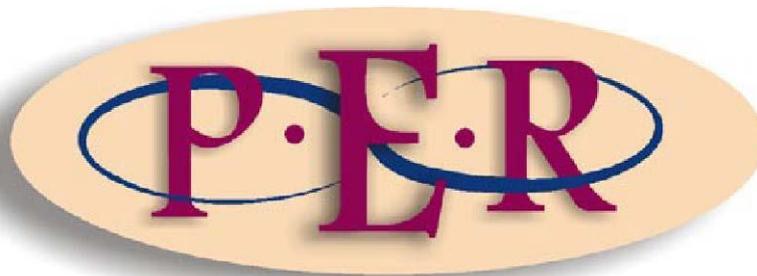


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CHAOS IN FAMILY LAW: A MODEL FOR THE RECOGNITION OF INTIMATE RELATIONSHIPS IN SOUTH AFRICA

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1 Introduction

What is chaos? The Oxford Dictionary¹ defines "chaos" as "complete disorder and confusion". There is however a further definition of "chaos" specifically in the realm of physics. The Royal Society² formally defined "chaos" in 1986 as "stochastic behaviour in a deterministic system". A system in chaos is therefore a system that, "although displaying apparently random behaviour, has an underlying pattern and lawfulness".³ Chaos Theory comes from the observation that a chaotic system appears to be in total disorder, but the theory is really concerned with finding the underlying order of the system.⁴

Chaotic systems are very sensitive and easily shift from an initially stable condition to a chaotic one.⁵ In a chaotic system long-term predictions are impossible due to the sensitivity of the initial conditions and the shifts from the ordered to the chaotic.⁶ A well-known example of a chaotic system in physics is that of a stream. At first a stream is a simple stable system but if the flow of water to the stream is increased it can change from the stable to the turbulent to the chaotic.⁷ When the flow of water reaches a chaotic state it is impossible to predict where a drop of water will be five metres downstream. It is, however, possible to predict its general direction of flow.⁸

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¹ Oxford University Press 2010 <http://www.bit.ly/14ygrWS>.

² Sterwart *Does God Play Dice?* 12.

³ Ayers 1997 *T&P* 375.

⁴ For a discussion of Chaos Theory see Gleick *Chaos: Making a New Science*.

⁵ Ayers 1997 *T&P* 376.

⁶ Ayers 1997 *T&P* 380; Reynolds 1991 *CLR* 111.

⁷ Ayers 1997 *T&P* 380; Reynolds 1991 *CLR* 111-112 uses the example of a dripping faucet.

⁸ Ayers 1997 *T&P* 380; Reynolds 1991 *CLR* 112.

Chaos originates from a disorder or complexity on a micro level which can develop into general trends on a macro level.⁹ The principle of the unpredictability of a chaotic system does not apply to general trends.¹⁰ Therefore, even in a chaotic system there are trends that can be predicted.¹¹ The level of analysis is important. At a macro level a very complex system can display simple behaviour.

You may ask how Chaos Theory relates to family law. It is true that Chaos Theory finds application mainly in physics and mathematics, although it has been extended to the social sciences and applied in psychology.¹² It is difficult to apply a quantitative theory on a qualitative level. I will, however, utilise the theory in a metaphorical manner to describe the current state of family law and more specifically law regulating intimate relationships in South Africa.¹³

The law regulating intimate relationships is also known as the "law of husband and wife" or "marriage law". I am of the opinion that these terms do not sufficiently describe the current reality in family law. More relationships than merely marriage are protected in law. A shift in social parameters occurred when South Africa moved away from a dominant minority culture which enforced its perspectives on society to a more tolerant society protecting the dignity and equality of all cultures and religions. Due to the tolerant nature of our society, more intimate relationships than marriage are regarded as worthy of protection in family law.

I will explain the current system of family law with regard to intimate relationships in South Africa. When discussing a system the level of focus is important. A system can be observed on a macro or micro level, with varying degrees in between. In a legal system, the macro system can be equated to official state recognised law. In a

⁹ Reynolds 1991 *CLR* 112; Knyazeva Date Unknown <http://www.bit.ly/13ZP45Q>. The study to determine order out of chaos is known as "synergetics".

¹⁰ Knyazeva Date Unknown <http://www.bit.ly/13ZP45Q>.

¹¹ Ayers 1997 *T&P* 380.

¹² Ayers 1997 *T&P* 380.

¹³ For chaos as a metaphor of law see Hayes 1991-1992 *UMKC LR* 765 and Scott 1993 *W&M* 331. This publication is an exploratory study into the application of chaos to the law of intimate relationships.

pluralistic system¹⁴ this level can be regarded as official or state-law pluralism.¹⁵ On a macro level we are merely concerned with legislation governing the current law of intimate relationships in general and legislative trends – that is the reaction of the state with regard to social demands. On a micro level the interaction between social, cultural and religious norms and state-law is investigated. In a pluralistic system this can be regarded as deep legal pluralism.¹⁶ The discussion will be on a macro level. My intention is to provide a bird's eye view of the law regulating intimate relationships rather than to investigate all the intricacies on a micro level. It happens regularly that we as academics are so involved in investigating a system on a micro level that we lose track of the trends developing on a macro level. Perceived random results or events on a micro level can generate particular general parameters or trends on a macro level.¹⁷

I will illustrate why I am of the opinion that the current system of law regulating intimate relationships is in a state of chaos. Thereafter changes on the macro level are proposed that might lead to a more stable system regulating intimate relationships over time.

2 Current state of the law of intimate relationships

Prior to the *Recognition of Customary Marriages Act* 120 of 1998, which came into operation on 15 November 2000, only one form of intimate relationship was recognised - the civil marriage. The family law system consisted merely of the

¹⁴ Although an analogy is made with reference to pluralism the chaos theory regards the theory of pluralism as too linear in its approach. Legal pluralists argue that one can find one or several causes which lead to particular legislation. They therefore regard the legislative process as a linear and relatively predictable process (Di Lorenzo 1994 *YLPR* 425-426). A detailed theoretical discussion of the chaos theory is beyond the scope of this publication, but see Gleick *Making a New Science*.

¹⁵ State-law pluralism is concerned with at least two legal systems that are recognised within one jurisdiction and run parallel to each other with limited interaction. For a discussion on the theoretical aspects of legal pluralism see Bakker 2004 *THRHR* 629; Van Niekerk "Legal Pluralism" 3-4.

¹⁶ Deep legal pluralism is concerned with the interaction between unofficial cultural or religious law and official or state law. In the South African context this would include the interaction between the common law and "living" customary law or religious laws such as Muslim and Hindu law. Bakker 2004 *THRHR* 629; Van Niekerk "Legal Pluralism" 4.

¹⁷ Di Lorenzo 1994 *YLPR* 431-432.

