

A HISTORICAL PERSPECTIVE ON THE RECOGNITION OF SAME-SEX UNIONS IN SOUTH AFRICA

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1 Introduction

Marriage is traditionally defined as a voluntary union for life between one man and one woman to the exclusion of all others while it lasts.¹ This notion of marriage reflects principles of monogamy and heterosexuality: ideologies originally affirmed by Christian beliefs.² Based on the concept of marriage as defined in Christendom, any kind of recognition of same-sex unions used to be forbidden in South Africa, and sexual relations between persons of the same-sex were characterised as deviant and criminal behaviour. In the period before 1994 the Westminster system of government applied in South Africa.³ During this period the courts of law did not have the competence to question the legality

- 1 Inst 1 9 1, *De patria potestate*: “Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuum consuetudinem vitae continens.” D 23 2 1, *Modestinus libro primo regularum*: “Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio”; M Kaser *Roman Private Law* 4 ed (Pretoria, 1984) at 284. See, generally, HR Hahlo *The South African Law of Husband and Wife* 5 ed (Cape Town, 1985) at 21.
- 2 *Hyde v Hyde & Woodmansee* (1866) LR 1 P & D 133, (1866) All E.R. Rep. Div. 175: “[M]arriage as understood in Christendom may ... be defined as the voluntary union of life of one man and one woman to the exclusion of all others.” For example, in *Seedat’s Executors v The Master* 1917 AD 309 and *Ismail v Ismail* 1983 (1) SA 1006 (A) 1019 a “marriage” was defined as the legally recognised life-long voluntary union between one man and one woman to the exclusion of all others.
- 3 JA Robinson “The evolution of the concept of marriage in South Africa: The influence of the Bill of Rights in 1994” (2005) 26 (3) *Obiter* 488-504 at 489.

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** Parts of this article are based on sections of the author’s LLM dissertation *The Recognition of Same-sex Unions in South Africa* (University of South Africa, 2009). The author would like to thank Prof J Heaton for her valuable comments and also for all the sources she so generously shared with the author. The financial support from the College of Law Research and Innovation Committee is gratefully acknowledged.

of parliamentary legislation; courts had to implement Acts of Parliament, not question them.⁴ This parliamentary sovereignty had a direct impact on the conventional attitude towards marriage. During the late 1980s gay and lesbian movements were established. These movements formed political alliances with anti-apartheid organisations and argued that their struggle fitted the same frame: oppression by the apartheid regime. With the abolition of apartheid and the introduction of a new constitutional dispensation, the state's totalitarian exclusion of homosexuals from legal recognition was relegated to a past era, creating ample opportunities for gays and lesbians to challenge the religious and ideological hegemony which dominated South African politics. Political alliances inevitably led to the inclusion of discrimination on the ground of sexual orientation in the Constitution of the Republic of South Africa, 1996 (hereafter Constitution, 1996)⁵ as one form of discrimination which would automatically be unfair until proven otherwise.⁶ After 1994 this constitutional commitment has led to various piecemeal legislative and judicial developments when the recognition and protection of same-sex relationships have been at issue. In *Minister of Home Affairs v Fourie v Minister of Home Affairs* (hereafter *Fourie*)⁷ the Constitutional Court declared the common-law definition of marriage to be inconsistent with the Constitution. This case led to the enactment of the Civil Union Act 17 of 2006 which provides for same-sex couples to enter into a civil union.

In this article I first discuss the concept of marriage that was received into South African law. Next I shall consider the church/state consubstantiality which provided a religious foundation upholding a state policy; one that presented the views of a white Christian community on what was acceptable conduct, as influenced by Roman-Dutch law. This will be followed by a detailed exposition of the politicisation of homosexuality. The article will include discussions on legislative and judicial developments that led to the legalisation of same-sex marriage in South Africa. These discussions will illustrate that a patchwork of laws still hinders the fostering of tolerance and appreciation of diversity after decades of bigotry.

2 Same-sex unions and the concept of marriage that was received into South Africa

The concept of marriage during the pre-constitutional era essentially reflected the position in canon and Roman-Dutch law.⁸ Canon law was basically Roman law as modified to meet the needs of the medieval church.⁹

4 WJ Hosten *et al Introduction to South African Law and Legal Theory* (Durban, 1995) at 337ff. See Robinson (n 3) at 489.

5 The citation of Constitutional Law Act 5 of 2005 subsequently removed the reference to "Act" and changed the title of the Constitution to Constitution of the Republic of South Africa, 1996.

6 Section 9(3) of the Constitution, 1996.

7 2006 (1) SA 524 (CC).

8 Robinson (n 3) at 489. See, also, TL Mosikatsana "The definitional exclusion of gays and lesbians from family status" (1996) 12 *SAJHR* 549-567 at 554.

9 HR Hahlo & E Kahn *The South African Legal System and its Background* (Cape Town, 1968) at 511.

2 1 Canon law and the church-state/state-church relationship

The sources of canon law were primarily the Bible, the writings of the church fathers, Justinian's codification, the *Corpus iuris civilis*, the canons of church councils and the papal decretals.¹⁰ According to the Church, Christ elevated marriage (*matrimonium ratum*) between baptised persons to a sacrament.¹¹ The institution of marriage was therefore the creation of God, not of the state or even the Church.¹² Accordingly, the status created by marriage as a sacrament was instituted by God; it was a natural relationship whose ends and essential properties were determined by natural law and which could not be varied by human legislation or the consent of the parties.¹³

The primary purpose of marriage as elevated by God was the procreation and rearing of children;¹⁴ as a result the early church fathers were intolerant of sexual pleasures not directed towards procreation.¹⁵ Any sexual acts that were not directed towards procreation were seen as contrary to the order of nature and were variously termed by the old authorities *sodomie*, *venus monstrosa* or *onkuysheyd tegens de Natuur* and were therefore considered crimes punishable by death.¹⁶

When Constantine became the first Christian Roman emperor, the Christian church and political decree became inseparably involved – consubstantial.¹⁷ The emperor became the chosen representative and instrument of God who was to guarantee political and spiritual peace by bringing people to the service of God.¹⁸ Both religious belief and state policy became embodied in the head of state. Thus the church became the state and the state became the church.

10 *Ibid.* See, also, DH van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (Durban, 1979) at 165-168; PhJ Thomas, CG van der Merwe & BC Stoop *Historiese Grondslae van die Suid-Afrikaanse Reg* (Durban, 2000) at 59.

11 “The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament”: Canon 1055 § 1. “Consequently, a valid marriage contract cannot exist between baptised persons without being by that very fact a sacrament”: Canon 1055 § 2. This canon repeats Canon 1012 of the 1917 Code. See, also, JH Lynch *The Medieval Church A Brief History* (London, 1992) at 169-170; JM Snee “Canon law of marriage: An outline” (1957-1958) 35 *Detroit LJ* 309-374 at 311; Hahlo (n 1) at 6.

12 Canon 1055 § 1.

13 “The essential properties of marriage are unity and indissolubility; in Christian marriage they acquire a distinctive firmness by reason of the sacrament”: Canon 1056. This canon repeats Canon 1013 § 2 of the 1917 Code.

14 Canon 1055 § 1.

15 M Goodich *The Unmentionable Vice – Homosexuality in the Later Medieval Period* (Santa Barbara, 1979) at 43 referring to Canon 11 of Lateran 3 (1179): legislation clearly directed against the “sin against nature”.

16 *R v Gough and Narroway* 1926 CPD 161; Snee (n 11) at 313.

17 J Barnard “Totalitarianism, (same-sex) marriage and democratic politics in post-apartheid South Africa” (2007) 23 *SAJHR* 500-525 at 501.

18 D Knowles “Church and state in Christian history” (1967) 2 *J of Contemporary History, Church and Politics* 3-15 at 5.

The state's attitude toward same-sex unions was extremely hostile.¹⁹ Same-sex intimacy was outlawed by the *Corpus iuris civilis*²⁰ and sodomy was criminalised.²¹ Particularly from the thirteenth century onwards the Church took an increasingly stronger stand against same-sex intercourse as evidenced, for example, by St Thomas Aquinas' *Summa theologiae*.²² There is no doubt that it was subsequently the Christian doctrine which would determine what the standard for normal behaviour in Europe would be.

