bill, 75.

[88] Joe Thompson, *Family Law in Scotland* (7th ed. Bloomsbury Professional 2014), 195.

[89] Alan Brown, 'The Legal Regulation of Cohabitation in Scotland: A Failed Attempt at Compromise' (2022) 44 *Hous J Int'l L* 221, 233.

[90] Scottish Law Commission *Report on Cohabitation* (Scot Law Com No. 261, 2022).

[91] Scot Law Com No. 261, 2022, para 3.61, factors include: duration of relationship, living together in same residence, extent of financial interdependency and the presence of a child.

[92] Garland (n 6), 315; Kenneth Norrie, *Annotations to the Family Law (Scotland) Act 2006* (Dundee University Press 2006), 59.

Utilising characteristics of marriage as a threshold criterion in the cohabitation context runs the risk of the standard being based on a "classed and gendered understandings of a good compassionate marriage"[93] – a standard which is incompatible with the heterogenous nature of these relationships. Additionally,[94] utilising the marriage yardstick generally relies on a heteronormative, Western conceptualisation of marriage.[95] It is thus unclear what would constitute compliance with the requirement of "living together" as if they were spouses or civil partners. In this regard, the SLC has recommended replacing "were living together as spouses" with "enduring family relationship"[96] in the definition of cohabitation in the FLSA. This is a welcome development considering the exclusionary effects that this requirement may have.

Living together

At first glance it seems obvious to require parties to live together, but it is a reality that some couples "live apart together" out of necessity.[97] Parties are required to live together when concluding a PACS,[98] which fulfils the purpose of preventing abuse of the regime through contracting into a "partnership of convenience"[99]. In Scotland, it was acknowledged that the spotlight placed on "living together" is legally unsound, inequitable and "ignor[ing] the realities of life".[100] The reasoning in the Scottish context is also applicable to the majority of South Africans in informal relationships. The hangover from Apartheid policies and colonialism is manifested in the prevalence of migrant labour, which has the consequence of cohabitants spending most of their time in different households.[101] In this regard, it seems that this requirement is applied in a relaxed fashion and flexibility would prevail over uncertainty to allow more relationships to fall within the scope of the relevant regime.

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[93] Robert Leckey, 'Judging in Marriage's Shadow' (2018) 26(1) *Feminist Legal Studies* 26(1) 25, 44.
[94] It must be noted that this is a uniquely South African concern but remains extremely relevant.
[95] Elsje Bonthuys 'A Duty of Support for All South African Unmarried Intimate Partners Part 2: Developing Customary and Common Law and Circumventing the Volks Judgment' (2018) 21 *PELJ* 1, 2.
[96] Scot Law Com No. 261, 2022 para 3.56.
[97] John Haskey, 'Living Arrangements in Contemporary Britain: Having a Partner Who Usually Lives Elsewhere and Living Apart Together (LAT)' (2005) 122 *Population Trends* 35, 42.
[98] Daniel Borillo, 'Who is Breaking with Tradition? The Legal Recognition of Sam-Sex Partnership in France and the Question of Modernity' (2005) 17(1) *Yale Journal of Law and Feminism* 89, 91.
[99] Christina Davis, 'Domestic Partnerships: What the United States Should Learn from France's Experience' (2006) 24 *Penn St Int'l L Rev* 683, 691.
[100] *B v B* 2014 GWD 30-593, at para. 27, 36
[101] Bonthuys (n 95), 2.

Minimum duration requirements

The imposition of a minimum duration requirement serves a normative function as it excludes relationships that are deemed casual and lack an element of interdependence,[102] as the primary concern is the "floodgates of litigation" argument.[103] Despite the "length of the period"[104] being a factor for the court to have regard to when determining whether the couple falls within the scope of the section 25, there is no minimum duration requirement in Scots law. It has been argued that the duration of a relationship is not necessarily a true reflection of its substance.[105] In considering the imposition of a minimum duration requirement, the SLC concurred that the operation of section 28 would be "self-limiting", in that the substantive requirements of establishing an economic disadvantage would be sufficient to address the "floodgates" concerns attached to an automatic remedy.[106] In The Report of 2022, the SLC followed a similar approach and decided not to propose a legislative change in this regard.[107]

The presence of children

As children are "innocent parties"[108] the autonomy argument clearly does not apply to them. Consequently, children born from long-term intimate relationships should be protected and this is a potential indicator as to why the child's parents' relationship should be recognised under law as well. Moreover, the existence of a child may be considered as evidence of commitment and stability of the relationship,[109] which would further justify recognition. Automatic eligibility is afforded to cohabitants in Scotland

[102] *Thompson's family law in Scotland* (8th ed, Bloomsbury 2022), 209.
[103] Scottish Law Commission, *Collated Responses to Discussion Paper On Aspects Of Family Law: Cohabitation*, 2020, 31.
[104] FLSA, s 25(2)(a).
[105] Aeschlimann (n 42), 254; *Harley v Robertson* [2011] 12 WLUK 328: a claim under section 28(2) was allowed to proceed after just seven months of cohabitation.
[106] Scottish Law Commission, *The Effects of Cohabitation in Private Law*, 1990, Discussion Paper No. 86, para 15.4.
[107] Scot Law Com No. 261, 2022, 3.49.
[108] Ian Dey & Fran Wasoff, 'Protection, Parity, or Promotion: Public Attitudes to Cohabitation and the Purposes of Legal Reform' (2007) 29 *Law & Pol'y* 159, 160
[109] Niamh Rodgers, 'Should Have Put a Ring on It; A Comparative Analysis of the Law of Cohabitation on Ireland, Scotland and England and Wales' (2012) 11 Hibernian LJ 122, 137.

who have children,[110] which indicates that legal intervention is justified at the cost of respecting autonomy, in favour of extending protection to vulnerable individuals.

Time limit to bringing claims

A time limit may either serve as a barrier to an applicant bringing a claim with detrimental consequences to the party seeking redress, or alternatively serve the purpose of empowering parties to move on from a failed relationship without a looming threat of potential litigation.[111] As such, irrespective of the underlying function, the imposition of a time limit to bring a claim for financial remedies appears to favour the autonomy side of the continuum. In Scotland difficulties have arisen regarding the determination of the relationship's end date, although courts have focused their inquiry on the stability of the relationship,[112] which is informed by the parties' expectation that the relationship would continue.[113] The end date becomes crucial in terms of section 28 and section 29 applications, as failure to comply with this requirement may result in the application being time-barred.[114] A minimum qualifying period may mitigate this undesirable position, as "certainty should prevail over flexibility in this particular context"[115]. Considering the consequences that a time limit may have, it is a clear indicator of favouring autonomy. However, the SLC addressed this issue in The Report and favoured the retention of the time limit, with an additional provision to permit late claims in limited circumstances through the exercise of judicial discretion.[116] It seems that the introduction of the additional provision seeks to balance protection and flexibility while respecting the autonomy of the parties in having a clean break from a failed relationship.