Marriage Act 25 of 1961 and ancillary Acts¹⁸ regulating one form of intimate relationship which on a macro level could be regarded as a stable system of marriage law. On a micro level (that is on a social, cultural and religious level) the system appeared more unstable due to the denial of the recognition of religious marriages concluded outside the *Marriage Act 25 of 1961* and the unwillingness to recognise indigenous marriages, same-sex marriage and domestic partnerships.¹⁹

The preamble of the *Constitution of the Republic of South Africa, 1996* acknowledges the diverse nature of the South African population and declares that we are "united in our diversity". The *Constitution* prohibits unfair discrimination on the grounds of gender, marital status, sexual orientation, religion and culture, amongst others.²⁰ The *Constitution* provides the state with the power to promulgate legislation recognising marriage in different religious, personal or family law systems as far as is compatible with the Bill of Rights.²¹ As a direct consequence of the prevailing social order and the *Constitution* a trend has developed to protect diversity within the South African law.²²

In protecting our diversity and recognising the plurality of our society, more and more legislation was generated to protect diverse intimate relationships. The first form of intimate relationship to be recognised after the shift in public policy was the customary marriage. Currently there are three forms of intimate relationships recognised by legislation in South Africa – the civil marriage, the customary marriage and the civil union. Piecemeal recognition has also been provided to religious marriages and domestic partnerships in legislation and by way of court decisions.²³

¹⁸ *Divorce Act 70 of 1979; Matrimonial Affairs Act 37 of 1953; Matrimonial Property Act 88 of 1984 and Mediation in Certain Divorce Matters Act 24 of 1987.*

¹⁹ After the promulgation of the *Interim Constitution of the Republic of South Africa 200 of 1993* the courts realised that one community cannot impose what it perceives to be correct on another community. The court had to impose a policy that is acceptable and representative of the community at large. In *Ryland v Edros* 1997 2 SA 960 (C) 707G the court found that an act is only *contra bonos mores* if it "is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it."

²⁰ Section 9(3)-(4) of the *Constitution of the Republic of South Africa, 1996.*

²¹ Section 15(3) of the *Constitution.*

²² *Daniels v Campbell* 2004 7 BCLR 735 (CC) [54].

²³ With regard to religious marriage see: ss 1, 2 and 7 of the *Estate Duty Act 45 of 1955*; s 10A of the *Civil Proceedings Evidence Act 25 of 1956*; s 195(2) of the *Criminal Procedure Act 51 of 1977*.

I will briefly discuss the different forms of recognised intimate relationships.

2.1 *The civil marriage*

The civil marriage is a monogamous marriage between parties of the opposite-sex concluded through a secular or religious ceremony.²⁴ The civil marriage is regulated by common law and by legislation. The common law definition of a civil marriage has, however, been declared unconstitutional by the Constitutional Court for the reason that it did not recognise same-sex marriage.²⁵ Even though the common law definition has been altered in the past,²⁶ the legislature did not amend the definition to include same-sex marriage under the *Marriage Act* 25 of 1961 but rather opted for an additional Act recognising same-sex marriage - the *Civil Union Act* 17 of 2006.

1977; *Births and Deaths Registration Act* 51 of 1992; *Domestic Violence Act* 116 of 1998; *Children's Act* 38 of 2005; *Ryland v Edros* 1997 2 SA 690 (C); *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA); *Daniels v Campbell* 2004 7 BCLR 735 (CC); *Khan v Khan* 2005 2 SA 272 (T); *Singh v Ramparsad* 2007 3 SA 445 (D); *Hassam v Jacobs* 2009 5 SA 572 (CC); *Govender v Ragavayah* 2009 3 SA 178 (D). With regard to heterosexual life partnerships see: s 21(13) of the *Insolvency Act* 24 of 1936; *Compensation for Occupational Injuries and Diseases Act* 130 of 1993. See further *Volks v Robinson* 2005 5 BCLR 446 (CC) where the court refused to extend legislation to include opposite-sex life partnerships if the Act did not expressly include such life partnerships. In *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA) the common law dependant's action was extended to include a partner in a hetero-sexual life partnership. With regard to same-sex life partnerships see: *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Farr v Mutual & Federal Insurance* 2000 3 SA 684 (C); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC); *J v Director General, Department of Home Affairs* 2003 5 BCLR 463 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA); *Gory v Kolver* 2007 4 SA 97 (CC). The following legislation is applicable to both opposite-sex and same-sex life partnerships: *Estate Duty Act* 45 of 1955; *Pension Funds Act* 24 of 1956; *Maintenance Act* 99 of 1998 (applicable if parties agreed upon a duty of support); *Domestic Violence Act* 116 of 1998.

²⁴ "Civil marriage" can be defined as a voluntary union between one man and one woman to the exclusion of others; see Heaton *South African Family Law* 15. The *Marriage Act* 25 of 1961 draws a distinction between "ex-officio marriage officers" and "ministers of religion and other persons attached to churches" (ss 2 and 3).

²⁵ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC).

²⁶ Sinclair assisted by Heaton *Law of Marriage* 307.

2.2 *The civil union*

A civil union is similar in nature to a civil marriage with the exception that partners of the same sex or opposite sex are allowed to marry under this Act. Partners are at liberty to choose to call their union a marriage or a civil partnership.²⁷ Regardless of what they call their relationship the consequences remain the same. The legal consequences of a civil union are identical to those of a civil marriage.²⁸

2.3 *The customary marriage*

A customary marriage is a monogamous or polygynous opposite-sex marriage concluded in terms of indigenous custom.²⁹ The *Recognition of Customary Marriages Act* 120 of 1998 forms the only exception to the strictly monogamous nature of a legally recognised South African marriage. A man can enter into a second or further customary marriage only after a matrimonial property contract regulating the patrimonial aspects of his future marriages is approved by the court.³⁰ The consequences of monogamous customary marriages entered into before the promulgation of the Act and all customary marriages concluded after the Act are similar to those of a civil marriage.³¹ The indigenous law consequences of customary marriage have been replaced with those of the civil marriage. The only true customary marriage that exists today is a polygynous customary marriage entered

²⁷ A civil union is described as "a voluntary union between two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in the Act, to the exclusion, while it lasts, of all others" (definition of "civil union" s 1 of the *Civil Union Act* 17 of 2006). The definition of a civil union is similar to that of a civil marriage with the exception that a civil union allows for parties of the same-sex to conclude a legally recognised intimate relationship.

²⁸ Section 13 of the *Civil Union Act* 17 of 2006.

²⁹ A "customary marriage" is defined in the *Recognition of Customary Marriages Act* 120 of 1998 as "...a marriage concluded in accordance with... the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people" (s 1 definitions of "customary marriage" and "customary law").

³⁰ Section 7(6) of the *Recognition of Customary Marriages Act* 120 of 1998. However, neglect to comply with s 7(6) does not affect the validity of the marriages – see *Ngwenyama v Mayelane* 2012 10 BCLR 1071 (SCA).

³¹ *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC).

into before the coming into operation of the Act.³² A customary marriage today is nothing more than a civil marriage that allows polygyny.³³ Similar to the *Marriage Act* 25 of 1961 which allows for religious custom but confers secular civil consequences upon the marriage, the *Recognition of Customary Marriages Act* 120 of 1998 allows for indigenous custom but confers secular civil consequences upon the customary marriage.³⁴

2.4 Religious marriage

Only religious marriages concluded in terms of the *Marriage Act* 25 of 1961 or the *Civil Union Act* 17 of 2006 are currently recognised. Ministers of religion and other persons attached to a church can apply to be designated as marriage officers and can officiate over religious marriages.³⁵ Religious marriages performed by a marriage officer, including Islamic and Hindu marriages, are, however, registered in terms of the *Marriage Act* 25 of 1961 or *Civil Union Act* 17 of 2006. Parties to a religious marriage who desire official recognition of their intimate relationship where the person officiating over the marriage is not a marriage officer need to conclude a further marriage under the *Marriage Act* 25 of 1961 or the *Civil Union Act* 17 of 2006. In both instances a dual marriage is created: one marriage with secular consequences that are recognised by the state and another that is recognised in the religious community.