2 2 Roman-Dutch law and the secularisation of marriage law

Canon law was received into Roman-Dutch law²³ that had embraced the philosophies of Montesquieu's doctrine of *triapolitica*, namely that the powers of legislation, administration and adjudication should be separated.²⁴ By virtue of the *jus majestatis circa sacra*, the Church was subject to control by the government.²⁵ All matters relating to the position of the Church in the community, namely the administration of its property and the legal consequences of acts performed in Church, including marriage, were thereafter the concern of the state.²⁶ Accordingly, after the Reformation, the marriage law of Holland became secularised and the sacramental nature of marriage was disclaimed.²⁷

However, it was still accepted that marriage was a relationship between one man and one woman. The comparison of the relationship between husband and wife with that of Christ and his congregation provided for the view of marriage as a relationship solely between one man and one woman.²⁸ These were the principles of the Roman-Dutch law of marriage that were brought to South Africa when Jan van Riebeeck established the first European settlement at the Cape of Good Hope, and they remained largely unchallenged in the pre-constitutional era.²⁹

19 C Th 9 7 6: "All persons who have the shameful custom of condemning a man's body, acting the part of a woman's, to the sufferance of an alien sex (for they appear not to be different from woman) shall expiate the crime of this kind in avenging flames in the sight of people" (tr L Crompton *Homosexuality & Civilization* (Cambridge, 2003) at 136).

20 See Crompton (n 19) at 142-149 for a discussion on persecutions by Justinian.

21 J Boswell *Christianity, Social Tolerance, and Homosexuality* (Chicago, 1980) at 175.

22 *Idem* at 318-330; Crompton (n 19) at 187-189.

23 Hahlo & Kahn (n 9) at 514; Van Zyl (n 10) at 416. Roman-Dutch law can be seen as the offspring of the union between the law of Holland and Roman law.

24 Hahlo & Kahn (n 9) at 528.

25 *Ibid.* The old ecclesiastical courts were abolished and the Reformed Church became the State Church of the Netherlands.

26 *Idem* at 528.

27 J Sinclair assisted by J Heaton *The Law of Marriage* (Kenwyn, 1996) at 191. See, also, Hahlo (n 1) at 11.

28 Ephesians 5:23-33: King James Version.

29 Hahlo (n 1) at 14-15; Hosten *et al* (n 4) at 337.

3 The church-state/state-church relationship and totalitarianism in the apartheid regime

Roman-Dutch law as influenced by, amongst others, canon law is generally accepted as the common law of the Republic of South Africa. It is evident that these common-law principles formed the foundation of the pre-constitutional government under whose rule all demeanour was supposed to conform to the Christian doctrine.

When we consider the constitutional history of South Africa two aspects of its legal system come to mind: the state's systematic institutionalisation of racist structures; and, in the context of religious matters, a distinct bias in favour of a certain brand of Christianity.³⁰ These two characteristics of the South African social, economic, political and legal structures reflect the fabric of a totalitarian regime both in the state's interference in the private lives of individuals and in its regulation of the internal affairs of non-state social institutions.³¹

A "distinct bias for Christianity" was one of the aspects that denoted the fabric of the apartheid regime.³² The church-state consubstantiality provided a religious foundation for the "political perpetration of isolation and loneliness (for example of gays and lesbians) that is required for terror to thrive".³³ It is evident that this religious bias was an indispensable component of the apartheid government's totalitarian recipe.³⁴ This particular brand of a totalitarian regime in terms of which the church and the state are consubstantial may be described as "totalitarianism par excellence".³⁵ Arendt emphasises that totalitarian domination distinguishes this form of government from all others. According to her view, totalitarianism is never content with the destruction of political life; it seeks the destruction of private life above and beyond all else.³⁶

The political and legal systems of pre-1994 South Africa were particularly noted for the state's totalitarian interference in the private sphere of people's day-to-day lives.³⁷ In 1948, DF Malan, who was a Minister of the Dutch Reformed Church, became the first Prime Minister of the apartheid era.³⁸ Soon after Malan's election the Dutch Reformed Church propagated the "purist" concept of apartheid, which required total separation between white and black South Africans as necessary for the survival of white "civilisation" in South Africa. From a political point of view this concept of apartheid

30 JA van der Vyver "Constitutional perspective of church-state relations in South Africa" (1999) 2 *Brigham Young Univ LR* 635-672 at 635.

31 *Ibid.*

32 *Idem* at 638.

33 Barnard (n 17) at 504.

34 *Ibid.*

35 *Idem* at 505.

36 H Arendt *The Origins of Totalitarianism* (London, 1967) at 474.

37 Van der Vyver (n 30) at 636.

38 RJ Ross "The Fundamentalisation of Afrikaner Calvinism" in H Diederiks & C Quispel (eds) *Onderscheid en minderheid Sociaal-Historische opstellen over discriminatie en vooroordeel* (Leiden, 1987) 201-220 at 201.

was essential for the continuation of white rule.³⁹ At the insistence of the Dutch Reformed Church⁴⁰ Parliament passed the Prohibition of Mixed Marriages Act 55 of 1949, which prohibited marriage and any form of cohabitation between white and black.

Sexual intimacy between males was prohibited by the common-law offence of sodomy, and unnatural sexual acts were prohibited in terms of the Immorality Act 5 of 1927. Under apartheid, the Immorality Act was repealed and replaced by the Sexual Offences Act 23 of 1957. Section 20A of the Sexual Offences Act criminalised any act between males at a party⁴¹ if such an act was calculated to stimulate sexual passion or to give sexual gratification.⁴² The penalty prescribed for such an act was a maximum fine of R 4000 or two years' imprisonment or both.⁴³ The Act further prohibited "immoral or indecent" acts between men and boys under the age of nineteen.⁴⁴ In 1988 Parliament extended the prohibition of "immoral or indecent" acts to acts between women and girls under the age of nineteen.⁴⁵ Discrimination was evident since the heterosexual age of consent was sixteen, not nineteen as in the case of the homosexual age of consent.⁴⁶

It may therefore be concluded that during the apartheid regime gay men, lesbian women and other sexual minorities suffered a harsh fate, having been categorised as criminals and rejected by society as outcasts and perverts.⁴⁷ This exclusion and marginalisation were experienced more intensely by those South Africans already suffering under the yoke of apartheid because of their race, sex and economic status.⁴⁸

4 Gay and lesbian movements and the political coalition that led to the attention paid to sexual orientation in the Bill of Rights

During the late 1980s the apartheid regime was criticised and sanctioned worldwide for its abuse of and discrimination against black people, and it was during this period that

39 SJ Terreblanche *A History of Inequality in South Africa, 1652-2002* (Pietermaritzburg, 2002) at 314.

40 Barnard (n 17) at 503.

41 Section 20A (2) defined a party as "any occasion where more than two persons are present".

42 Section 20A (1).

43 Section 22(g).

44 Section 14(1)(b).

45 Section 14(3)(b).

46 In *Geldenhuys v The National Director of Public Prosecutions* 2009 (2) SA 310 (CC) [now reported] the Constitutional Court confirmed an order by the Supreme Court of Appeal declaring that ss 14(1) (b) and 14(3)(b) of the Sexual Offences Act unfairly differentiated and discriminated between heterosexual and same-sex sexual activities. This unfair discrimination was found to be unjustifiable and was declared unconstitutional. Note that the Criminal Law (Sexual Offences) Amendment Act 32 of 2007 repealed s 14 of the Sexual Offences Act and that ss 15 and 16 of the 2007 Act set a uniform age of consent, namely sixteen, for all consensual sexual activities.

47 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) in pars [27], [28]; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) in pars [31], [32].

48 P de Vos & J Barnard "Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga" (2007) 124 *SALJ* 795-826 at 797.

gay and lesbian movements were established to place gay issues on the agenda of the anti-apartheid struggle both in South Africa and abroad.⁴⁹

Prior to the 1980s there had been little sign of a gay rights struggle in South Africa.⁵⁰ However, during the 1980s gay life was politicised.⁵¹ The Gay Association of South Africa (GASA) was the first gay and lesbian organisation established in Johannesburg in 1982.⁵² Its principal function was to serve as a social meeting place for white, middle-class gay men.⁵³ At first, the nascent gay and lesbian movement did not align itself with the anti-apartheid struggle.⁵⁴ This position changed drastically when GASA became involved in the isolation of groups sympathetic to the apartheid movement.⁵⁵ This was fatal for GASA and subsequently led to its expulsion from the International Lesbian and Gay Alliance (ILGA).⁵⁶

Because of heightened politicisation, Lesbian and Gays against Oppression (LAGO) was formed in Cape Town in 1986 – the first gay and lesbian organisation with explicit links to anti-apartheid groups.⁵⁷ In 1988, gay anti-apartheid activist Simon Nkoli established the first mass-based black gay and lesbian organisation, the Gay and Lesbian Organisation of the Witwatersrand (GLOW).⁵⁸ This organisation committed itself to a “Non-Racist, Non-Sexist, and Non-Discriminatory Democratic Future”.⁵⁹ Nkoli emphasised that the battles against homophobia and racism were indivisible.⁶⁰ He stated: “I’m fighting for the abolition of apartheid, and I fight for the right of freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as a black man if I am not free as a gay man.”⁶¹

49 J Cock “Engendering gay and lesbian rights: The equality clause in the South African Constitution” (2002) 26 *Woman’s Studies International Forum* 35-45 at 36.