Establishing a contract

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[110] Rodgers (n 109), 137.
[111] F Wasoff, J Miles, and E Mordaunt, "Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006" (2010), 17, 68, 75, 126-127, available at http://www.crfr.ac.uk/assets/ Cohabitation-final-report.pdf (Accessed on 15 June 2023).
[112] Alan Brown, *What is the Family of Law? The Influence of the Nuclear Family* (2019), 97.
[113] *M v T*, Aberdeen Sheriff court, 17 November 2011, unreported (2011 G.W.D. 40-828); *Garrad v Inglis* 2013 WL 6980541; 2014 GWD 1-17: sheriff found that the relationship was over when the defender informed the pursuer that their relationship was over and she consulted her accountant about related financial matters.
[114] *Simpson v Downie* [2012] CSIH 74; 2013 SLT 178
[115] Whiting (n 6), 61
[116] Scot Law Com No. 261, 2022, para 6.25.

The approach of South African courts has been to reinterpret common law rules to extend financial protections to life partners[117] - a divergent approach from the other two jurisdictions that follow a so-called "shopping list"[118] approach regarding eligibility. The basis of this extension lies specifically in the presence of a tacit agreement between the partners. In this context, relief has successfully been sought to obtain shares in partnership property[119] or for a claim to provide support.[120] It is argued that these contracts are not contrary to public policy by virtue of the conjugal nature of these relationships,[121] which points to the presence of stability weighing in favour of recognition. Additionally, this serves a practical function by including relationships that may require protection on termination resulting from interdependence and contributions made.

The point of departure when it comes to the existence of a duty of support is that the duty ceases to exist when the relationship ends.[122] However, the duty of support may continue to exist after the death of the maintenance debtor upon a successful claim against the estate of the deceased by utilising the MSSA[123] or against a third party for the dependent's loss of support.[124] The latter issue falls outside of the scope of this dissertation.

The predominant issue is related to the evidentiary hurdles associated to tacit contracts. A partner is placed in a precarious and unpredictable position as it is not guaranteed that a court will infer the existence of such a contract,[125] and there are additional uncertainties regarding the factors which a court must take into account.[126] A factor relevant to the court's assessment has been the nature of the relationship between the parties and in this regard courts have based the enquiry on the "marriage-

[117] *Butters v Mncora* 2012 4 SA I (SCA); *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA).
[118] Language used in para 3.55 of Scot Law Com No. 261, 2022. *Gutcher v Butcher* [2014] 9 WLUK 514, para 9: even in absence of shopping list, CH can be established by looking at the facts.
[119] *Butters v Mncora 2012* 4 SA I (SCA).
[120] *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA).
[121] Elsje Bonthuys, 'Public Policy in Family Contracts, Part I: Agreements about Spousal Maintenance' (2020) 31 Stellenbosch L Rev 377, 381-382
[122] Bonthuys (n 121), 384.
[123] *Bwanya v Master of the High Court, Cape Town* 2022 3 SA 250 (CC).
[124] *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA).
[125] Barrat (n 47), 118.
[126] Elsje Bonthuys, 'A Duty of Support for All South African Unmarried Intimate Partners Part I: The Limits of the Cohabitation and Marriage Based Models' (2018) 21 *PELJ* 1, 19.

like" qualities in the relationship.[127] Generally speaking, if a court or legislative provision utilises this standard, it would automatically exclude most South African women, who experience multiple intersections of disadvantage[128] on racial, socio-economic, gendered, religious and cultural grounds. Bonthuys proposes a solution to the issues addressed above: the factual existence of cohabitation should act as proxy for establishing the necessary animus contrahendi, which would transform any social promises into legally enforceable obligations.[129]

Other procedural requirements

As mentioned above, parties have leeway regarding the substance of their PACS, however, stringent criteria is imposed for formal validity to ensue.[130] The agreement must be in written form,[131] followed by a joint declaration by both parties.[132] Moreover, registration is required for the PACS to be binding[133] and will take place upon compliance with all necessary formalities.[134] After registration, the identity of each partner, as well as the registration of the PACS is inserted in the birth certificate of each partner[135] and any amendments to the PACS must be registered to be binding.[136] This efficient, formalistic approach to recognising relationships that fall within the scope of the Code Civil is indicative of the fact that autonomy is promoted to the extent that parties comply with procedure, with very little scope to exercise a protective function.

PART TWO

[127] *Meyer v Road Accident Fund* (TPD) (unreported) case number 29950/2004 of 28 March 2006, para 29; *Volks NO v Robinson* 2005 5 BCLR 446 (CC) paras 122, 193; *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) paras 15, 25; *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T), paras 314B, 316G; *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC), paras 4, 23); Bonthuys (n 126), 23.
[128] Bonthuys (n 95), 4.
[129] Bonthuys (n 20), 267.
[130] Braat (n 82), 77.
[131] Art. 515- 3 Civil Code.
[132] Art. 515- 3 Civil Code.
[133] Terminal (n 58), 163.
[134] Cornu (n 79), 110.
[135] Art. 55 Civil Code.
[136] Art. 515-3 Civil Code; Paragraph 6 Art. 515-3 Civil Code.

3 How the jurisdictions respond to relationship termination

3 1 Termination by breakdown/dissolution

3 1 1 Remedies provided by the Family Law (Scotland) Act 2006

The point of departure for the Scottish position is that issues pertaining to the ownership of assets will be determined in accordance with the general rules of property law.[137] However, as per the FLSA, there are two rebuttable presumptions of equal ownership regarding household goods[138] and to money or property contributed by either party for joint household purposes.[139] More relevant for this dissertation is the section 28 right to apply for an order for financial provision within one year of cessation of relationship, which can include a capital sum,[140] an order to provide recourse in terms of the "future economic burden of childcare",[141] or an interim order.[142] Essentially, section 28 of the FLSA would apply if the court is satisfied that the respondent received an economic advantage[143] from "contributions"[144] and the "burden of childcare" as a result of the relationship, which is subsequently balanced by considering whether the any economic disadvantage[145] was suffered by the applicant. The rationale behind section 28 was to play a protective role in favour of individuals facing economic vulnerability on relationship termination,[146] whilst at the same time attempting to give effect to the "clean break principle"[147].The so-called "test" for financial provision in sections 28(3) to (6) unfortunately lacks a principled basis guiding the court in granting awards. It is at this point necessary to clarify that there is no obligation to provide aliment to a former partner as is the case with former spouses,[148] unless the parties contract to the contrary. Consequently, it can convincingly be argued that section 28 attempts to balance protection and autonomy.