³² Traditional customary law is applicable only to polygynous customary marriages. The *Gumede* decision is applicable only to monogamous customary marriages concluded prior to the coming into operation of the *Recognition of Customary Marriages Act* 120 of 1998.

³³ Bakker 2012 *THRHR* 155.

³⁴ The requirements for a valid customary marriage, listed in s 3 of the *Recognition of Customary Marriages Act* 120 of 1998, include that the customary marriage "must be negotiated and entered into or celebrated in accordance with customary law," but the patrimonial consequences of customary marriages and the consequences upon divorce are regulated by civil law and not customary law (ss 7 and 8 of the *Recognition of Customary Marriages Act* 120 of 1998).

³⁵ Under the *Marriage Act* 25 of 1961 a minister of religion or any person holding a responsible position in any religious denomination or organization can apply to be designated as a marriage officer. This is, however, not possible under the *Civil Union Act* 17 of 2006. Now only religious denominations or organisations can apply for permission to solemnise marriages and a minister or person attached to a religious denomination or organization cannot apply in his/her personal capacity (s 5).

The legislature has drafted the *Muslim Marriages Bill* which intends to recognise Muslim marriages.³⁶ If enacted, the Bill will codify the Islamic law principles of marriage. The Bill recognises polygynous marriages but limits such relationships to four and a man can marry a second or further wife only with the permission of the court.³⁷ The polygyny restriction clause in the *Muslim Marriages Bill* imposes a stricter requirement than the *Recognition of Customary Marriages Act* 120 of 1998 which requires the court merely to approve a contract to regulate future matrimonial property.³⁸

2.5 Domestic partnerships

Domestic partnerships are currently not formally recognised by legislation and can be protected only through other avenues of law such as contract, universal partnerships, estoppel and unjustified enrichment.³⁹ Prior to the promulgation of the *Civil Union Act* 17 of 2006 a number of cases conferred spousal benefits on same-sex life partners which are still applicable in law.⁴⁰ These rights were conferred on same-sex life partnerships for the reason that same-sex life partners were not in a position to enter into a marriage.⁴¹ Although same-sex marriage is now legally permissible since the enactment of the *Civil Union Act* 17 of 2006, same-sex life partners can still lay claim to these rights until the position is amended by the

³⁶ GN 37 in *GG* 33946 of 21 January 2011. The Bill is derived from the draft Bill proposed by the South African Law Reform Commission contained in Annexure A to *Project 59 Report on Islamic Marriages and Related Matters* (SALRC *Project 59*). With regard to the build-up to the Bill, which was a long and drawn-out process, and the mixed reaction the Bill received see Moosa *Unveiling the Mind* 145-158.

³⁷ Clause 8(6) of the *Muslim Marriages Bill*.

³⁸ Section 7(6) of the *Recognition of Customary Marriages Act* 120 of 1998.

³⁹ Heaton *South African Family Law* 244-247.

⁴⁰ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Farr v Mutual & Federal Insurance Co Ltd* 2000 3 SA 684 (C); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC); *Du Toit v Minister for Welfare and Population Development* 2003 2 SA 198 (CC); *J v Director General, Department of Home Affairs* 2003 5 BCLR 463 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA); *Gory v Kolver* 2007 4 SA 97 (CC).

⁴¹ *Gory v Kolver* 2007 4 SA 97 (CC) [19]. However, in *Volks v Robinson* 2005 5 BCLR 446 (CC) the court held with regard to opposite-sex life partnerships that the law may differentiate between married and unmarried persons and withhold spousal benefits from unmarried persons.

legislature.⁴² The result is that same-sex life partners have access to more spousal benefits than opposite-sex life partners.⁴³

A *Draft Domestic Partnerships Bill* proposing formal recognition of domestic partnerships has been published.⁴⁴ The Bill was the result of an investigation launched by the South African Law Reform Commission that accumulated into a report proposing the recognition of registered and unregistered domestic partnerships.⁴⁵ The proposal was at first incorporated into chapter 3 of the *Civil Union Bill* which resulted in the promulgation of the *Civil Union Act 17* of 2006.⁴⁶ However chapter 3 was removed by the Home Affairs Portfolio Committee and not included in the *Civil Union Act 17* of 2006. A separate bill, the draft *Domestic Partnerships Bill* was published for comments in 2008. The Bill has as yet not been amended or introduced into parliament.⁴⁷

3 Hierarchy of marriage

Complications arise from the intricate set of Acts regulating intimate relationships. The most obvious complication is that the average person does not know the legal consequences of his or her intimate relationship due to the complex system of rules applicable to intimate relationships.⁴⁸ A further consequence is the creation of a hierarchy of intimate relationships in South Africa.⁴⁹ This was not the intention of the legislature, which endeavoured to provide the same recognition to all intimate relationships, but is a practical consequence of regulating intimate relationships by different Acts. The hierarchy refers to a perception that certain intimate relationships

⁴² *Gory v Kolver* 2007 4 SA 97 (CC) [28]; Smith 2011 *SALJ* 561.

⁴³ See Heaton *South African Family Law* 253-254.

⁴⁴ GN 36 in GG 30663 of 14 January 2008.

⁴⁵ SALRC *Project 118*.

⁴⁶ GN 1275 in GG 29169 of 31 August 2006.

⁴⁷ Smith 2011 *SALJ* 563.

⁴⁸ The requirements laid down by the *Recognition of Customary Marriages Act 120* of 1998 are simply not followed. Section 7(6) of this Act requires that a man entering into a second or further customary marriage should approach the court for approval of a future matrimonial property contract. It seems that even the South African president has not complied with this section (Rabkin 2010 <http://www.bit.ly/14Zc7gf>).

⁴⁹ Bakker 2009 *JJS* 29.

are preferred above others in the social order and therefore enjoy more protection in the community and/or law.

The co-existence of the *Marriage Act* 25 of 1961 and the *Civil Union Act* 17 of 2006 is problematic. After the Constitutional Court declared the common law definition of marriage unconstitutional the legislature opted to draft a separate Act rather than to incorporate same-sex marriages into the *Marriage Act* 25 of 1961.⁵⁰ Not accommodating same-sex marriage in the common law definition of marriage creates the impression that a civil marriage is still the preferred form of intimate relationship. The *Civil Union Act* 17 of 2006 is, however, not limited to same-sex relationships and also allows for opposite-sex civil unions.⁵¹ A civil union is recorded in a register separate from that of a civil marriage.⁵² Minors are not allowed to contract a civil union in accordance with the *Civil Union Act* 17 of 2006, whereas it is possible for a minor, acting with the necessary assistance, to conclude a civil marriage under the *Marriage Act* 25 of 1961.⁵³ A bureaucratic differentiation between the two forms of intimate relationships exists. Stricter requirements are set for the conclusion of a civil union although the consequences are the same.⁵⁴

The *Civil Union Act* 17 of 2006 further provides a choice between a marriage or a civil partnership.⁵⁵ Although there is no legal differentiation between the two forms of civil unions there is a sociological differentiation.⁵⁶ If parties enter into a marriage they will call their intimate relationship a "marriage" and the parties to the civil union will be known as "spouses". If parties enter into a civil partnership they will call their intimate relationship a "civil partnership" and the parties to the civil union will be known as "civil partners". The different terms have specific established sociological connotations. A partnership has always been regarded as being of less importance

⁵⁰ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC).