50 See M Gevisser “A different fight for freedom: A history of South African lesbian and gay organisation from the 1980s to the 1990s” in M Gevisser & E Cameron (eds) *Defiant Desire Gay and Lesbian Lives in South Africa* (Johannesburg, 1995) 14-86.

51 P de Vos “The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid state” (2007) 23 *SAJHR* 432-465 at 435.

52 *Ibid.*

53 Gevisser (n 50) at 50.

54 GASA was therefore viewed and characterised as “apartheid-friendly” and patriarchal. See B Luirink *Moffies Gay Life in South Africa* (Cape Town, 2000) at 21.

55 De Vos (n 51) at 435. See, also, S Croucher “South Africa’s democratisation and the politics of gay liberation” (2002) 28 *J of South African Studies* 315-330 at 324.

56 Cock (n 49) at 37; De Vos (n 51) at 435.

57 EC Christiansen “Ending the apartheid from the closet: Sexual orientation in the South African constitutional process” (1997) 32 *International Law and Politics* 997-1058 at 1023.

58 R Louw “Sexual orientation” (1997) 8 *South African Human Rights Yearbook* 245-266 at 260. See, also, Cock (n 49) at 36; Christiansen (n 57) at 1025.

59 Louw (n 58) at 260.

60 S Nkoli “Wardrobe: Coming out as a black gay activist in South Africa” in Gevisser & Cameron (eds) (n 50) 249-257.

61 This statement was made at the first public parade in 1990 organised by GLOW. See Luirink (n 54) at 5.

Then followed the affiliation of the Western Cape Organisation of Lesbian and Gay Activist (OLGA), which eventually replaced LAGO. Although the majority of the members of OLGA were white, the organisation located itself within the liberation struggle and was led by anti-apartheid activists.⁶² OLGA was affiliated to the leading organisation in the struggle for democracy, namely the United Democratic Front (UDF), a broad-based political alliance aligned with the African National Congress (ANC).⁶³

Until the late 1980s the ANC had no policy on sexual orientation, and some senior officials in the party even dismissed gay issues as irrelevant.⁶⁴ In the late 1980s gay political activists flew to London to argue the case for gay rights with the ANC.⁶⁵ These activists met with, amongst others, Albie Sachs,⁶⁶ then a member of the ANC constitutional committee, and impressed on him and others the need to put the rights of gay men and lesbian women on the ANC agenda.⁶⁷ By the time the South African political parties began drafting the Interim Constitution, the ANC had formally recognised gay and lesbian rights and had agreed to include a prohibition of discrimination on the basis of sexual orientation in its proposed Bill of Rights.⁶⁸

According to De Vos the gay and lesbian movement was ultimately successful because its leaders were fortunate and wise enough to present their struggle as forming part of a broader struggle against oppression by the apartheid state.⁶⁹ He states that some political scientists, such as McAdam, argue that in order for any minority group to be successful in its struggle for acceptance and/or rights, its activists must “tap highly resonant ideational strains in mainstream society”.⁷⁰ Often their ability to do so is influenced by the availability of “master frames”⁷¹ or what De Vos describes as “master narratives”.⁷² In South Africa the most powerful master frame or master narrative available was that of

62 Christiansen (n 57) at 1024.

63 I Toms “Ivan Toms is a Fairy” in Gevisser & Cameron (eds) (n 50) at 258-263. See, also, Croucher (n 55) at 319.

64 Christiansen (n 57) at 1025. For example, Ruth Mompoti, a member of the National Executive Committee of the ANC made the following dismissive statement in 1987 (see Gevisser (n 50) at 70): “I cannot even begin to understand why people want lesbian and gay rights. The gays have no problems. They have nice homes and plenty to eat. I don’t see them suffering. No one is prosecuting them ... We haven’t heard about this problem in South Africa until recently. It seems to be fashionable in the West.” She saw the gay issue as a “red herring” which detracted attention from the main struggle against apartheid, and justified the ANC’s lack of policy on gay and lesbian rights by stating that “[w]e don’t have a policy on flower sellers either”. According to her lesbians and gays are “not normal. If everyone was like that, the human race would come to an end”.

65 De Vos (n 51) at 436.

66 Now a retired Constitutional Court Judge.

67 De Vos (n 51) at 436.

68 *Idem* at 437.

69 *Idem* at 436.

70 *Ibid.* See, further, D McAdam “Culture and social movements” in E Laraña, H Johnston & J Gusfield (eds) *New Social Movements From Ideology to Identity* (Philadelphia, 1994) at 36-57.

71 Croucher (n 55) at 324.

72 P de Vos “A bridge too far? History as context in the interpretation of the South African Constitution” (2001) 17 *SAJHR* 1-33 at 9-16.

the anti-apartheid struggle.⁷³ Gay men and lesbian women could refer to this struggle and were able to argue that their struggle fitted the same frame, namely the larger struggle for human rights and the emancipation of the oppressed.⁷⁴

5 Inclusion of sexual orientation in the Interim Constitution of the Republic of South Africa Act 200 of 1993

It is difficult to identify a clear beginning and end to the political and social transformation of South Africa. The process of adopting a new Constitution was a complicated, intentionally reflective process set against the dramatic historical backdrop of the end of apartheid and the fundamental reformulation of the political and societal structure of the entire nation.⁷⁵

In the draft Bill of Rights drawn up by the South African Law Commission appointed by the then Government, and the draft Bill of Rights drawn up by the ANC the following were accepted:

1. the centrality of individual rights of equality;⁷⁶
2. that limitations must be placed on governmental power; and
3. that the exercise of governmental power must be subject to oversight by the judiciary.⁷⁷

Although all the parties that participated in the drafting process agreed that an equality clause must be enshrined in the Constitution, that all persons are equal before the law and that discrimination is unconstitutional, there was no unanimity on how this agreement was to be embodied in it.⁷⁸ In its first paper on Group and Human Rights the South African Law Commission suggested that like women, children and disabled persons,

73 De Vos (n 51) at 436.

74 *Ibid.*

75 Talks between the National Party (NP) and the ANC officially started in February 1990 when the liberation movements were unbanned. The constitutional negotiations commenced at a forum called the Convention for a Democratic South Africa (CODESA) in Dec 1991 at which delegates of the various political parties gathered at Kempton Park's World Trade Centre. These negotiations ended in controversy, deadlock and violence. In Nov 1993 negotiations were resumed at the Multi-Party Negotiation Process (MPNP). During these negotiations an agreement was finalised. Despite the finalisation of the agreement, conflict over the writing process continued between the dominant parties, the ANC and NP. The negotiated solution to the conflict was a two-stage constitutional drafting process. The first stage involved drafting an interim constitution, planning elections, and setting up a new Parliament that would elect a new president. During the second stage the newly elected Parliament in its role as the Constitutional Assembly would draft a "final constitution": see Christiansen (n 57) at 998, 1003-1004.

76 South African Law Commission Draft Bill of Rights (1991) art 3(a); art 1 of A Bill of Rights for a New South Africa 1993 (generally referred to as the ANC Draft Bill of Rights) available at <http://www.anc.org.za/show.php?id=231> (accessed 22 Aug 2013).

77 ANC Draft Bill of Rights (n 76) arts 2(26) and 17; South African Law Commission Bill of Rights (n 76) arts 31 and 35.

78 E Cameron "Sexual orientation and the Constitution: A test case for human rights" (1993) 110 *SALJ* 450-472 at 451.

gays and lesbians constitute a “natural group”.⁷⁹ The common characteristic of these groups is that “they have not chosen to have a particular status in a particular group, but have been assigned to that status by nature”.⁸⁰

According to Cameron this indicated that although the Government wanted to extend protection to gays and lesbians it only wanted to do so obliquely and that the protection it wanted to afford was limited to protection from discrimination.⁸¹ He further states that the protection envisaged would be insufficient and would not outlaw many of the pervasive forms of discrimination that homosexual persons encountered. The envisaged protection created a problem in that it implied that “natural characteristics” were “disabilities” and that only “disabilities” which were “natural characteristics” would be protected.⁸²

That most parties agreed that either explicit or implicit anti-discrimination protection for gays and lesbians must be included was a remarkable achievement. However, it did not ensure the inclusion of an express reference to sexual orientation in the Interim Constitution.⁸³ By the time of the Multi-Party Negotiation Process (MPNP), the Technical Committee of Theme Committee Four of the Constitutional Assembly⁸⁴ (hereafter the Technical Committee) was still uncertain whether the equality clause would be a provision prohibiting discrimination against specific, enumerated classes or a generic non-discrimination provision.⁸⁵ Ultimately, party negotiators chose to accept an equality clause that prohibited discrimination on specific grounds, including sexual orientation. Thus, section 8(2) of the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution) prohibited unfair discrimination, directly or indirectly, on the ground of sexual orientation.