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[137] Frédérique Ferrand, 'National Report: Informal Relationships: France' (2015) France-IR.pdf (ceflonline.net) [accessed on 15 May 2023], 21.
[138] Family Law (Scotland) Act 1985, S. 26(2); "household goods" is defined in section 26(4) and excludes: money; securities; any vehicle; or any domestic animal.
[139] FLSA 2006, s 27(1).
[140] FLSA 2006, s 28(2)(a).
[141] FLSA 2006, s 28(2)(b).
[142] FLSA 2006, s 28(2)(c).
[143] FLSA 2006, s 28(3)(a).
[144] FLSA 2006, s 9.
[145] FLSA 2006, s28(3) (b).
[146] Tom Guthrie and Hilary Hiram, 'Property and Cohabitation: Understanding the Family Law (Scotland) Act 2006' (2007) 11(2) *EdinLR* 208, 218; Policy Memorandum for the Family Law (Scotland) Bill, para 66.
[147] Garland (n 5) 316.
[148] Aliment is a requirement in terms of S1 of the FLSA; *Thompson's Family Law* (n 102), 209.

i. *Section 28(2)(a)*

There is potential for the protection of partners who have undertaken a more domestic role,[149] however, this section only covers advantages and disadvantages arising during the relationship. The failure to provide for future losses may exacerbate financial vulnerability,[150] and may leave the courts ill-equipped to gauge the detrimental economic impact falling on the party undertaking the domestic role.[151] On the other hand, employment opportunities sacrificed or property alienation prior to the start of the cohabitation relationship are excluded from the enquiry.[152] However, courts have considered the extent to which the economic disadvantage may influence the partner's ability to enter into and remain in the labour market.[153]

The Scottish court's approach to section 28(2)(a) prior to *Gow v Grant*[154] was a restrictive one, dependent on forensic assessment pertaining to a quantifiable value of advantage or disadvantage.[155] Consequentially, financial contributions were placed above domestic contributions in the inquiry - a deficiency that the courts justified by being "unable to place any financial value on these services and thus the economic advantage"[156]. The takeaway is therefore that under section 28, it is inconceivable that a partner could have derived an economic advantage from the other partner's exclusively domestic contributions.[157]

The Supreme Court in *Gow v Grant*[158] altered the path followed in dealing with section 28 applications, as it adopted a far broader interpretation of the provision by recognising the foundation of the section as fairness,[159] despite the absence of such language in the FLSA.[160] Ultimately the effect of this decision was to open the door to a wider range of applicants under section 28(2)(a).[161] This approach has been illustrated in *Whigham v Owen,*[162] as the court acknowledged the significance of her

[149] Garland (n 6) 317.
[150] Guthrie (n 146), 219-220.
[151] Garland (n 6), 317.
[152] Garland (n 6), 317.
[153] *M v S* 2008 SLT 871.
[154] *Gow v. Grant* [2012] UKSC 29.
[155] Garland (n 6), 318
[156] *Jamieson v Rodhouse* 2009 Fam LR 34, para 42.
[157] Garland (n 6), 319.
[158] *Gow v. Grant* [2012] UKSC 29.
[159] [2012] UKSC 29 para 35.
[160] [2012] UKSC 29, paras 31-33.
[161] Garland (n 6) 321.
[162] *Whigham v Owen* [2013] CSOH 29.

"contributions to the running of the household."[163] When dealing with section 28(2)(a) matters, the courts follow a "broad brush approach",[164] despite the inherent uncertainties regarding the outcome of the case.[165]

A few preliminary conclusions can be made at this stage. The decision to restrict the scope of section 28(2)(a) indicates a preference for promoting the autonomy of the parties during the specific relationship and not saddling the economically stronger parties with duties that stretch beyond the relationship. Reliance on the standard of fairness, as per the Scottish approach in *Gow v Grant,* may have the consequence of causing additional uncertainty, as fairness itself is vague and discretionary,[166] and "lies in the eyes of the beholder"[167]. Despite being in the interests of flexibility and recognising the gendered reality of relationship breakdown as a result of the individual contributions made, it has been argued that the interests of certainty still require a nexus between economic disadvantage suffered and contributions provided by the applicant.[168]

In this regard, The Report proposes promoting flexibility by replacing the current test,[169] and including property transfers and "short term payments for the relief of serious financial hardship"[170] in the range of remedies the court may grant. The replacement "two-part test"[171] involves using guiding principles[172] to determine whether a section 28 order is justified and which specific order is most reasonable considering the resources of the cohabitants. In this regard, the scope of the resources will not be limited to what was accrued during the relationship.[173] The flexible approach as envisaged by The Report's proposals can be interpreted as an attempt to assist more applicants to claim appropriate orders under the FLSA and benefit from the protective function.

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[163] [2013] CSOH 29, para 31.
[164] The broad-brush approach has subsequently been confirmed in *HAT v CW* [2020] EDIN 37 and *Duthie v Findlay* [2020] Fam LR 141, para 9.
[165] *Smith-Milne v Langler* 2013 Fam LR 58, para 12.
[166] Brown (n 89), 245.
[167] *White v White* [2000] UKHL 54 (Lord Nicholls).
[168] 2013 Fam LR 58*,* para 12.
[169] Scot Law Com No. 261, 2022, Para 5.35.
[170] Ibid*,* Para 5.79.
[171] Ibid, Para 5.35.
[172] Ibid, Para 5.37-5.49
[173] Ibid, Para 5.35.

ii Section 28(2)(b)

Section 28(2)(b) makes provision for future losses resulting from taking on a primary caretaking role and functions to mitigate the economic hardship that may flow from performing domestic responsibilities.[174] The same issues have arisen with subsection (b) as has been the case with the initial interpretation of section 28(2)(a) pertaining to inconsistency and insufficient awards.[175] Additionally, the matter has not been clarified by the Supreme Court as it has done in terms of section 28(2)(a) in *Gow*[176]. Moreover, in the absence of specifying the type of order the court is permitted to make, the courts have opted for a stringent approach by only awarding capital sums,[177] which cannot be altered in future.[178] It is an impossible task for a court to foresee the needs of the child in future and make an accurate award,[179] and consequently any economic burdens would fall solely on the primary caregiver,[180] without any recourse to amend the initial award. The court is afforded no guidance in terms of factors to consider when making a section 28(2)(b) award, with the implication that courts have focussed their awards on considering only external childcare costs without considering the income-earning ability (or lack thereof) of the primary caregiving partner.[181] Despite the legislative commitment to address the potential financial hardships arising from childcare, the practical implementation regarding the protective scope of section 28(2)(b) leaves much to be desired.