⁵¹ Sections 1 and 8(6) of the *Civil Union Act* 17 of 2006.

⁵² Section 12 of the *Civil Union Act* 17 of 2006.

⁵³ Definition of "civil union" in s 1 of the *Civil Union Act* 17 of 2006. Minors are allowed to conclude customary marriages under the *Recognition of Customary Marriages Act* 120 of 1998.

⁵⁴ In terms of s 13 of the *Civil Union Act* 17 of 2006 the legal consequences of a marriage in accordance with the *Marriage Act* 25 of 1961 are applicable to civil unions.

⁵⁵ Section 11(1) of the *Civil Union Act* 17 of 2006.

⁵⁶ Bakker 2009 *JJS* 34-35.

than a marriage. We refer to "life partnerships" where parties are not formally married and the terminology conveys the same message - that the parties are in something less than a marriage, although this is not true from a legal perspective.⁵⁷

Although the *Civil Union Act 17* of 2006 provides a choice of whether the parties want to call their union a "marriage" or a "civil partnership"; the title of the Act does not contain the word "marriage" but rather "union". The term "union" is customarily used in South African family law to refer to a relationship that is less than a marriage. Prior to the recognition of customary marriages these intimate relationships were referred to as "customary unions" to indicate that the relationship did not have the same recognition as that of a civil marriage.⁵⁸ The "marriage" in the *Civil Union Act 17* of 2006 is grouped with a "civil partnership" and is therefore less than a civil marriage by association.⁵⁹

Ex officio marriage officers appointed in terms of the *Marriage Act 25* of 1961 can officiate over a marriage in terms of the *Civil Union Act 17* of 2006.⁶⁰ Such a marriage officer can object on grounds of conscience, religion and belief to conclude a civil union between persons of the same-sex.⁶¹ They cannot, however, object with regard to opposite-sex civil unions and civil marriages. This creates the impression that a same-sex civil union is more objectionable than an opposite-sex civil union or

⁵⁷ However, see Bilchitz and Judge 2007 *SAJHR* 484-485, who argue that space is created to form different social forms of intimate relationships under the label "civil partnership" as the parties may enter into an intimate relationship with consequences similar to those of a marriage, but which do not carry the same socially loaded meaning as marriage. A space is therefore created for the development of a new social definition of "civil partnership".

⁵⁸ Section 35 of the *Black Administration Act 38* of 1972 defines a "customary union" as "the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage". From the definition it is clear that a "customary union" is not regarded as a marriage but merely as a "conjugal relationship". The definition has not been repealed and is still applicable within the context of the Act. S 57(1) of the *Natal Code of Bantu Law* (Proc R195 in GG 1840 of 8 September 1967) defined "customary union" as "a civil contract entered into by and between the intending partners, subject to the essential requirements of this Code, and endures until the death of the first dying unless earlier dissolved by a competent court of law". The *Natal Code of Bantu Law* was replaced with *the Natal Code of Zulu Law* (Proc R151 in GG 10966 of 9 October 1987) whereby "customary union" was replaced by "customary marriage" (s 36(1)) although the description of "customary marriage" remained the same as the description of "customary union" in s 57(1) of the *Natal Code of Bantu Law*.

⁵⁹ Section 11 of the *Civil Union Act 17* of 2006.

⁶⁰ Definition of "marriage officer" in s 1 of the *Civil Union Act 17* of 2006.

⁶¹ Section 6 of the *Civil Union Act 17* of 2006.

a civil marriage.⁶² A same-sex civil union therefore does not have the same status as an opposite-sex civil union.

From the above it is clear that a hierarchy exists among the different forms of intimate relationships regulated by the *Marriage Act* 25 of 1961 and the *Civil Union Act* 17 of 2006. The civil marriage is regarded as the more important intimate relationship and more worthy of protection, whereafter the civil union follows. A "marriage" under the *Civil Union Act* 17 of 2006 is also regarded as carrying more status than a "civil partnership". This differentiation might, however, be favourable for parties who want the consequences of a marriage but do not want to be associated with the traditional concept of marriage, perhaps because they think this confines the parties to traditional sexist roles in their relationship.⁶³

Even though the *Recognition of Customary Marriages Act* 120 of 1998 recognises the customary marriage as a valid marriage, the Act provides for a monogamous customary marriage to be converted into a civil marriage.⁶⁴ A civil marriage can, however, not be converted into a customary marriage. This conveys the message that civil marriage is still preferred to customary marriage. This perception is not merely an academic construction. My view can be illustrated by the facts of *K v P*.⁶⁵ The parties were married according to customary law although their marriage was invalid due to an existing civil marriage of the man of which the customary "wife" had no knowledge. The defendant promised to marry his customary "wife" in a civil marriage. After the defendant realised his "wife" was HIV positive he declared that she was not worthy of concluding a civil marriage with him. In the defendant's social reality a civil marriage had a higher status than a traditional customary marriage, even though both forms of marriage enjoy equal protection before the law.⁶⁶

⁶² Bilchitz and Judge 2007 *SAJHR* 490-491; De Vos 2007 *SAJHR* 462; Bakker 2009 *JJS* 31.

⁶³ Bilchitz and Judge 2007 *SAJHR* 484-485.

⁶⁴ Section 10 of the *Recognition of Customary Marriages Act* 120 of 1998.

⁶⁵ *K v P* [2010] ZAGPJHC 93 (15 October 2010).

⁶⁶ See Bakker 2012 *THRHR* 151-160.

From the above it can be concluded that a hierarchy of intimate relationships exists.⁶⁷ The civil marriage is at the apex of the hierarchy. The civil union follows. An opposite-sex civil union is, however, more acceptable than a same-sex civil union. Somewhere between the civil marriage and the civil union the customary marriage has a form of quasi existence. Certain consequences of life partnerships are recognised similar to those of marriages and this will therefore be the lowest form of legally recognised relationship.⁶⁸ This currently includes religious marriages not concluded in terms of the *Marriage Act* 25 of 1961 or the *Civil Union Act* 17 of 2006.

4 Possible regulation of intimate relationships

As is evident from the above, the regulation of intimate relationships in a multicultural society is problematic. In reaction to protecting diversity and intimate relationships within the ambit of the *Constitution* it is apparent that the legislature opted for a model in which different intimate relationships are regulated under different Acts. The original intention was to create equal parallel recognition of intimate relationships. The consequence is a myriad of problems associated with inconsistent legal drafting, oversights and complexity. This is the natural reaction of a system in chaos. When a calculation is repeated in a chaotic system the result will not be the same due to its dependence on the initial conditions.⁶⁹ The result is dependent on time and space.⁷⁰ The simple solution to diversity, the recognition of diverse intimate relationships through parallel legislation, created a feedback loop⁷¹ which generated a more unstable system than the initial unstable system in which the legal system recognised only civil marriages and denied diversity. The process of a system feeding back into itself can be illustrated with the promulgation of the *Recognition of Customary Marriages Act* 120 of 1998. Initially the intention was for the Act to recognise African customary marriages. However, a while after the

⁶⁷ For more comprehensive arguments with regard to the existence of a hierarchy of intimate relationships see Bakker 2009 *JJS* 42-45.

⁶⁸ Heaton *South African Family Law* 247-252.

⁶⁹ Ayers 1997 *T&P* 380; Reynolds 1991 *CLR* 111.