6 The retention of the sexual orientation clause in the Final Constitution

As late as October 1995, the inclusion of sexual orientation as a protected ground in the Constitution, 1996, remained an outstanding issue. In the Explanatory Memorandum on the Draft Bill of Rights of 9 October 1995 that was prepared for the Constitutional Committee, the Technical Committee recommended that sexual orientation be included

79 *Idem* at 465.

80 South African Law Commission Working Paper 25 Project 58 *Group and Human Rights* (1989) § 13.44 at 398.

81 *Ibid.*

82 *Ibid.*

83 Christiansen (n 57) at 1031.

84 The Technical Committee of Theme Committee Four dealt with fundamental rights. The mandate and work of this Committee was guided by Constitutional Principle II, which states: “Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter Three of the Constitution.”

85 Christiansen (n 57) at 1032.

as a prohibited ground of discrimination in the equality clause.⁸⁶ The Technical Committee referred to the similarities between sexual orientation and other forms of forbidden discrimination that had been highlighted in various human rights documents. It emphasised that the enumerated grounds of discrimination in international law related to characteristics and choices that all formed an integral part of human personality and identity. The forbidden discrimination specifically related to groups that were particularly vulnerable to discrimination, exclusion and subordination, such as gays and lesbians.⁸⁷

Because of the absence of national precedents and human rights documents in South Africa, the Technical Committee based its arguments and recommendations on various international human rights documents. In the international arena no formal international human rights document explicitly afforded gays and lesbians equal rights and protection from unfair discrimination based on sexual orientation.⁸⁸ International human rights bodies therefore had to interpret certain rights in order to extend them to gays and lesbians. Thus, for example, the United Nations Human Rights Committee (hereafter UNHRC) interpreted sex, a prohibited ground of discrimination in terms of articles 2(1) and 26 of the International Covenant on Civil and Political Rights (hereafter ICCPR) as including sexual orientation.⁸⁹ The UNHRC therefore ruled that legislation criminalising all forms of sexual intercourse between consenting homosexual men violated the right to privacy protected in article 17 of the ICCPR read with the right to non-discrimination in the enjoyment of the rights protected in the ICCPR.⁹⁰ This interpretation is consistent with the case law of the European Court of Human Rights.⁹¹

The Technical Committee further referred to the Canadian case of *Haig v Birch*⁹² in which it was held that sexual orientation should be treated as an analogous ground of discrimination and should therefore be included within the scope of section 3(1) of the Canadian Human Rights Act, which prohibits discrimination on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.⁹³

Not all the members of the Constitutional Assembly were convinced by the arguments based on international human rights precedents, chiefly because equal rights for gays

86 Explanatory Memorandum on the Draft Bill of Rights, 9 Oct 1995 in par [4.2.3].

87 *Idem* in par [4.2.2].

88 Christiansen (n 57) at 1035.

89 Explanatory Memorandum (n 86) in par [4.2.3].

90 In *Toonen v Australia* U.N. Human Rights Commission No. 488/1992, Nicholas Toonen asserted that the protection from unfair discrimination based on sex in the ICCPR, art 26, was to be interpreted as including sexual orientation: Explanatory Memorandum (n 85) in par [4.2.3].

91 The Technical Committee cited three cases: *Dudgeon v United Kingdom* (Application 7525/76) judgment of 22 Oct 1981, Series A, vol 45; *Norris v Ireland* (Application 10581/83) judgment of 30 Nov 1987, Series A, vol 142; *Modinos v Cyprus* (Application 15070/89) judgment of 22 Apr 1993, Series A, vol 259) heard in the European Court of Human Rights in which it was decided that sodomy laws that criminalised homosexual acts violated art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which guarantees “everyone the right to respect for private and family life, his home and his correspondence”: Explanatory Memorandum (n 86) in par [4.2.3].

92 (1992) 10 CRR (2d) 287.

93 RSC 1985 c H-6. See Explanatory Memorandum (n 86) in par [4.2.3].

and lesbians lacked universal acceptance.⁹⁴ Advocates for the inclusion of a reference to sexual orientation “responded that universal acceptance only defined the minimum platform that had to be provided. It did not stop the constitution-making body from including other kinds of protection, even if not universally accepted”.⁹⁵ Despite the debate in the Constitutional Assembly, the Technical Committee was unequivocal in its final endorsement: “[I]t is our strongest recommendation that sexual orientation be included as a prohibited ground of discrimination in the equality clause.”⁹⁶

During the final drafting period the gay and lesbian community’s endeavour to influence the final Constitution was supported by a coalition of activists under the name National Coalition for Gay and Lesbian Equality (hereafter NCGLE). The NCGLE was formed in December 1994 in anticipation of the struggle to keep sexual orientation in the final Constitution’s equality clause.⁹⁷ The Coalition’s work included coordinating coalition member actions, organising lobbying efforts that reflected the racial and linguistic diversity of gay and lesbian South Africans, preparing submissions to the Constitutional Assembly, and orchestrating very successful letter-writing, petition and postcard campaigns.⁹⁸ It is submitted that the protection afforded sexual orientation in the Constitution, 1996 may be viewed as the product of the successful campaign by the NCGLE.

On 10 October 1995 the Constitutional Committee agreed to follow the Technical Committee’s recommendation that sexual orientation be afforded protection from discrimination despite public opposition, limited legal precedent, fragmented organisations, and conservative cultural elements.⁹⁹ South Africa thus became the first country in the world explicitly to recognise in its Constitution that discrimination on the ground of sexual orientation would automatically be unfair until proven otherwise.¹⁰⁰

7 Post-constitutional developments

The Constitution contains an explicit prohibition of unfair discrimination on the grounds of sexual orientation and marital status,¹⁰¹ and guarantees everyone the right to privacy,¹⁰² human dignity¹⁰³ and equality before the law and equal protection and benefit of the law.¹⁰⁴ The constitutional commitment to human dignity and equality, and the inclusion of sexual orientation as a prohibited ground of discrimination in terms of section 9(3) of

94 Christiansen (n 57) at 1036.

95 *Idem* at 1037.

96 Explanatory Memorandum (n 86) in par [6.1].

97 Croucher (n 55) at 320; Christiansen (n 57) at 1037; Cock (n 49) at 37.

98 Christiansen (n 57) at 1038.

99 *Idem* at 1042.

100 Section 8(2) of the Interim Constitution and confirmed by s 9(3) of the Constitution, 1996.

101 Section 9(3) of the Constitution, 1996.

102 Section 14 of the Constitution, 1996.

103 Section 10 of the Constitution, 1996.

104 Section 9(1) of the Constitution, 1996.

the Constitution, 1996, have formed the *Grundnorm* of several court cases¹⁰⁵ in which the recognition and protection of same-sex relationships have been at issue.¹⁰⁶ The Constitutional Court has emphasised the implication in these provisions that everyone has the right to equal concern and respect across difference,¹⁰⁷ and that the Constitution demands a change in the way in which intimate relations are legally regulated and acknowledged in South Africa.¹⁰⁸

7 1 Legislative developments

None of the legal consequences of marriage automatically applies if a same-sex couple concludes a life partnership.¹⁰⁹ However, some statutes included same-sex partners in the ambit of their provisions to the extent that these partners comply with certain factual criteria.

For example, the Maintenance Act 99 of 1998 Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty.¹¹⁰ The Act therefore extends recognition to a contractual duty of support by same-sex life partners who have agreed on a duty to support each other.¹¹¹ The Domestic Violence Act 116 of 1998 affords protection to persons who live or lived together in a relationship in the nature of a marriage and therefore includes same-sex life partners in its ambit.¹¹² In terms of the Medical Schemes

105 *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T); *Minister of Justice* (n 47); *Minister of Home Affairs* (n 47); *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 of Welfare and Population Development* 2003 (2) SA 198 (CC); *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC); *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC); *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA); *Fourie* (n 7); *Gory v Kolver* 2007 (4) SA 97 (CC).