3 1 2 South Africa's use of universal partnerships

In the South African context there is no statutory remedy available to a life partner to claim a share of partnership property.[182] However, as mentioned above, the trend in case law has been to permit a party to prove the existence of a universal partnership as a potential solution to the problem. The remedy is derived from Pothier's essentialia for partnership agreements: a contribution from each partner in the form of either money, labour and skill; an element of mutual benefit for both parties as a result of carrying out the partnership; and that making a profit should be the object of the

[174] Garland (n 6), 324.
[175] Garland (n 6), 324.
[176] Sutherland (n 44), 159.
[177] Wasoff (n 111), 24; Sutherland (n 44), 159.
[178] *M v S* 2008 SLT 871, paras 261-262.
[179] Garland (n 6), 325
[180] 2008 SLT 871, para 261.
[181] *F v D* 2009 Fam LR 111; *G v F* 2011 SLT (Sh Ct) 161; *Lindsay v Murphy* [2010] Fam LR 156, para 100.
[182] Bonthuys (n 20), 263.

partnership.[183] In *Butters v Mncora*[184] an avenue was created for a partner to claim their share of property acquired by the partners during the relationship. The court demonstrated a "greater awareness in modern society of the value of the contribution of those who are prepared to sacrifice the satisfaction of pursuing their own careers, in the best interests of their families",[185] by considering the contributions of the party of maintaining the home and providing care.[186]

The approach of South African courts is therefore to extend protection to parties upon relationship breakdown utilising contract law principles. However, the solution of inferring a universal partnership from the conduct of the parties has been the subject of criticism. From an evidential perspective the question may legitimately be posed whether the evidence truly justifies the inference that a universal partnership has as a matter of fact been concluded. Courts have applied the test of tacit contracts to identify the existence of a universal partnerships,[187] irrespective of whether there is evidence of an oral agreement concluded between the parties.[188] The onerous burden attached to proving a tacit contract would present additional difficulties for parties utilising this remedy, as there "can be no assumption of a general intention to contract" as is the case with express contracts.[189] The difficulties in proving the existence of a tacit intimate universal partnership are manifested in vulnerable parties who are unable to institute legal proceedings in the first place.[190]

Moreover, intimate universal partnerships are distinct from the traditional context in which commercial universal partnerships exist, especially regarding the aims it seeks to achieve and the behavioural norms during and at the termination of these partnerships.[191] Given the relational nature of intimate universal partnerships, equal importance is attributed to maintaining the relationship as it is to obtaining economic advantages, which is largely dependent on trust and co-operation between the

[183] *Pezzutto v Dreyer* 1992 (3) SA 379 (A) at 390A-B.): '(1) that each of the partners bring something into the partnership, whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit (Pothier A Treatise on the Contract of Partnership (Tudor's translation) 1.3.8).', cited by the court in para 11.
[184] *Butters v Mncora* 2012 (4) SA 1 (SCA).
[185] 2012 (4) SA 1 (SCA), para 22.
[186] 2012 (4) SA 1 (SCA) paras 29, 22.
[187] Bonthuys (n 20), 268.
[188] Bonthuys (n 51), 92.
[189] Bonthuys (n 20), 269.
[190] Bonthuys (n 20), 273.
[191] Bonthuys (n 20), 264.

parties.[192] As trust and co-operation are factors that are fickle, it is difficult to have a certain outcome at the time of creation of the intimate universal partnership.

An additional disadvantage of utilising the universal partnership remedy is the size of partnership assets awarded to female plaintiffs,[193] as percentages awarded have been between 30 to 35 percent.[194] The implication is that despite the court in *Butters'* achievement in recognising the validity of non-financial contributions, such value is still considered lower than the value of financial contributions.[195] Therefore, despite courts grappling with the boundaries of contract law and family law to extend financial protection to parties who need it most, the remedy remains complex and may lead to unpredictable results.

3 1 3 The response by the PACS provisions

The default legal regime of partners who have concluded a PACS is *la separation de biens* ("separation as to property")[196] which has the consequence of property purchased prior to and during the relationship remaining with the purchasing party.[197] Proof in this regard is dependent on title and the burden rests on to the party claiming ownership,[198] but in the absence of such evidence, the value of the asset is split equally between the co-owners.[199] When it comes to everyday goods, ownership is, in accordance with general rules of property determined by possession.[200] A right is afforded to the parties in the event that there are issues regarding division of assets, which entitles the parties to approach the Family Court for a claim for preferential allocation of joint items to one party, which would then entitle the other party to compensation.[201] At first glance, the default regime promotes autonomy by maintaining a distinction regarding ownership of assets, but nevertheless allows for a fair outcome through the right of preferential allocation and compensation.

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[192] Bonthuys (n 20), 264.
[193] Bonthuys (n 51), 84.
[194] *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA); *Butters v Mncora* 2012 4 SA I (SCA).
[195] Bonthuys (n 51), 94.
[196] Art. 515-5 Code Civil; Act No. 2006-728 of 23 June 2006, Reforming Inheritance and Donation Law amended the default regime from being indivision to separation as to property.
[197] Albana Metaj-Stojanova, 'French Civil Partnership Contract (PACS)' (2019) 14(1) *SEEU Rev.* 134, 151.
[198] Metaj-Stojanova (n 197), 151
[199] Art. 515-5 al. 2 Civil Code.
[200] Arts. 2276 and 515-5 al. 3 Civil Code.
[201] Art. 515-6 Civil Code.

It is possible for parties to exercise their choice by diverting from the default regime by concluding an agreement and submitting the property to "indivision",[202] which is essentially indivisible joint ownership regarding all properties acquired after concluding the PACS, subject to a few limitations.[203] However, any dispute regarding ownership is subsequently disallowed, for example contesting contributions or maintenance of the property.[204] As mentioned when discussing the nuances of choice, an unfortunate outcome may arise where the financially stronger party is persuaded to submit their properties to "indivision", without any recourse to dispute the matter afterwards.