⁷⁰ Di Lorenzo 1994 *YLPR* 428.

⁷¹ A "feedback loop" is created when the result of an equation is re-entered into the same equation. In a chaotic system this will create a random answer within certain parameters, so-called "strange attractors" (Di Lorenzo 1994 *YLPR* 431-432).

customary marriage was recognised the constitutionality of certain sections of the Act was challenged. Section 7(1) of the *Recognition of Customary Marriages Act* 120 of 1998 determined that the patrimonial consequences of a customary marriage entered into before the coming into operation of the Act was determined by customary law. In *Gumede v President of the Republic of South Africa*⁷² the court declared section 7(1) unconstitutional and invalid as far as it related to monogamous customary marriages and applied section 7(2) to monogamous customary marriages entered into prior to the Act by declaring the wording "entered into after the commencement of this Act" unconstitutional. However, the court indicated that it had a wide discretion in regard to the redistribution of property regardless of when the customary marriage was concluded or what the matrimonial property system of the customary marriage was.⁷³ This application in turn provided spouses in customary marriages with greater protection than their counterparts in civil marriages and civil unions.⁷⁴ The judicial discretion to redistribute is extremely limited with regard to civil marriages and nonexistent in civil unions.⁷⁵ This in turn might lead to the extension of the discretion of the court with regard to the redistribution of assets in civil marriages and the application thereof to civil unions if challenged,⁷⁶ which was definitely not intended by the legislature when the process of the recognition of customary marriages was started. Such a development will, however, conform with the trend of protecting the rights of vulnerable parties within intimate relationships.

The chaotic situation of the law regulating intimate relationships was created by the legislature. The Acts merely transferred the complex and often chaotic nature of a multi-cultural society on a micro level to the macro level, which in turn feeds back

⁷² *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC).

⁷³ *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) [44].

⁷⁴ Heaton *South African Family Law* 136.

⁷⁵ Section 7(3)–(6) of the *Divorce Act* 70 of 1979 empowers the court to make a redistribution order. Such an order can be made only if the parties are married with complete separation of property and were married prior to the commencement of the *Matrimonial Property Act* 88 of 1984 or the *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988. Although the *Divorce Act* 70 of 1979 applies to civil unions, the *Civil Union Act* 17 of 2006 was promulgated after the commencement of the aforementioned Acts and redistribution is therefore not possible (Heaton *South African Family Law* 201).

⁷⁶ Heaton *South African Family Law* 136-137.

into the micro system, creating further instability or unpredictability. The state reacts to change at a micro level by merely transferring it to a macro level. Where the need arises for the recognition of intimate relationships, the legislature merely creates a new Act to accommodate those relationships. To create a more stable system on a macro level the legislature should encapsulate the general predictable trends between the different cultures and religions in legislation within the constitutional framework. The most apparent trend with regard to intimate relationships is the need to recognise the autonomy of persons to choose the nature of their intimate relationships and to determine the consequences thereof.⁷⁷

Intimate relationship legislation needs to be re-evaluated. The current regulation of intimate relationships is unsatisfactory. There are too many Acts with different procedures, a situation which creates legal uncertainty. It is further unacceptable to have a hierarchy of intimate relationships with the civil marriage as the most acceptable form of intimate relationship. A hierarchy of intimate relationships does not recognise diversity but rather weighs relationships against Christian and Western norms. Such a yardstick is not acceptable in a society based on human dignity, equality and freedom. An interesting phenomenon is that in most international human rights instruments it is not marriage as an institution that is protected but rather the family as the basic unit of society.⁷⁸ The legislature should move away from the common law concept of marriage as the norm. The ideal solution would therefore not be to determine what can be done to protect the institution of marriage but rather what would best protect the family unit.⁷⁹

What are the alternatives? Can we simply deregulate marriage and allow individuals to regulate their own intimate relationships by contract, or should the state be involved in the regulation of intimate relationships?

⁷⁷ This is apparent from the number of case law in this regard. See para 2 of this contribution.

⁷⁸ Article 18 of the *African Charter on Human and People's Rights* (1981); a 10 of the *International Covenant on Economic, Social and Cultural Rights* (1966); a 23 of the *International Covenant on Civil and Political Rights* (1966).

⁷⁹ Australia has moved away from determining the consequences of a relationship based on the ceremony of marriage but rather looks at a relationship of interdependence between the parties. Parties can enter into a binding financial agreement before, after or during separation to opt out of the prescribed financial consequences (see Witzleb 2011 *IJLPF* 143).

5 Intimate relationships and contract

At first glance the most pragmatic option would seem to be to get rid of the current system in its entirety. Deregulate all intimate relationships, remove state involvement and leave the regulation of intimate relationships to individuals in their private sphere.

In South Africa the consequences of marriage are currently determined both by status and by contract.⁸⁰ There is a difference between the variable consequences negotiated individually and the invariable consequences determined by the state. The economic consequences of intimate relationships are increasingly regulated by contract.⁸¹ There is a trend in South Africa to provide parties with larger autonomy to determine the consequences of their relationship.⁸²

Parties in a civil marriage, customary marriage or civil union are allowed to conclude an antenuptial contract to regulate the variable consequences of their marriage. They are free to contract anything in relation to their relationship provided it is not illegal, immoral, impossible or contrary to the nature of marriage.⁸³ In practice the antenuptial contract is, however, usually used only to determine the matrimonial property system of the parties.⁸⁴

It is accepted practice for divorcing parties to enter into a settlement agreement upon divorce. They are free to contract the consequences of their divorce in such an

⁸⁰ Consequences based on status are determined by the state and are applicable to all intimate relationships, whereas consequences based on contract are individually negotiated by the parties to an intimate relationship (Bonhuys 2004 *SALJ* 880).

⁸¹ Bonhuys 2004 *SALJ* 889.

⁸² Bonhuys 2004 *SALJ* 880. Bonhuys argues that family law rules should be based on status or universal human rights norms rather than contract. She argues that the current contract law cannot deliver justice in intimate relationships.

⁸³ Heaton *South African Family Law* 88; *Ex parte Wismer* 1950 2 SA 195 (C).

⁸⁴ Sinclair "Marriage" 195. Antenuptial contracts are binding between the parties even if they are not in writing. The contract can, however, be enforced against third parties only if the contract is attested by a notary and registered in the deeds registry within three months date of marriage (s 87(7) of the *Deeds Registration Act* 47 of 1937). It is interesting to note that even though such strict requirements are set to protect third parties, spouses may, as stated in the main text above, disregard their antenuptial contracts when concluding settlement agreements upon divorce.

agreement.⁸⁵ Any provision can be included in the settlement agreement if it is not illegal, *contra bonos mores* or impossible. The parties may even disregard their antenuptial contract when concluding a settlement agreement at divorce. Parties do however not have full autonomy with regard to settlement agreements. The courts do not have to endorse a settlement agreement but have a discretion to make an order in accordance with a settlement agreement.⁸⁶ Children are protected by the *Divorce Act 70* of 1979 and the *Children's Act 38* of 2005 and an order of court should be made in the best interests of the child.⁸⁷

Islamic marriages not concluded in terms of the *Marriage Act 25* of 1961 are currently regulated purely by contract.⁸⁸ At first the Islamic marriage contract (*nikah*) was not enforceable due to the potentially polygynous nature of such a marriage.⁸⁹ After the decisions in *Ryland v Edros*⁹⁰ and *Hassam v Jacobs*⁹¹ it is highly unlikely that courts will not enforce such a contract.⁹²

Contractual regulation of intimate relationships is not unfamiliar in our law. Writers arguing for the regulation of intimate relationships by contract regard a contractual approach to intimate relationships as beneficial, as such an approach honours party

⁸⁵ Section 7(1) of the *Divorce Act 70* of 1979.