106 WJ van Aardt & JA Robinson “The biology of homosexuality and its implications for human rights in South Africa” (2008) 71 *THRHR* 179-93 at 180. The recognition and protection of same-sex unions have been controversial throughout the world. There are now several countries that recognise same-sex marriage. The Netherlands was the first country in the world to legalise same-sex marriage through the amendment of art 1:30 of the Dutch Civil Code. The law came into operation on 1 Apr 2001. Prior to the amendment of the Dutch Civil Code the exclusion of same-sex couples from the institution of marriage was based on religious grounds. See, generally, MV Antokoloskaia & K Boele-Woelki “Dutch family law in the 21st century: Trend-setting and straggling at the same time” (2002) 6(4) *Electronic J of Comparative Law* available at <http://www.ejcl.org/64/art64-5.html> (22 Aug 2013).

107 *Minister of Justice* (n 47) in par [132] (per Sachs J).

108 P de Vos “Same-sex sexual desire and the re-imagining of the South African family” (2004) 20 *SAJHR* 179-206 at 181.

109 See J Heaton *South African Family Law* 3 ed (Durban, 2010) at 243-247 on the protection of life partners by means of ordinary legal rules.

110 Section 2(1).

111 Heaton (n 109) at 249-250. See, also, H de Ru “A critical analysis of the retention of spousal benefits for permanent same-sex life partners after the coming into operation of the Civil Union Act” (2009) 23 *Speculum Juris* 1-126 at 113 n 16.

112 Section 1.

Act 131 of 1998, a medical scheme will not be registered if the rules discriminate against anyone on the ground of sexual orientation.¹¹³ A medical scheme may therefore not deny membership to a person because of his or her sexual orientation.¹¹⁴ The Rental Housing Act 50 of 1999 protects same-sex life partners from unequal treatment and prohibits unfair discrimination on the grounds of marital status and sexual orientation.¹¹⁵ In terms of section 1 of the Employment Equity Act 55 of 1998, “family responsibility” is defined as “the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care and support”. “Partner” is not defined by the Act but may be interpreted to include a same-sex life partner. Section 27 of the Basic Conditions of Employment Act 75 of 1997 requires an employer to give an employee three days’ paid leave in the event of the death of the employee’s “spouse or life partner”. “Life partner” is not defined by the Act but may be interpreted to include a same-sex life partner. Since the coming into operation of the Taxation Laws Amendment Act 5 of 2001 same-sex life partners have also been included in the definition of “spouse” in the Transfer Duty Act 40 of 1949, the Estate Duty Act 45 of 1955 and the Income Tax Act 58 of 1962.

Changes to legislation that stem from court decisions will be discussed under the next heading.

7 2 Judicial developments

7 2 1 *The so-called “Sodomy” judgment*

National Coalition for Gay and Lesbian Equality v Minister of Justice (hereafter *Minister of Justice*)¹¹⁶ was the first case in which the Constitutional Court had to give judgment on alleged discrimination based on sexual orientation. The case dealt with the confirmation of an order made by the Witwatersrand Local Division.¹¹⁷ The Witwatersrand Local Division had granted an order declaring unconstitutional and invalid the common-law offence of sodomy and certain statutory provisions which prohibited and criminalised sexual conduct between consenting male adults.

Although the Constitutional Court did not have to confirm the invalidity of the common-law offence of sodomy,¹¹⁸ Ackermann J, who delivered the majority judgment, indicated that the Constitutional Court was obliged to consider the correctness of the High Court’s order with regard to sodomy to enable it to consider the correctness of that court’s order declaring unconstitutional and invalid the statutory provisions that

113 Section 24(2)(e).

114 Heaton (n 109) at 249.

115 Section 4(1).

116 (n 47).

117 *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 (2) SACR 102 (W).

118 An order declaring an Act of Parliament unconstitutional must be confirmed by the Constitutional Court: s 172(2)(a) of the Constitution, 1996.

criminalised any conduct between men which is “calculated to stimulate sexual passion or to give sexual gratification”.¹¹⁹

Ackermann J held that the sole purpose and existence of the offence of sodomy was to criminalise a particular form of gay expression which failed to conform to the moral or religious views of a section of society.¹²⁰ The objective of the common-law offence of sodomy was not dictated by the punishing of “male rape”. The fact that the ambit of the offence was wide enough to include “male rape” was merely coincidental. The core purpose of the offence was to punish sexual expression between gay men.¹²¹

Ackermann J further held that gay men were a permanent minority in society and had in the past suffered from patterns of disadvantage the consequences of which were severe, affecting the dignity, personhood and identity of gay men at a deep level.¹²² Although the right to equality was the primary basis on which the case was argued, Ackermann J held that the criminalisation of sodomy also infringed the right to dignity enshrined in section 10 of the Constitution, 1996. He stated that the common-law prohibition on sodomy criminalised all sexual intercourse between men regardless of the circumstances surrounding the relationship, thus punishing a form of sexual conduct that the broader society identified with homosexuality.¹²³ The existence of a law which criminalises a form of sexual expression for gay men degraded and devalued gay men in our broader society and constituted an invasion of their dignity and thus infringed section 10 of the Constitution, 1996.¹²⁴

Ackermann J further held that the criminalisation of sodomy infringed the right to privacy enshrined in section 14 of the Constitution, 1996. He stated:

Privacy recognises that we all have the right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.¹²⁵

It was therefore concluded that the common-law offence of sodomy was unconstitutional because it breached the rights to equality, dignity and privacy.¹²⁶ The limitations on these rights were not justifiable in terms of section 36 of the Constitution, 1996. It was held that the “enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose”.¹²⁷

119 *Minister of Justice* (n 47) in pars [9], [73].

120 In par [69].

121 *Ibid.*

122 In par [26].

123 In par [28].

124 *Ibid.*

125 In par [32].

126 In par [30].

127 In par [37].

The concept of equality as emphasised in this case laid down a solid foundation for future recognition of same-sex unions. It endorsed the view that the “desire for equality is not a hope for the elimination of all differences” because “to understand ‘the other’ one must try, as far as humanly possible, to place oneself in the position of ‘the other’”.¹²⁸ It is appallingly injurious to say that those who are handicapped or of a different race, religion, colour, or sexual orientation are less worthy.¹²⁹

In his concurring judgment Sachs J held that “equality means equal concern and respect across difference” and that equality “does not imply a levelling or homogenisation of behaviour”, but instead indicates that we must acknowledge and accept the differences in our society.¹³⁰ Therefore, the right to equality is conceptualised as the right to be different from stated or unstated norms without suffering unfavourable consequences because of such difference.¹³¹

The Constitutional Court confirmed the order of the Witwatersrand Local Division declaring invalid and unconstitutional the common-law offence of sodomy and certain statutory provisions which criminalised and prohibited consensual sexual male intercourse.

7 2 2 Case law which conferred spousal benefits on same-sex life partners

Various judgments extended some of the benefits and rights associated with a civil marriage to the parties in a “same-sex life partnership”. The concept of a “same-sex life partnership” was first recognised by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (hereafter *Minister of Home Affairs* to distinguish it from the other National Coalition case which was brought against Minister of Justice).¹³² In this case the court restructured the conformist order of intimate monogamous relationships and acknowledged the existence of “another form of partnership which is different from marriage as recognised by law. This form of life partnership is represented by a conjugal relationship between two people of the same sex”.¹³³ The court found that same-sex life partnerships may perhaps differ with regard to duration and content, but in essence represent an “intimate and mutually interdependent” relationship.¹³⁴ In this case the Constitutional Court held that the rights to dignity and equality dictated the recognition and extension of spousal benefits (here, immigration rights) to gay and lesbian partners in a same-sex life partnership.¹³⁵

The concept was further developed and applied by various courts. In *Satchwell v President of the Republic of South Africa* (hereafter *Satchwell*)¹³⁶ sections 8 and 9 of the

128 In par [22].

129 *Ibid.*

130 In par [132].

131 De Vos (n 108) at 185.

132 (n 47).

133 *Minister of Home Affairs* (n 47) in par [36].

134 In par [17].

135 In par [97].

136 (n 105).

Judge's Remuneration and Conditions of Employment Act 88 of 1989 were found to be inconsistent with the equality provisions of section 9 of the Constitution, 1996.¹³⁷ These provisions provided that, upon the death of a judge, two-thirds of the salary that would have been payable to that judge had to be paid to his or her "surviving spouse" until the death of such spouse. The "surviving spouse" was also entitled to a gratuity and certain allowances. These benefits were reserved solely for the judge's "surviving spouse" and were not payable to the judge's surviving "same-sex life partner" in a permanent same-sex life partnership. Delivering the Constitutional Court's judgment, Madala J stated that the benefits afforded to judges' spouses were afforded to them because of the importance of the institution of marriage in our society and because judges owed a legal duty of support to their spouses. Historically our law recognised marriage only between heterosexual spouses. This narrowness of focus excluded many relationships which create similar obligations and a similar social value to heterosexual marriage.¹³⁸ The Constitutional Court held that the fact that the provisions afforded benefits to spouses and omitted same-sex partners who established a permanent relationship synonymous to a marriage including a reciprocal duty of support, constituted unfair discrimination on the grounds of sexual orientation and marital status.¹³⁹ After this judgment the Judge's Remuneration and Conditions of Employment Act of 1989 was replaced by the Judge's Remuneration and Conditions of Employment Act 47 of 2001. Like its predecessor, this Act and its regulations did not afford benefits to a judge's same-sex life partner. In *Satchwell v President of the Republic of South Africa* (hereafter *Second Satchwell*)¹⁴⁰ the Constitutional Court declared the provisions and regulations unconstitutional and corrected the defect with a reading-in order similar to the order it made during the first *Satchwell*-case.