A consequence of concluding a PACS is that the parties become jointly and severally liable for debts incurred relating to household goods or raising children, but this rule may be excluded on the ground that the debt incurred fell outside the scope of the "usual standard of living of the couple"[205]. This removes the gendered division of labour, while still providing protection to a party whose partner incurred excessive debts.

There is no provision regarding a compensatory or maintenance scheme applicable to dissolution, but it is open to the parties to cover this aspect in an agreement.[206] Unfortunately, if an agreement is not concluded and the default regime is followed, it may leave the more vulnerable party in a precarious position, especially if they have no assets of their own. However, it is relevant to note that parties are barred from waiving their rights to compensatory remedies in the PACS,[207] but these claims fall under the scope of tort law.[208]

3 2 Termination by death

3 2 1 Section 29 of the Family Law (Scotland) Act 2006

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[202] Art. 515-5-1 Code Civil.

[203] Metaj-Stojanova (n 197), 151, Article 515-5-2 lists these properties which should remain the exclusive property of only one of the partners. Thus, the following property shall remain separate property: 1) cash received by each partner from whatever source, subsequent to registration of the agreement and not used to obtain title to an asset; 2) created assets and accessories; 3) personal effects; 4) assets or proportion of assets with respect to the last apartment 'acquired from a prior partner, to the extent that the rights were established pursuant to duly registered prior agreement as amended; 5) assets or an interest in assets purchased with cash derived from an inter vivos donation or through an estate.

[204] Metaj-Stojanova (n 197), 151

[205] Art. 515-4 al. 2 Civil Code.

[206] Terminal (n 58), 171.

[207] Conseil constitutionnel Decision No. 99-419 DC of 9 November 1999, JO 16 November 1999, p. 16962.

[208] Terminal (n 58), 171.

In Scotland, there is no legal right for a cohabitant in this scenario, which is unfortunate, as about 75 percent of Scots die without a will.[209] However, a successful discretionary award, in the form of a capital sum or property transfer,[210] may be paid out of the net intestate estate[211] of the deceased if the application is made within six months since the death of the cohabiting partner.[212] Moreover, cohabitation with the deceased immediately before death is required[213] - a provision which may have detrimental consequences to the applicant in the event of the deceased receiving care in a hospital or nursing home.[214]

A critique levelled against section 29 relates to the absence of a clear underlying rationale underpinning the provision,[215] as there is no express mention of considering the needs, reliance interests or contributions made by the surviving partner.[216] However, the court is authorised to consider "any matter that the court deems appropriate"[217] and case law demonstrates that the court has taken the aforementioned factors into account.[218] Courts are generally in favour of factors related to the stability of the relationship,[219] which would have the consequence of the court exercising its discretion in providing protection to a vulnerable surviving partner.

The unfettered discretion of the courts has been a sensitive topic for its lack of reliability and certainty, despite the SLC's initial rationale being to recognise the heterogeneity of cohabitation relationships whilst simultaneously enabling the court to craft an appropriate remedy.[220] However, it has been argued that the unfettered

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[209] *Thompson's Family Law* (n 102), 224.
[210] FLSA 2006, s 29(2)(a)(i)–(ii).
[211] The net intestate estate is defined in the FLSA 2006, s 29(10) as what remains of the intestate estate after payment of or satisfaction of inheritance taxes, certain other liabilities of the estate, and the surviving spouse's or surviving civil partner's "legal rights" and "prior rights."
[212] FLSA 2006, s 29.
[213] FLSA 2006, 29(1)(b)(ii).
[214] *Thompson's Family Law* (n 102), 225-226.
[215] *Kerr v. Mangan* [2014] CSIH 69 [17], (2015) SC 17, 23.
[216] Gary Spitko, 'Intestate inheritance Rights for Unmarried Committed Partners: Lessons for U.S. Law Reform from the Scottish Experience' (2018) 103 *Iowa LR* 2175, 2185.
[217] FLSA 2006, s 29(3)(d).
[218] *Windram, Applicant* (2009) Fam. L.R. 157, [14]–[18]; *Savage v. Purches* (2009) S.L.T. (Sh. Ct.), [4]–[8].
[219] Factors weighing in favour of the applicant include: domestic contributions pertaining to childcare and looking after the deceased prior to his death ((2009) Fam. L.R. 157, 161 [14]); relationship-induced dependency ((2009) Fam. L.R. 157 at 161 [14]); the surviving partner's obligation of childcare and the detrimental consequences that would occur in the absence of an award ((2009) Fam. L.R. 157 at 162 [15]–[18]). On the other hand, a short cohabitation period has proved to be a factor weighing against the claimant ((2009) S.L.T. (Sh. Ct.) at 41 [11])
[220] Policy Memorandum for the Family Law (Scotland) Bill, para 75.

discretion of the courts is incompatible with certainty considerations that inform Scottish succession laws on a general level.[221] There is clearly inherent difficulties with the contradictory aims of having clear intestate succession entitlements and providing redress through the flexible discretionary provisions of the court in granting a section 29 order.

In the SLC's Report on Succession in 2009,[222] it was recommended, amongst other things, repealing section 29 in favour of attributing rights to surviving cohabitants in both testate and intestate succession cases.[223] A problematic aspect regarding the proposal is the definition of a cohabitant, similar to section 25, which refers to the "characteristics of the relationship between spouses and civil partners."[224] However, a positive remark can be made in favour of the fact that in determining the appropriate value of the cohabitant's right, the court must consider factors such an interdependence[225] and contributions of the survivor to their life lived together.[226] Minimising the amount of factors that the court should take into account in making the award would be a favourable change as it would increase certainty and consequently predictability.[227] However, the SLC missed the opportunity to clarify the rationale underpinning section 29, as this could have assisted in harmonising Scots succession law with the ultimate goal of the providing a right to surviving partners to claim from their deceased partner's intestate estate.

3 2 2 Piecemeal protections in South Africa

The legal frameworks that govern intestate succession in South Africa is the Intestate Succession Act ("ISA"),[228] which was originally enacted only for the benefit of spouses in monogamous civil marriages,[229] and the Maintenance of Surviving Spouses Act

[221] Kenneth G.C. Reid, 'Intestate Succession in Scotland', in Kenneth Reid et al (eds.) *Comparative Succession Law: Volume 2: Intestate Succession* (Oxford University Press 2015), 370, 396.
[222] Scottish Law Commission *Report of Succession* (Scot Law Com No. 215, 2009), 66.
[223] Scot Law Com No. 215, 2009, at 69
[224] Succession (Scotland) Bill (Draft), in (Scot Law Com No. 215, 2009), s 22(3), 155.
[225] Succession (Scotland) Bill (Draft), s 23(2)(b).
[226] Succession (Scotland) Bill (Draft) s 23(2)(c).
[227] Spitko (n 216), 2194.
[228] 81 of 1987.
[229] Intestate Succession Act 81 of 1987, s 1(1)(a). "The deceased's surviving descendant(s) will inherit the entire estate where the deceased has not been survived by a spouse" (s 1(1)(b)). A valid civil marriage in this regard refers to "voluntary lifelong union between one man and one woman to the exclusion of all others while it lasts" (*Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) paras 1 -3) in terms of the common law and the Marriage Act 25 of 1961.