⁸⁶ *Rowe v Rowe* 1997 4 SA 160 (SCA). The court can approve only part of the agreement (Heaton *South African Family Law* 123).

⁸⁷ Section 6(1)(a) of the *Divorce Act 70* of 1979. The family advocate assists in determining if orders will be in favour of the children. Although the *Mediation in Certain Divorce Matters Act 24* of 1987 does not provide for mediation by family advocates it seems that mediation is encouraged where the courts deal with children. In *Kotze v Kotze* 2003 3 SA 628 (T) the parties had agreed in their settlement agreement that the child would belong to a particular faith and participate in all of the church's activities. The court found that such a clause would infringe upon the child's right to freedom of religion.

⁸⁸ Islamic marriages are based on contract rather than sacrament (*Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA) para 14; *Ryland v Edros* 1997 2 SA 960 (C) 698I-J).

⁸⁹ *Ismail v Ismail* 1983 1 SA 1006 (A).

⁹⁰ *Ryland v Edros* 1997 2 SA 690 (C).

⁹¹ *Hassam v Jacobs* 2009 5 SA 572 (CC).

⁹² In *Ryland v Edros* 1997 2 SA 960 (C) an Islamic marriage contract was enforced where the parties were married in a monogamous Muslim marriage. The decision was a Cape Provincial decision (now the Western Cape High Court). It is, however, improbable that other courts would not enforce such a contract. In the light of *Hassam v Jacobs*, where the Constitutional Court found the exclusion of polygynous spouses from the *Intestate Succession Act 81* of 1987 unconstitutional, it is doubtful that courts would not enforce a marriage contract based on the principle that the marriage is *de facto* polygynous. The *Children's Act 38* of 2005 is also applicable to religious marriages and will limit the parties' autonomy to contract.

autonomy and creates finality and legal certainty in family matters.⁹³ Those opposed thereto criticise a contractual approach for upholding unfair contracts rather than risking future uncertainty and conflict.⁹⁴ The argument is based on the premise that parties are never truly equals in an intimate relationship. One party is usually financially or emotionally weaker than the other or under religious or cultural pressure.⁹⁵ In this sense one party will always influence the other and there will never be equal bargaining power between the parties.

Further criticism in regulating intimate relationships by contract is that the parties do not foresee the termination of their relationship, not merely due to optimism that the relationship will not end, but due to there being too many unforeseeable contingencies in a long-term relationship that can change the dynamics between the parties.⁹⁶ If termination is indeed considered, the parties usually think the other party will act honourably, and therefore do not include protection in the agreement should the relationship be terminated.⁹⁷

Contractual freedom is important to provide parties with autonomy with regard to the regulation of their personal lives according to their culture, religion and belief. The right to freedom of conscience, religion and belief⁹⁸ can be honoured only by providing autonomy in decisions regarding intimate relationships. However the right to equality and dignity and the promotion of the best interest of the child necessitate state interference in certain circumstance to honour the rights of vulnerable parties. Even though contract law promotes the freedom to contract by the individual in intimate relationships, there remains a public interest with regard to the best interest

⁹³ See Bonthuys 2004 *SALJ* 895 for a discussion of the arguments for the regulation of intimate relationships by contract.

⁹⁴ Heaton 2005 *SAJHR* 556; Bonthuys 2004 *SALJ* 895; Sinclair assisted by Heaton *Law of Marriage* 145-146.

⁹⁵ The system a person marries under is usually determined by the community he or she lives in rather than by a conscious choice between different intimate relationships (*Daniels v Campbell* 2003 9 BCLR 969 (C) 991D-E).

⁹⁶ Heaton 2005 *SAJHR* 554.

⁹⁷ Heaton 2005 *SAJHR* 554; Bonthuys 2004 *SALJ* 895. The object of a family contract is different from that of a commercial contract where the parties merely want to make a profit. Due to the particular relationships between the parties in a family, good faith and trust play a larger role than in commercial contracts (see Bonthuys 2004 *SALJ* 895).

⁹⁸ Section 15 of the *Constitution of the Republic of South Africa*, 1996.

of the children and the maintenance of indigent family members.⁹⁹ Therefore it is of the utmost importance that the courts are still involved in the termination of intimate relationships, even in systems where the parties can determine the consequences of termination by settlement agreement.¹⁰⁰ Although intimate relationship contracts are commonly used, intimate relationships cannot be regulated purely by contract. The Constitution dictates that there should be state involvement in issues regarding the rights of the child and the promotion of equality. The regulation of intimate relationships only by contract can therefore not be used as a model to simplify the law of intimate relationships. Mere deregulation does not pose a possible solution to the current system. A balance between status and contract is required.

Another option for creating a more stable system regulating intimate relationships is to reduce the existing legislation that regulates such relationships.

6 An alternative model for the recognition of intimate relationships

The *Draft Domestic Partnerships Bill* is of particular interest in this regard.¹⁰¹ The Draft Bill proposes a more informal form of intimate relationship – the domestic partnership. A domestic partnership can be unregistered or registered.¹⁰² The difference between the two forms of domestic partnerships are that certain consequences similar to marriage will be conferred on the parties either automatically – in the instance of a registered domestic partnership¹⁰³ - or by court order on application by one of the parties upon the termination of the relationship in the instance of unregistered domestic partnerships.¹⁰⁴

A registered domestic partnership will give rise to certain invariable consequences similar to those of a marriage. The partners will owe each other a duty of support in accordance with their respective financial means and needs, both partners will have

⁹⁹ Bonthuys 2004 *SALJ* 897.

¹⁰⁰ Bonthuys 2004 *SALJ* 897.

¹⁰¹ GN 36 in GG 30663 of 14 January 2008.

¹⁰² Definition of "domestic partnership" in clause 1 of the *Draft Domestic Partnership Bill*.

¹⁰³ Clauses 9, 10 and 11 of the *Draft Domestic Partnership Bill*.

¹⁰⁴ Clause 26 of the *Draft Domestic Partnership Bill*.

a right to occupy the family home, and there will be limitations on the disposal of joint property.¹⁰⁵ However, domestic partners will not be held jointly liable for debts incurred by one of the domestic partners for the purchase of household necessities.¹⁰⁶ Although the default property regime will be out of community of property and the parties will be able to contract to live in community of property, the *Matrimonial Property Act 88 of 1984* will not be applicable to domestic partnerships. This is a serious shortcoming in the Draft Bill.¹⁰⁷ Where spouses in a civil marriage, civil union or customary marriage have automatic protection under the *Matrimonial Property Act 88 of 1984*, domestic partners will need to contract to receive similar protection. There is no reason why the capacity to incur debts for household necessities cannot be extended to domestic partners.