In *Langemaat v Minister of Safety and Security* (hereafter *Langemaat*)¹⁴¹ the constitutionality of the rules and regulations of the police medical aid scheme, Polmed, was questioned. The scheme afforded benefits to a legal spouse, widow or widower and the children of a member of the police force. These persons alone could be registered as a member's dependants. It was argued that the definition of "dependant" in Polmed's rules was inconsistent with section 9(3) of the Constitution, 1996. The court held that a "dependant" is someone who relies upon another for maintenance and that this includes a same-sex life partner. Roux J did not indicate the specific ground of discrimination but declared the discrimination to be unconstitutional and ordered the chairman of Polmed to review his decision and register a lesbian partner as the dependant of the police officer.¹⁴²

In *Du Plessis v Road Accident Fund* (hereafter *Du Plessis*)¹⁴³ the appellant and the deceased were partners in a same-sex union at the time that the deceased was killed in a motor vehicle accident. The Supreme Court of Appeal extended the common-law action

137 *Satchwell* (n 105) in par [21].

138 In par [22].

139 In par [23].

140 *Second Satchwell* (n 105).

141 (n 105).

142 *Langemaat* (n 105) at 317G.

143 (n 105).

for damages for loss of support to a surviving same-sex life partner whose deceased same-sex life partner had undertaken a contractual duty to support him. The common-law action for damages was extended to a surviving same-sex life partner on the ground that not to do so violated the right to equality and human dignity.¹⁴⁴

In *Farr v Mutual & Federal Insurance Co Ltd*¹⁴⁵ the applicant had been insured by the respondents against loss or damage to the applicant's motor vehicle and liability to third parties. The insurance policy excluded liability for death or bodily injury to a member of the policy holder's family normally resident with him. The applicant and his same-sex life partner were in the applicant's motor vehicle when it collided with another motor vehicle. The applicant's same-sex life partner sustained injuries and claimed damages arising from his injuries from the applicant. The respondent repudiated the claim on the ground that the claimant was a member of the applicant's family normally resident with him. The court held that the phrase "a member of the policy holder's family" in an insurance policy clause included the long-term same-sex partner of the policy holder. The consequences of the inclusion of the policy holder's same-sex life partner in the phrase was that the respondent was not obliged to indemnify the applicant against claims by his same-sex life partner which arose out of injuries he sustained in a motor vehicle collision when the motor vehicle had been driven by the applicant.

In *Du Toit v Minister of Welfare and Population Development* (hereafter *Du Toit*)¹⁴⁶ the applicants – partners in a long-term lesbian relationship – wanted to adopt two children jointly but were prohibited from doing so by the now-repealed Child Care Act 74 of 1983¹⁴⁷ and the Guardianship Act 192 of 1993.¹⁴⁸ Skweyiya AJ, who delivered the Constitutional Court's judgment, held that the exclusion of same-sex life partners from adopting children where they would otherwise be suitable to do so did not serve the best interests of the children. Thus the exclusion was in direct conflict with section 28(2) of the Constitution.¹⁴⁹ The exclusion also deprived children of the possibility of acquiring a loving and stable family life as required by section 28(1) (b) of the Constitution, 1996, and infringed the rights to dignity and equality of the same-sex life-partners.¹⁵⁰ The court found the infringement of these rights unjustifiable.

In 2003 in *J v Director-General, Department of Home Affairs*¹⁵¹ (hereafter *J*) lesbian life partners had twins as a result of artificial insemination using the ova of the first applicant and the sperm of an anonymous male donor. The fertilised ova were implanted into the second applicant who gave birth to the twins. The applicants wanted to be registered and recognised as the parents of the twins but their registration was refused by the Department of Home Affairs on the ground of the provisions of section 5 of the

144 *Du Plessis* (n 105) in par [19].

145 (n 105).

146 (n 105).

147 This Act was repealed by the Children's Act 38 of 2005 on 1 Apr 2010.

148 This Act was repealed by the Children's Act 38 of 2005 on 1 Jul 2007.

149 *Du Toit* (n 105) in par [22].

150 In pars [22], [26], [29].

151 (n 105).

now-repealed Children's Status Act 82 of 1987, which provided that children born as a result of artificial fertilisation are legitimate if the birth mother is married, but not if she is a partner in a same-sex life partnership or heterosexual life partnership.¹⁵² The court declared the section inconsistent with the Constitution, 1996. The result of this decision was that a child born as a result of artificial insemination of a woman in a same-sex life partnership is deemed to be the "legitimate" child of the same-sex life partners. Section 40 of the Children's Act 38 of 2005 re-enacted section 5 of the unamended Children's Status Act 82 of 1987 which excluded permanent same-sex life partners from its ambit. The effect of this provision is that a child born of same-sex life partners as a result of artificial fertilisation is once again regarded as a child born of "unmarried persons".¹⁵³ The constitutionality of section 40 of the Children's Act 38 of 2005 may be challenged on the same grounds that led to the declaration of unconstitutionality of section 5 of the Children's Status Act 82 of 1987 in the *J* case. It can be argued that section 40 of the Children's Act 38 of 2005 differentiates between married and unmarried couples and constitutes discrimination on the grounds of marital status and sexual orientation¹⁵⁴ which is presumed to be unfair in terms of section 9(5) of the Constitution, 1996. On the other hand it can be argued that same-sex couples now have the option to enter into a legally recognised civil union under the Civil Union Act 17 of 2008 and that any discrimination that section 40 may constitute can be justified on the ground that the partners chose not to make their relationship official.¹⁵⁵

In *Gory v Kolver* (hereafter *Gory*)¹⁵⁶ section 1(1) of the Intestate Succession Act 81 of 1987 was declared invalid and unconstitutional. Section 1(1) afforded rights of intestate succession to heterosexual spouses but not to permanent same-sex life partners. Van Heerden AJ held that the failure of section 1(1) of the Act to include a surviving same-sex life partner of a partnership in which the partners have undertaken reciprocal duties of support was inconsistent with the applicants' rights to equality and dignity and that the limitation on these rights could not be justified.¹⁵⁷

Permanent same-sex life partnerships have not been defined in a comprehensive manner. The existence of a permanent same-sex life partnership is a question of fact

152 This Act was repealed by the Children's Act 38 of 2005 on 1 Jul 2007. See J Heaton *The South African Law of Persons* 4 ed (Durban, 2012) at 9-10.

153 With the enactment of the Children's Act 38 of 2005 "the law shifted its emphasis from labelling children to labelling the marital status of their parents". A child is now referred to as "a child born of married parents" and "a child born of unmarried parents": Heaton (n 152) at 47. See ss 19-21, 38, 40 and 233 of the Children's Act.

154 Section 9(3) of the Constitution, 1996.

155 Heaton (n 152) at 49. See, also, A Louw "The acquisition of shared parental responsibility by same-sex civil union partners" (2007) 28 (2) *Obiter* 324-330 at 327.

156 (n 105).