(MSSA).[230] The latter Act permits a surviving spouse to institute a maintenance claim against the deceased's estate[231]. Fortunately, the scope of recipients of the provisions under the ISA has been broadened by the Constitutional Court to black couples that have concluded a polygynous[232] customary marriage,[233] and couples who have concluded their marriages in in terms of Hindu[234] and Muslim[235] rites. The purpose of highlighting these legal developments is to illustrate the Constitutional Court's liberal approach to affording statutory protection to couples that do not comply with the pre-Constitutional era's "rigid Calvinist religious views of the white minority population"[236].

Zitske is of the opinion that succession and maintenance claims should be dealt with together, as both serve a similar societal function.[237] The rationale behind the MSSA was to cater for "vulnerability and need",[238] to ensure that spouses (prior to the developments in case law) were supported after divorce. In a similar vein, the ISA attempts to mitigate hardships flowing from relationship-induced dependency, as a right to inherit from a deceased spouse's intestate estate has been characterised as needs-based.[239]

From the outset it must be noted that the South African framework regarding the surviving partner's rights to their deceased partner's intestate estate has been complicated. This is largely due to the differentiation between heterosexual and homosexual partners in the context of the so-called "objective choice model"[240].

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[230] 27 of 1990.
[231] MSSA, s 2(1)
[232] Section 1 of the Recognition of Customary Marriages Act 120 of 1998 extended the same legal status of civil marriages to monogamous and polygynous customary marriages.
[233] *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC).
[234] *Govender v Ragavayah* 2009 3 SA 178 (D).
[235] *Daniels v Campbell* 2004 5 SA 331 (CC). The court in *Hassam v Jacobs* 2009 5 SA 572 (CC) permitted surviving spouses in polygynous Muslim marriages to fall under the scope of the Intestate Succession Act 91 of 1987.
[236] Robbie AJ Robinson, 'The evolution of the concept of marriage in South Africa: The Influence of the Bill of Rights in 1994" (2005) *Obiter*, 488, 489.
[237] Emile Zitzke, '"Constitutionally wanting" reasoning in the law of intestate succession: a critique of categorical objectivism, the achievement of inequality, and a jurisprudence of pride' (2018) *TSAR* 182, 191-192.
[238] *Bwanya v Master of the High Court, Cape Town* 2022 3 SA 250 (CC), paras 36, 41.
[239] 2022 3 SA 250 (CC), 90; Bradley Smith, 'Intestate Succession and Surviving Heterosexual Life Partners: Using the Jurist's "Laboratory" to Resolve the Ostensible Impasse that Exists after *Volks v Robinson'* (2016) *SALJ* 284, 307-308.
[240] The "choice argument was used in Bradley Smith, 'Rethinking *Volks v Robinson*: The Implications of applying a "Contextualised Choice Model" to prospective South African Domestic Partnerships Legislation' (2011) 13(3) *PELJ* 237, 238.

In *Gory v Kolver*,[241] a surviving partner challenged the constitutionality of section 1(1) of the ISA, as it (at the time) barred him from being an heir to his deceased partner's intestate estate. Interestingly, the judgement was delivered a week before the enactment of the Civil Union Act 17 of 2006 ("CUA")[242]. The court held that the infringement of the surviving partner's constitutional rights to equality and dignity was unjustified,[243] especially considering the trial court's finding of the existence of a contractual mutual duty of support between the parties.[244] The legal position regarding same-sex life partners was confirmed in *Laubscher v Duplan*[245] - a judgement that clarified the position post-enactment of the CUA, that the consequence of *Gory* was not merely an interim measure,[246] and that same-sex life partners had a right to inherit intestate.

The contradictory approaches followed by the Constitutional Court regarding sexuality was showcased in *Volks v Robinson*,[247] which involved a constitutional challenge to the MSSA by a surviving partner on the grounds that she was excluded from the operation of the Act due to her (lack of) marital status. The CC dismissed the claim, most importantly for current purposes, on the basis of the absence of a legal impediment that would prevent the partners from marrying.[248] The CC justified the differentiation between married and unmarried partners on the basis of the elevated position of marriage and the reservation of benefits to spouses.[249] Consequently, the voluntary choice of the parties in not getting married had the effect of the couple opting out of the "rights and duties uniquely attached to marriage,[250] which included the *ex lege* reciprocal duty of support.[251] The decision in *Volks* has been criticised as being contradictory to the achievement of substantive equality, as enshrined in the

[241] 2007 4 SA 97 (CC).
[242] The landmark judgement of *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC), which did not relate to any intestate succession claims, lead to the enactment of the Civil Union Act which essentially afforded the same spousal benefits to homosexual couples, including the automatic qualification as spouses for purposes of the ISA.
[243] 2007 4 SA 97 (CC) para 19.
[244] 2007 4 SA 97 (CC) para 2.
[245] 2017 2 SA 264 (CC).
[246] 2017 2 SA 264 (CC), paras 1, 10-11.
[247] 2005 5 BCLR 446 (CC).
[248]2005 5 BCLR 446 (CC), paras 15, 55, and 91-92.
[249] Ibid, paras 50-57, 80-87.
[250] Ibid paras 55, 56 and 92. Also see para 154 of Sachs J's dissenting judgment as well as *Laubcher v Duplan* 2017 2 SA 264 (CC), para 76.
[251] 2005 5 BCLR 446 (CC), para 55-56.

Constitution, which in turn fails to dismantle social structures which exacerbate the difficulties faced by vulnerable groups.[252]

Therefore, until the judgement of Bwanya,[253] there was no right available to opposite-sex life partners to institute a claim against their deceased partner's intestate estate based on loss of support. Ms Bwanya challenged the constitutional validity of both the MSSA and the ISA for the omission of "permanent opposite-sex life partnership in which the partners have undertaken reciprocal duties of support" from the definition of "spouse"[254] and "marriage",[255] respectively. The ISA challenge rested on a claim of unfair discrimination on the grounds of sexual orientation, relying on *Gory*[256] and *Laubscher.*[257] On the other hand, the MSSA challenge relied on discrimination on the grounds of marital status,[258] however, this claim presented issues as it the court was bound by the precedent of the *Volks* case.[259] The strict test for precedent is in line with the certainty intrinsic in the rule of law as central to the South African democracy.[260] Essentially the precedent could only be overturned by the Constitutional Court if it was satisfied that the *Volks* judgement was "clearly wrong"[261].