Should the Draft Bill be promulgated as an Act, the consequences of a registered domestic partnership will correspond largely with those of a marriage. Such a position is not unheard of. The Dutch registered domestic partnership has the same consequences as marriage.¹⁰⁸

The *Draft Domestic Partnerships Bill* provides for contractual regulation of the financial consequences of domestic partnerships. Parties to a registered domestic partnership can conclude a domestic partnership agreement regulating their partnership.¹⁰⁹ A domestic partnership agreement will have the same validity against

¹⁰⁵ Clauses 9-11 of the *Draft Domestic Partnership Bill*. Further to the above the presumption of paternity will exist where the parties are of opposite sex (clause 17), parties will inherit intestate from each other, the surviving partner will be able to claim maintenance from the deceased estate, and the parties will be regarded as married spouses with regard to delictual liability (clauses 19-21). In accordance with the *Children's Act 38 of 2005* the father obtains parental rights and responsibilities automatically in an opposite-sex relationship if the parties live together at the children's conception or birth. The invariable consequences will therefore be similar to those of spouses.

¹⁰⁶ The capacity is based on a common law principle but is currently regulated by sections 17(5) and 23 of the *Matrimonial Property Act 88 of 1984*. The requirements for such a capacity are a valid marriage and joint household (*Excell v Douglas* 1924 CPD 472). However, the other spouse can be estopped or held responsible by implied agency (Sinclair assisted by Heaton *Law of Marriage* 447).

¹⁰⁷ Smith 2010 *PER* 280.

¹⁰⁸ Section 80b *Burgerlijke Wetboek Boek 1*.

¹⁰⁹ Clause 8 of the *Draft Domestic Partnership Bill*. Although registered domestic partnership agreements are subject to the normal principles of contract law, the courts have a discretion not

third parties on registration as an antenuptial contract, even though it will not have to be attested by a notary or registered in the deeds registry.¹¹⁰

Domestic partnerships can be terminated by agreement.¹¹¹ A marriage or civil union on the other hand can be dissolved only by court order.¹¹² Registered domestic partners will be able to register a termination agreement to regulate the financial consequences of the termination of their intimate relationship.¹¹³ A court order is required to terminate a registered domestic partnership where children are involved.¹¹⁴ The procedure enables the court to determine if the parties had regard to the best interests of the child. A wide discretion is afforded to the court in proceedings regarding the division of property. The court will be able to deviate from the domestic partnership agreement if such an agreement will cause serious injustice.¹¹⁵ The domestic partner in a weaker bargaining position will be in a far better position than a civil marriage spouse or civil union spouse or civil partner in the same situation, as the courts tend to hold spouses to their antenuptial agreements in the absence of settlement agreements. The question of whether or not the contract might lead to injustice is irrelevant.¹¹⁶

A registered domestic partner can apply for a maintenance order after termination of the domestic partnership.¹¹⁷ Such an application will be possible even if no provision was made for maintenance upon termination of the domestic partnership.¹¹⁸ The domestic partner will once again be in a better position after termination of the partnership than a married person after divorce: In a marriage the duty of support

to enforce the agreement if the domestic partnership agreement will cause serious injustice (clause 8(2)).

¹¹⁰ Clause 7 of the *Draft Domestic Partnership Bill*.

¹¹¹ Clause 12(1) of the *Draft Domestic Partnership Bill*.

¹¹² Section 3 of the *Divorce Act 70* of 1979.

¹¹³ Clause 14 of the *Draft Domestic Partnership Bill*.

¹¹⁴ Clause 15 of the *Draft Domestic Partnership Bill*. The court can grant a termination order only if the best interests of the children have been duly met (clause 16). The court can appoint a family advocate to investigate the situation in terms of the *Mediation in Certain Divorce Matters Act 24* of 1987. The court may make any order it deems fit with regard to the best interest of minor children.

¹¹⁵ Clause 8 of the *Draft Domestic Partnership Bill*.

¹¹⁶ Heaton 2005 *SAJHR* 553-557.

¹¹⁷ Clause 18 of the *Draft Domestic Partnership Bill*.

¹¹⁸ Clause 18(1) of the *Draft Domestic Partnership Bill*.

terminates upon divorce and the court cannot award maintenance to a former spouse after the marriage has been terminated by divorce. A new duty of support can be created only through a settlement agreement or a maintenance order upon divorce.¹¹⁹

Where there is a dispute regarding the division of joint or separate property after termination of a registered domestic partnership, one or both parties will be able to approach the court for an order that is just and equitable.¹²⁰ The division of property will not be limited to the division at the time of termination, but the parties will be able to approach the court within a two-year period after termination.¹²¹ The court will be empowered to make any order it deems just and equitable.¹²²

The redistribution of assets will be possible. Separate property can be transferred to the partner who made a direct or indirect contribution to the maintenance or increase of the separate property of the other partner.¹²³ The redistribution clause provides a wide discretion to the court. Redistribution can be ordered regardless of the parties' property regime. Redistribution is currently not available to parties in civil unions and is very limited in the case of civil marriages.¹²⁴ Redistribution is nevertheless possible in customary marriages regardless of the matrimonial property regime.¹²⁵

Third parties will be protected under the Draft Bill. A court will be able to make any order to protect interests of third parties or parties with vested rights in property.¹²⁶

¹¹⁹ Sections 7(1) and 7(2) of the *Divorce Act* 70 of 1979.

¹²⁰ Clause 22 of the *Draft Domestic Partnership Bill*.

¹²¹ Clause 23 of the *Draft Domestic Partnership Bill*. The court may grant leave to apply after 2 years if it is convinced that greater hardship will be caused if leave is not granted.

¹²² Clause 22(2) of the *Draft Domestic Partnership Bill*.

¹²³ Clause 22(3) and (5) of the *Draft Domestic Partnership Bill*.

¹²⁴ See para 4 of this contribution.

¹²⁵ Section 8(4)(a) of the *Recognition of Customary Marriages Act* 120 of 1998 empowers the court to make a redistribution. In the wake of *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) [44], redistribution is applicable to all customary marriages regardless of when the marriage was concluded or what the matrimonial property regime is. S 8(4)(b) further empowers the court to make "any equitable order it deems just" upon the dissolution of a polygynous customary marriage. The court therefore has a wide discretion in making an order upon divorce.

¹²⁶ Clause 24 of the *Draft Domestic Partnership Bill*.

On termination, notice will have to be provided to interested parties by the domestic partners or the executor of the estate.¹²⁷

The second form of intimate relationship that will be recognised under the Draft Bill is the unregistered domestic partnership. Such a relationship will be formed informally and dissolved by the separation of the parties. No consequences of marriage will automatically be granted or recognised in such a relationship. The party who after dissolution of the unregistered partnership through separation or death feels that he or she is entitled to maintenance, the division of property, or inheritance from the deceased partner's intestate estate will need to approach the court for an order in this regard.¹²⁸ The court will have to determine every case with regard to the facts.¹²⁹

The Draft Bill therefore provides for two different forms of intimate relationships: one where the parties make a conscious effort to register and obtain consequences similar to those of marriage and another that has no such consequences but where an aggrieved party can apply *ex post facto* for such consequences, which will be granted only if the facts clearly dictate that it is proper in the circumstances and if any additional relief-specific conditions imposed by the Bill are complied with. The choice between registered and unregistered domestic partnerships complies with the approach that the consequences of marriage should not be imposed on domestic partners as they should be provided with the freedom to choose the consequences of their relationship without the state's imposing consequences. An option to approach the court will, however, protect the vulnerable party in the relationship, who might have wanted such consequences but was denied them due to the other partner's stronger bargaining position. Although the freedom of choice of the dominant partner will be denied in such an instance, this is sometimes required to provide for substantive equality. Consequences similar to those of marriage will, however, be granted only if the surrounding circumstances dictate this.