157 *Gory* (n 105) in par [19].

which must be determined in the light of the intention of the partners as established by the facts and circumstances of each case.¹⁵⁸

7 2 3 *Affording marriage rights to same-sex couples*

The most far-reaching development after the “sodomy” judgment occurred in *Fourie*¹⁵⁹ when section 30(1) of the Marriage Act 25 of 1961 and the common-law definition of marriage were declared unconstitutional. Although the Marriage Act 25 of 1961 does not define “marriage” it contains a marriage formula which only makes provision for persons of the opposite sex to declare that they accept each other as husband and wife.¹⁶⁰ And, as indicated above, the common-law definition of “marriage” is predicated on the spouses’ being of the opposite sex.¹⁶¹

The Constitutional Court held that the failure of the common law and the Marriage Act 25 of 1961 to provide for means whereby same-sex couples could enjoy the same status, entitlements and responsibilities that are afforded to heterosexual couples through marriage constituted an unjustifiable violation of their right to equal protection under the law under section 9(1) of the Constitution, 1996, their right not to be unfairly discriminated against in terms of section 9(3) of the Constitution, 1996, and their right to dignity in terms of section 10 of the Constitution, 1996.¹⁶² It declared the common-law definition of marriage to be inconsistent with the Constitution, 1996 and invalid to the extent that it does not permit same-sex couples to enjoy the benefits coupled with the responsibilities it accords to heterosexual couples. The order of invalidity was suspended for twelve months to give Parliament the opportunity to correct the defect.¹⁶³ In delivering the majority judgment, Sachs J referred to *Dawood v Minister of Home Affairs*; *Shalabiv Minister of Home Affairs*; and *Thomas v Minister of Home Affairs*¹⁶⁴ where O’Regan J had pointed out that

158 The courts have adopted an inconsistent approach in instances where spousal benefits were conferred on same-sex life partners. For detailed discussions on what constitutes a same-sex life partnership, see L Schäfer in B Clark (ed) *Family Law Service* (loose-leaf) (Durban, 1998) (hereafter Schäfer *Family Law Service*) in pars [E18], [R3-R5]; B Goldblatt “*Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC): notes and comments” (2003) 19 *SAJHR* 118-123 at 122; L Schäfer “Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships” (2006) 123 *SALJ* 626-647 (hereafter Schäfer “Marriage and marriage-like relationships”) at 630-631; L Picarra “*Gory v Kolver* NO 2007 (4) SA 97 (CC): notes and comments” (2007) 123 *SAJHR* 563-569 at 568-569; MC Wood-Bodley “Establishing the existence of a same-sex life partnership for the purposes of intestate succession: Notes” (2008) 125 *SALJ* 259-273 at 259; De Ru (n 111) at 116-119.

159 (n 7).

160 Section 30(1).

161 See 1 and 2 2 *supra* for a discussion on the common-law definition of marriage based on principles of monogamy and heterosexuality.

162 *Fourie* (n 7) in par [114].

163 In pars [135], [136].

164 2000 (3) SA 936 (CC) in par 63.

[i]t would be inappropriate for this Court to seek to remedy the inconsistency in the legislation under review. The task of determining what guidance should be given to decision-makers and, in particular, the circumstances in which a permit may justifiably be refused is primarily a task for the Legislature and should be undertaken by it. There is a range of possibilities that the Legislature may adopt to cure the unconstitutionality.

Sachs J concluded that it was the duty of Parliament to restructure the institution of marriage. He therefore concluded that the Constitutional Court *had* [my emphasis] to suspend the order of invalidity to give Parliament the opportunity to correct the defect itself.¹⁶⁵ If Parliament failed to cure the defect within twelve months, the words “or spouse” would automatically be read into section 30(1) of the Marriage Act 25 of 1961 and this Act would become the legal vehicle enabling same-sex couples to achieve the status and benefits afforded by marriage.¹⁶⁶ Sachs J emphasised that Parliament had to “avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation”.¹⁶⁷

A remedy that would amount to a “separate but equal” approach would be unacceptable because it would serve “as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation”.¹⁶⁸ Differential treatment does not automatically constitute a violation of the dignity of same-sex couples; however, in instances where a “separate but equal” approach amounts to repudiation or inferiority and perpetuates a caste-like status, it becomes intolerable within a constitutional paradigm.¹⁶⁹ Sachs J held that it was necessary to take cognisance of the reform process recommended by the South African Law Reform Commission (SALRC) in determining the appropriate remedy to be ordered. He further held the reform process was to be conducted in a “holistic, systematic, structured and consultative” manner and of value to the legislature in drafting the appropriate legislation.¹⁷⁰ His decision to afford Parliament the opportunity to correct the legal position on same-sex marriage was largely based on research initially conducted by the SALRC.

Sachs J held that in finding an appropriate remedy, the moral and religious sensitivities of the case called for a more tentative approach and that public debates on the sacred and the secular were essential to satisfy the concerns of religious groups and traditional leaders.¹⁷¹ However, he ignored the reality that public sentiment is predominately against the legalisation of same-sex marriages.

Bohler-Muller condemns the Constitutional Court’s failure to do justice to the particularity of the case and describes the decision as a retreat from “ethical responsibility”

165 *Fourie* (n 7) in pars [135], [136].

166 In par [161].

167 In par [150].

168 *Ibid.*

169 In par [152].

170 In par [125].

171 In pars [90], [91].

by the judiciary.¹⁷² Pieterse argues that judges should rather “guide than constrain the potential of the judiciary to carve out an institutional role that contributes meaningfully to the social transformation of South African society”.¹⁷³ What is therefore needed is an appropriate balance between judicial alertness and deference, as our courts have wide powers that allow for *flexible* and *creative* (original emphasis) judicial engagement.¹⁷⁴ In *Fourie* the Constitutional Court clearly deferred to the legislature for political reasons.¹⁷⁵ The welfare and needs of a minority group were sacrificed in favour of public interest and in the interests of social stability and maintaining a good relationship with the legislature.¹⁷⁶

In our constitutional realm the secular and the sacred must respect each other and co-exist through the accommodation of diversity.¹⁷⁷ The religious beliefs of some cannot be used to determine the constitutional rights of others. And, importantly, views of the religious majority on marginalised homosexual members of our society should not be given recognition. It is the function of the Constitution, 1996 and law to step in and counteract, rather than reinforce, unfair discrimination against a minority group.¹⁷⁸ Although this was the view expressed by the majority judgment in *Fourie*, it does not accord with the relief ordered by the court.

What led to the enactment of the Civil Union Act 17 of 2006, which permits same-sex couples to enter into a legally recognised civil union, will be discussed under the next heading.

8 The Civil Union Act 17 of 2006

8 1 Draft Civil Union Bill

In its Discussion Paper on domestic partnerships, the SALRC had already raised the possibility of the extension of marriage rights to same-sex couples in 1998.¹⁷⁹ The Commission’s final report on its study of domestic partnerships was published in March 2006. The Commission made certain recommendations that it submitted would satisfy the

172 N Bohler-Muller “Judicial deference and the deferral of justice in regard to same-sex marriages and in public consultation” (2007) 40 *De Jure* 90-112 at 98. See, also, J Sinclair in D Atkin & F Banda (eds) “A new definition of marriage: Gay and lesbian couples may marry” (2008) *The International Survey of Family Law* 397-409 at 401.

173 M Pieterse “Coming to terms with judicial enforcement of socio-economic rights” (2004) 20 *SAJHR* 383-417 at 384.

174 *Idem* at 411.

175 Bohler-Muller (n 172) at 112.

176 *Ibid.*

177 *Fourie* (n 7) in par [98].

178 *Fourie* (n 7) in par [92].

179 South African Law Reform Commission “Discussion Paper 104, Project 118, Domestic Partnerships” available at <http://www.justice.gov.za/salrc/dpapers/dp104.pdf> (accessed 29 Jul 2013).

equality provision of the Constitution.¹⁸⁰ As a first choice, the Commission recommended the amendment of the Marriage Act 25 of 1961 by the insertion of a definition of marriage that extends marriage in terms of the Act to same-sex and opposite-sex couples; the amendment of the Marriage Act 25 of 1961 by the insertion of a definition of the word “spouse”; and the amendment of the marriage formula in the Marriage Act 25 of 1961 to include the words “or spouse”.¹⁸¹ To accommodate the religious and moral objections that were raised against the recognition of same-sex marriage, the Commission recommended a second choice, the enactment of the “Orthodox Marriage Act” (the so-called Dual Act option) that would be available only to opposite-sex couples.¹⁸² The amended Marriage Act would be called the “Reformed Marriage Act”.¹⁸³ Both proposals of the Commission were all-encompassing, considering the right of same-sex couples to equal protection and benefit of the law and taking into account religious and moral objections that had been raised against the recognition of same-sex marriage.

The Legislature discarded the reformatory options recommended by the SALRC.¹⁸⁴ When the Civil Union Bill¹⁸⁵ (hereafter the Bill) was presented to Parliament at the end of August 2006 it evoked much disapproval.¹⁸⁶ The Bill proposed the implementation of a separate institution for same-sex couples: civil partnerships.¹⁸⁷ However, the legal consequences of marriage would apply *mutatis mutandis* to civil partnerships.¹⁸⁸ The proposed civil partnership differed from traditional marriage in three fundamental ways: it would not be called a marriage (except if the parties preferred to refer to their civil partnership as a marriage, but this would be allowed only during the solemnisation of the civil partnership);¹⁸⁹ marriage officers employed by the state would have the right to refuse to solemnise a civil partnership on the grounds of conscience;¹⁹⁰ and it would be available only to same-sex couples, not to heterosexual couples.¹⁹¹

Activists and members of the Lesbian Gay Bisexual Transgendered and Intersex (LGBTI) community were displeased with the Bill, arguing that it represented an attempt to create a “separate but equal” marriage institution that would “protect” “real marriage”

180 South African Law Reform Commission “Project 118, Report on Domestic Partnerships” available at http://www.justice.gov.za/salrc/reports/r_prj118_2006march.pdf (accessed 29 Jul 2013) in par [5.6].