The CC held that the question of choice was a factual, rather than a legal matter, and consequently the court was not bound by the *Volks* judgement on the factual issues.[262] Regarding the *ex lege* nature of the MSSA claim, the court opined that the matter had to be reconsidered in light of the legal developments post-*Volks*, especially regarding the extension of legally enforceable duties of support to unmarried life partners on the grounds of the existence of a tacit contract.[263] The outcome was therefore that the court overturned the *Volks* precedent on the MSSA as it concluded that the denial of

[252] Catherine Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253, 265.
[253] *Bwanya v Master of the High Court, Cape Town* 2022 3 SA 250 (CC)
[254] Intestate Succession Act 89 of 1987, s 1.
[255] Intestate Succession Act 89 of 1987, s 1.
[256] *Gory v Kolver* 2007 4 SA 97 (CC).
[257] *Laubscher v Duplan* 2017 2 SA 264 (CC).
[258] *Bwanya v Master of the High Court, Cape Town* 2022 3 SA 250 (CC), para 2.
[259] 2022 3 SA 250 (CC), para 56.
[260] *True Motives 84 (Pty) Ltd v Mahdi* [2009] ZASCA 4; 2009 (4) SA 153 (SCA) at para 100.
[261] 2022 3 SA 250 (CC), para 46, citing *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (2) BCLR 121 (CC), para 28.
[262] 2022 3 SA 250 (CC), para 61
[263] *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA), para 12.

section 2(1) benefits to permanent life partners amounted to unfair discrimination where the parties had indeed undertaken reciprocal duties of support.[264]

Unfortunately, the Constitutional Court in *Bwanya* neglected to clarify whether "undertaking reciprocal duties of support" should require a contractual undertaking. However, the court's reliance on the *Paixao* judgement, where the SCA inferred a "tacit contract for reciprocal support" from the partners' circumstances,[265] would suggest that this requirement would be satisfied by evidence of the parties' commitment and interdependence.[266] The majority's decision in *Bwanya* is indicative of the Constitutional Court's dedication to ensuring substantive equality and providing adequate safeguards to partners who might be left vulnerable as a result of their partners dying intestate. However, in the absence of clear criteria, the issues regarding proof of a tacit contract, as mentioned above, persists and would leave surviving partners in a precarious position.

3 2 3 The lacuna in French law

In France, a partner in a PACS agreement is not considered an heir to their deceased partner's intestate estate. However, if the parties opted to put their properties under the legal regime of in "indivision", the consequence would be to inherit the deceased partner's portion of the joint property upon death.[267] It should be pointed out that the scope of inheritance is limited, as there are some restrictions to property subject to "indivision", for example property acquired prior to concluding the PACS.[268] The lacuna in French law in respect of granting intestate succession rights to a PACS-partner can be linked to the autonomous core of a registration system – if you do not make the choice and carry out the positive act of opting-in, the law remains ignorant of your position.

Part 3

4 General conclusions in light of the continuum

The initial purpose behind the enactment of the FLSA was to clarify the position of cohabitants in favour of offering protection upon relationship termination, while

[264] 2022 3 SA 250 (CC), para 73.
[265] 2012 6 SA 377 (SCA), paras 19-21
[266] Barrat (n 8), 16-18.
[267] Metaj-Stojanova (197), 156.
[268] Metaj-Stojanova (n 197), 156-157.

simultaneously giving effect to the choice of adults to "live unfettered by financial obligations"[269]. From the analysis conducted it can be concluded that as the FLSA only regulates rights and obligations after relationship termination, without ascribing a new status, there is minimal intrusion into the autonomy of the parties. On the other hand, there is a clear attempt to acknowledge the possibility of relationship-induced dependency by permitting financial remedies at relationship termination. The wide approach utilised in terms of eligibility criteria creates an avenue for a larger group of applicants to gain access into the scheme, while still requiring elements of commitment and stability for purposes of limiting the floodgates of litigation.

The broad-brush approach followed by the courts in considering section 28 applications allows for a subjective assessment into the facts of each individual whilst acknowledging the reality of gendered, asymmetrical relationships. However, as mentioned above, judicial discretion is at odds with providing predictability to the parties regarding their position at relationship termination. These concerns seem to be addressed by The Report of the SLC and only time will tell what the practical outcomes would be. In this regard there would potentially be a satisfactory balance between flexibility and certainty, as the judicial discretion would be coupled with clear guidelines and factors for the court to consider. The absence of a clear redistributive rationale, coupled with the unfettered discretion afforded to the courts in terms of section 29 unfortunately cannot be overlooked.

Considering the Scottish response to relationship termination, as facilitated by the FLSA, I conclude that Scotland is the closest out of the three jurisdictions in reaching an equilibrium on the continuum. However, it cannot be said that the initial aims of the FLSA have been met.

The South African approach can be described as departing firmly from the autonomy pole and moving to the protective side, as illustrated by the decisions of the Constitutional Court. This is largely a result of the constitutional commitment to ensuring substantive equality,[270] regardless of race, religion, sexual orientation, and culture. Although the approach demonstrates a commitment to ensuring formal protection, substantive protection remains an elusive goal, as issues with proof and

[269] Policy Memorandum for the Family Law (Scotland) Bill, para 65.
[270] *Daniels v Campbell* 2004 5 SA 331 (CC), para 22.

uncertainty remain primary concerns. The uncertainty associated to relying on the judiciary is justified by the contradictory judgments delivered by the CC in *Bwanya.* The majority of Madlanga J should be commended for acknowledging the balance that must be struck between the value of freedom, as enshrined in the Constitution, and the reality that "a woman may have to be content with what is in essence is the man's choice"[271]. However, the minority of former Chief Justice Mogoeng is disappointing as he reverts back to the objective choice model and holds that "women are in law equal to men"[272] as he is "unpersuaded that the notion of choice may be illusory"[273]. It is unfortunate that the South African legislature fails to acknowledge the variety of ways in which family formation can take place, especially considering the recognition that "the nuclear family has long not been the norm."[274] As such, I argue that South Africa is placed towards the protective side of the continuum, although the regime is merely a shell without any substance.