¹²⁷ Clause 24 of the *Draft Domestic Partnership Bill*.

¹²⁸ Clause 28(1) of the *Draft Domestic Partnership Bill*.

¹²⁹ Clause 26(2) of the *Draft Domestic Partnership Bill*.

What is interesting about the registered domestic partnership is that the consequences are similar to those of a marriage, although the conclusion and termination of such a partnership are less formal than those of a marriage. The parties will be in a better position after termination, as an interested party will be able to apply for post-divorce maintenance and the division of assets. The court's power to redistribute of assets will not be as limited as in the case of a civil marriage. The parties will in fact be in a better position than their counterparts in marriage. The importance of the Draft Bill is that it proposes a simplified process of regulating the consequences of an intimate relationship and the termination of such a relationship, while still safeguarding the interests of third parties, children and vulnerable parties in domestic partnerships. The Draft Bill will even provide relief after the termination of the relationship.

7 Recommendation

There is no reason why different Acts should regulate different intimate relationships if the consequences are the same. The *Draft Domestic Partnerships Bill* provides a good starting point to regulate all intimate relationships. The ideal would be to have one secular Act regulating all forms of intimate relationships. There should be only two forms of intimate relationships: registered and unregistered. A registered intimate relationship should be created by mere registration. When registering intimate relationships the parties can select what they prefer to call their relationship – a marriage, union, partnership or any other name. Such a registered partnership can be concluded between opposite-sex or same-sex parties. Although the *Draft Domestic Partnerships Bill* does not provide for polygynous registered domestic partnerships, provision should be made for polygyny where the parties' religion or custom allows polygyny.¹³⁰ Such an Act will therefore provide for customary marriages and religious marriages that allow polygyny. The unregistered intimate

¹³⁰ It is noteworthy that although clauses 4(1) and 4(2) of the *Draft Domestic Partnership Bill* require that registered domestic partnerships be monogamous, this is not required of unregistered domestic partnerships. The court can, in making an order with regard to the consequences of an unregistered domestic partnership, have regard to other existing unregistered domestic partnerships and customary marriages of the domestic partners (clause 28(2)(h)).

relationship will be similar to the current life partnership. If the relationship is terminated the parties may, however, apply for protection similar to that of the registered partnership based on the circumstances of each case.

The Act should contain all of the minimum requirements for a valid intimate relationship. Certain invariable consequences will be conferred on parties in a registered intimate relationship similar to the current consequences of a civil marriage.

The Act should contain a set of default intimate relationship agreements regulating the variable consequences of the relationship depending on the nature of the intimate relationship the parties enter into. Default relationship contracts will regulate the different forms of intimate relationships to ensure substantive equality. For example, a default intimate relationship agreement can be created for a registered intimate relationship in terms of Islamic law, which will cede the right of *talaq* to the female partner and a clause protecting multiple wives or even by default excluding polygyny.¹³¹ The parties should have an option to regulate the variable consequences of their intimate relationship by contract and should therefore be able to opt out of the default contract by registering an intimate relationship contract. Currently it is possible to regulate more than the matrimonial property regime in an antenuptial contract. The parties will be able for example to determine that Islamic law or customary law will be applicable to their marriage. There is a trend to increase judicial discretion where party autonomy is increased in family law.¹³² A wide discretion should therefore be provided to the court to deviate from a relationship contract if it leads to undue hardship. The majority of civil marriages are in community of property due to the fact that this is the default matrimonial property system and most parties do not enter into an antenuptial contract. This is in all probability due to the parties being satisfied with the *status quo*, due to ignorance of the law, or simply because they do not want to go through the process of having an

¹³¹ For a discussion of Islamic marriage law principles see Bakker 2010 *SJ* 66.

¹³² In the Netherlands and Germany, parties have a broad contractual capacity to regulate family matters. The broader the parties' contractual freedom is in a particular jurisdiction the more this allows for judicial capacity to determine that the agreement complies with general legal principles and the law in general (Sonnekus 2010 *TSAR* 58).

antenuptial contract drafted. A similar trend will provide protection to the majority of partners under the proposed Act.

Due to the personal and emotional nature of intimate relationships our adversarial legal system is not sufficiently equipped to deal with the termination of intimate relationships.¹³³ The parties should be able to terminate their relationship by the mere registration of a termination agreement. However, where there is a dispute regarding the consequences of termination, the parties will have to undergo compulsory mediation and only if the parties are unable to mediate their differences should the matter be referred to court. As in the *Draft Domestic Partnerships Bill*, the termination of an intimate relationship where children are involved should require a court order. It is advisable that the parties should first draft a termination agreement between themselves or through mediation before the matter is referred to court.

A wide judicial discretion to deviate from termination agreements should such an agreement lead to injustice between the parties or not provide for the best interests of the children involved is inevitable. The regulation of termination by contract might not always have the equitable outcome envisaged, due to the unequal bargaining power of the parties or emotional manipulation by one of the parties or by the community. The solution to this problem is to empower the parties to approach the court after termination of the relationship.

As in the *Draft Domestic Partnerships Bill*, provision should be made for a party in an unregistered intimate relationship to approach the court after dissolution for appropriate relief *inter alia* for maintenance and the division of property, which will be granted only if the facts justify it. Such an approach will protect the parties' autonomy to choose the consequences of their relationship without the state's imposing consequences, while at the same time protecting the rights of the vulnerable parties.

¹³³ De Jong 2005 *TSAR* 33.

8 Conclusion

Chaos in the law regulating intimate relationships originates on a micro level due to social, religious and cultural diversity. Prior to the advent of the constitutional dispensation, diversity in the nature of the intimate relationships in which South Africans were involved was largely ignored. The legislature has currently merely transferred the chaos on a micro level to the macro level by enacting legislation as the need arose to recognise a new form of intimate relationship. The correct approach would be to identify general trends in society and regulate these trends on a macro level while providing freedom for the development of the different cultures and religions on a micro level. Some of the trends that are apparent are the development of social tolerance towards diversity, a change in the nature of families, an increase in private autonomy, and an increase in consciousness of the plight of vulnerable parties in intimate relationships.

Creating one secular Act that regulates intimate relationships would bring about more legal certainty in the currently chaotic family law system. The Act would promote diversity by providing the parties with an option to regulate the nature of their intimate relationship by contract, and as such would promote private autonomy while acknowledging the diverse nature of South African families. Default provisions would protect the majority of partners in registered intimate relationships, whereas partners in unregistered intimate relationships could rely on the courts to provide relief after termination of the intimate relationship. As a consequence of the regulation of different cultural and religious intimate relationships by one Act, acculturation would take place in the different social, cultural and religious systems, and this would over a period of time lead to a more stable system on a micro level.

Chaos Theory can assist in unravelling the current predicament we are facing in our multicultural society. We merely need to change our approach. Instead of reacting to specific changes in the social order and trying to predict specific outcomes it might be advisable to investigate general trends instead. There is order behind all the

apparent chaos. We need to determine what this order consists of and act accordingly.

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List of abbreviations

CLR	Columbia Law Review
IJLPF	International Journal of Law, Policy and the Family
JJS	Journal for Juridical Science
PER	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SJ	Speculum Juris
T&P	Theory & Psychology
THRHR	Tydskrif vir Hedendaags Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UMKC LR	University of Missouri-Kansas City Law Review
YLPR	Yale Law and Policy Review
W&M	William and Mary Law Review