The efficient, no-nonsense French approach has been argued as creating "family law resolutions upon breakdown"[275] in a way that allows the parties to structure their affairs free from prescribed substantive requirements. Moreover, the clarity provided by the Code Civil has had the consequence of minimising legal disputes when it comes to relationship termination.[276] As elaborated on in previous sections, the PACS epitomises giving effect to the choice of the parties by affording legal recognition to their relationship, specifically if that choice is linked to the rejection of marriage as a union. The fact that the choice manifests not only through the conclusion of a contract, but through the additional act of registration further advances the essence of the autonomy argument – the law will not impose consequences on an intimate relationship, unless the parties expressly indicated that it is what they desire. However, as has been established, the notion choice is far more complex than what the argument reveals it to be.

I believe that the PACS system pushes France towards the furthest end of the autonomy side of the continuum, as evidenced by the position of the parties on

[271] *Bwanya v Master of the High Court, Cape Town* 2022 3 SA 250 (CC), para 63.
[272] 2022 3 SA 250 (CC), para 119.
[273] 2022 3 SA 250 (CC), para 126.
[274] *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA), para 31.
[275] El-mumin (n 36), 60.
[276] Cynthia Bowman, *Unmarried Couples, Law, and Public Policy* (Oxford University Press 2010), 214; El-mumin (n 36), 60.

relationship termination. The decision of the legislature to create a default system that favours a separation between the assets of the partners and negating to insert a maintenance obligation upon dissolution is illustrative of an attempt to foster a clean break for the parties when their relationships end, unless they agree otherwise. Moreover, the omission of any right afforded to a partner that would enable them to institute a claim against their deceased partner's estate shows that in the absence of the parties creating a will, the law will not intervene in the intimate orientations of their relationship.

However, despite the questionable appearance of this approach, I argue that it is sufficient to meet the needs of the recipients of the regime. French law has been characterised by a "strong notarial tradition",[277] so registration of the relationship would not be at odds with the state intrusion into the private sphere. French general population surveys are helpful to ascertain some of the characteristics present in parties who register their relationship. Generally, these parties have a higher education background,[278] a value-system fairly removed from religion and gendered stereotyping,[279] and a core reason for choosing the PACS is the preference for a liberal view of sexuality.[280] Moreover, individualism has considerable significance in France, which has been infiltrated into the how parties enter into and maintain relationships.[281]

5 Conclusion

Outside of the traditional sphere of formalising a relationship through marriage, the social phenomenon of cohabitation has become so prevalent that many jurisdictions have answered to calls in favour of recognising these relationships. Respecting party autonomy as a justification for the law's initial ignorance of these relationships has been juxtaposed by the law's obligation to intervene in favour of protecting vulnerable parties. This juxtaposition has been the focal point of this dissertation, as a

[277] Probert (n 24), 261.
[278] Emma Davie, 'Un million de pacsés début 2010' (Insee premiére 2011), 1336, 4p. Wilfried Rault and Muriel Letrait, 'Formes d'unions différentes, profils distincts ? Une comparaison des pacsé.e.s en couple de sexe différent et des marié.e.s" (2010) 1(3) *Sociologie*, 319-336.
[279] Wilfried Rault and Muriel Letrait, 'Diversité des formes d'union et "ordre sexué"', in Arnaud Régnier-Loilier (eds.), *Portraits de famille. L'enquête Étude des relations familiales et intergénérationnelles* (INED, Grandes 2009), 59-85; Wilfried Rault and Muriel Letrait, 'Choix du pacte civil de solidarité et rapport à la religion', (2009) 96 *Politiques sociales et familiales*, 41-54.
[280] Wilfried Rault, 'The intimate orientations of the first "PACS" couples in France' (2011) 66 *Population* 303, 305.
[281] Bénédicte Goussault, 'Le pacs et les représentations de la famille' (2000) *Espaces Temps*. 78, 87–88, translated by Terminal (n 133), 169.

jurisdiction's legal response to cohabitation tends to favour either autonomy or protection as a predominant consideration informing regulation. However, as I have argued, if the issue is viewed in isolation, regulation should ideally fall in the middle of the autonomy/protection continuum. This is because the reality and extent of choice of *both* of the parties in the relationship is a determinative factor in the success of the jurisdiction's regulatory approach. The equilibrium is achieved if there is sufficient attention given to relationships in two instances. Firstly, where parties actively choose to cohabit and the relationship is characterised by equality of bargaining power, shared responsibilities, and a commitment to contribute equally, irrespective of the nature of such contributions. In the second instance, choice is an empty notion, whether it is a result of asymmetry in the relationship, ignorance of the law or merely neglecting to consider the possibility of termination. Due to the heterogenous dimension of cohabitation relationships, a response to both these relationships are necessary.

This dissertation attempted to determine whether the relevant jurisdictions gave recognition to both types of relationships. In Part One, a broad overview was given of each jurisdiction's approach and considering the interaction with certainty and flexibility, with specific attention given to a system of registration, a legislative framework, reliance on judicial discretion and the use of contract law. Eligibility criteria was considered, as the employment of certain markers signals what a jurisdiction deems necessary to for an applicant to qualify for entry into the regime.

In Part Two, the areas of the law which are argued to either mitigate or exacerbate the position of the parties upon relationship termination were evaluated, considering financial remedies and intestate succession entitlements specifically. Regarding termination through dissolution, it is clear that Scotland aimed to achieve a balance between fostering a clean break from the relationship, whilst still acknowledging the gendered dimension of the law in the context of intimate relationships. In the absence of a legislative framework, South African law moulded Pothier's essentialia for universal partnerships into a relationship context to provide a financial remedy for a partner to claim their share of property. However, given the conceptual discrepancies between contract law and intimate relationships, this remedy is unsatisfactory. The clear default provisions in the French Code Civil demonstrates a preference for autonomy as it leaves much of the regulations up to the parties' choice. In the context of intestate succession, section 29 of the FLSA provided some recourse to a surviving

partner, but the unfettered judicial discretion, coupled with the absence of a clear redistributive rationale underpinning the section left much to be desired. The developments in South Africa, as facilitated by the Constitutional Court, showcased the commitment to recognising non-nuclear family forms, however the position still remains insufficiently clear. The absence of any provisions regarding intestate succession in France makes it evident that in the absence of actively creating a will, French law will not intervene. Consequently, in light of the continuum the following conclusion can be made: France finds itself at the autonomy end, Scotland drifts around the middle and South Africa attempts to ensure protection, albeit it a relatively futile one.

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