181 *Idem* in pars [5.6.6], [5.6.7].

182 *Idem* in pars [5.6.17], [5.6.23].

183 The SALRC recommended a different name for the amended Marriage Act in order to differentiate between “orthodox marriages” and “reformed marriages”.

184 Sinclair (n 172) at 402.

185 Draft Civil Union Bill, 2006 publ in GN 1385 GG 29169 of 13 Aug 2006.

186 B Smith & R Robinson “The South African Civil Union Act 2006: Progressive legislation with regressive implications?” (2008) 22 *International J of Law, Policy and the Family* 356-392 at 358.

187 Clause 2(a) of the Bill. A “civil partnership” is defined as “the voluntary union of two adult persons of the same sex that is solemnised and registered in accordance with the procedures prescribed in this Act to the exclusion, while it lasts, of all others”: clause 1 of the Bill.

188 Clause 13(1).

189 Clause 11.

190 Clause 6(1).

191 Clause 1.

from “contamination” and “defilement” by same-sex couples, while pretending to afford same-sex couples equal marriage rights.¹⁹² They further argued that the Bill contradicted the instructions set out in the *Fourie* case in which the Constitutional Court had expressly stated that Parliament should avoid implementing a remedy providing for “separate but equal” rights to same-sex couples that would in their context and application create new forms of oppression.¹⁹³ It was argued that the Bill created a separate and inferior institution which failed to recognise both the tangible legal consequences and intangible benefits that flow from entering into marriage.¹⁹⁴ Accordingly, the Bill deprived same-sex couples of the right to access the status associated with traditional marriage and endorsed the view that same-sex couples are somehow immoral and impure and that heterosexual marriage must be protected from contamination.¹⁹⁵

Gay and lesbian activists launched a sustained attack on the draft Bill, stating that it was insulting and humiliating towards people who would prefer to marry a member of their own sex.¹⁹⁶ The fact that the Bill gave same-sex life partners not marriage rights but a mere second-class institution called a “civil partnership” affirmed the view that the legislature was reluctant to grant equal marriage rights to same-sex couples and that the draft Bill expressed an intolerance for the plurality of the South African society.¹⁹⁷ This view expressed by gay and lesbian activists resonated with some members of the ANC because of associations with apartheid, and so the ANC members of the Home Affairs Portfolio Committee came to the conclusion that it was necessary to amend the Bill.¹⁹⁸

The Constitution, 1996, allows the public to participate in the law-making process. Sections 59(1) and 72(1) (a) of the Constitution, 1996, oblige Parliament to “provide education that builds capacity for such participation” and to facilitate “learning and understanding in order to achieve meaningful involvement by ordinary citizens”.¹⁹⁹ This must be done in order to guarantee that the public participates in the law-making process in coherence with our democracy.²⁰⁰ The result of Parliament’s failure to comply with its constitutional duty was a public participation process that turned into a homophobic outburst; an opportunity to advance arguments against the evils of homosexuality.²⁰¹ The public hostility against same-sex marriage certainly had an impact on the legislature’s decision to enact separate legislation to regulate same-sex marriage. In instances where hate speech is allowed in public affairs, democracy is endangered and totalitarianism

192 P de Vos “A judicial revolution? The court-led achievement of same-sex marriage in South Africa” (2008) 2 *Utrecht LR* 162-174 at 167. See, also, De Vos (n 51) at 458.

193 *Fourie* (n 7) in par [150].

194 De Vos (n 192) at 168.

195 *Ibid.* Much of the debate revolved around the procedural issue whether the Bill had been properly tabled to the Home Affairs Portfolio Committee and whether it had been properly certified by the State law advisors.

196 *Ibid.*

197 Barnard (n 17) at 516.

198 *Idem* at 522.

199 *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) in par [131].

200 In par [135].

201 De Vos & Barnard (n 48) at 814.

encouraged.²⁰² Sinclair argues that the political and social pressure which caused the Constitutional Court to defer to the legislature prompted the latter to defer to the moral majority of society in formulating its remedy.²⁰³ In early November 2006 the National Assembly adopted a substantially amended Civil Union Act 17 of 2008 which provides for same-sex couples and heterosexual couples to enter into a civil union. The Civil Union Act 17 of 2008 came into operation on 30 November 2006.

8 2 General overview of the Civil Union Act as a separate measure to govern same-sex marriage

The Preamble to the Civil Union Act 17 of 2008 acknowledges that the family law dispensation existing after the commencement of the Constitution, 1996, failed to “provide for same-sex couples to enjoy the status and benefits coupled with the responsibilities that marriage accords heterosexual couples”. The Act defines a civil union as “the voluntary union of two persons who are both 18 years or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others”.²⁰⁴ The Act therefore applies to civil-union partners joined in a civil union.²⁰⁵ It is important to note that the Act applies to both same-sex and heterosexual couples in a monogamous relationship. A person in a civil union may not conclude a marriage under the Marriage Act 25 of 1961 or the Recognition of Customary Marriages Act 120 of 1998²⁰⁶ and a person married under the Marriage Act or Recognition of Customary Marriages Act is not allowed to register a civil union.²⁰⁷ Section 13(1) of the Civil Union Act 17 of 2008 provides that the legal consequences of marriage as contemplated in the Marriage Act 25 of 1961 apply *mutatis mutandis* to a civil union subject to changes which are required by context.²⁰⁸

Certain provisions of the Act apply only to same-sex couples, which renders the objectivity and constitutional commitment by the legislature to provide same-sex couples with an equal status that the law accords to heterosexual couples questionable. The Act creates anomalies between *ex officio* and religious marriage officers.²⁰⁹ An *ex*

202 Arendt (n 36) at 268.

203 Sinclair (n 172) at 401.

204 Section 1 of the Civil Union Act 17 of 2006.

205 *Idem* s 3.

206 *Idem* s 8(2).

207 *Idem* s 8(3).

208 For the legal requirements for a civil union see, generally, Heaton (n 109) at 194-201.

209 D Bilchitz & M Judge “The Civil Union Act: Messy compromise or giant leap forward?” in M Judge (ed) *To Have and to Hold The Making of Same-Sex Marriage in South Africa* (Johannesburg, 2008) 149-163 at 158. See, further, E Bonthuys “Irrational accommodation: Conscience, religion and same-sex marriage in South Africa” (2008) 125 *SALJ* 473-483 at 475; H de Ru “The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues?” (2010) 73 *THRHR* 553-568 at 554.

officio marriage officer²¹⁰ is not compelled to solemnise a same-sex civil union if he or she objects on the ground of conscience, religion or belief.²¹¹ Thus the conscience provision in the Civil Union Act 17 of 2008 accommodates the right to freedom of conscience, religion and belief of civil servants who are marriage officers and who object to the solemnisation of a civil union by same-sex parties; on the other hand it limits the constitutional rights of same-sex couples who wish to marry in terms of the Civil Union Act 17 of 2008.²¹²

Only a person who is eighteen years or older is permitted to enter into a civil union.²¹³ A minor can therefore not enter into a civil union even if assisted by his or her guardian. This differs from the legal position in terms of the Marriage Act 25 of 1961 and Recognition of Customary Marriages Act 120 of 1998.²¹⁴ It is submitted that the blanket ban on a civil union by minors violates their constitutional rights to equality and dignity and is also in conflict with the Constitutional Court judgment in *Fourie* since it denies minors in a same-sex relationship the opportunity to acquire the status, benefits and responsibilities that minors in heterosexual relationships can acquire.²¹⁵

- 210 Section 2(1) and (2) of the Marriage Act 25 of 1961 defines an *ex officio* marriage officer as “[e]very magistrate, every special justice of the peace and every Commissioner” and states that the marriage officer shall “by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office”. Furthermore, “the Minister and any officer in the public service authorized thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area”.
- 211 Section 6 of the Civil Union Act 17 of 2008. It may be argued that the *Fourie* judgment provided an escape route for *ex officio* marriage officers with religious objections to conducting same-sex civil unions by stating (as per Sachs J) that “[t]he principle of reasonable accommodation could be applied by the State to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience” (*Fourie* (n 7) in par [159]). See, further, De Ru (n 209) at 555-560.
- 212 Bonthuys (n 209) at 478. See, also, R Wintemute “Religion vs sexual orientation: A clash of human rights?” (2002) 1 *J of Law and Equality* 125-154 at 141; B MacDougall “Refusing to officiate at same-sex marriages” (2006) 69 *Saskatchewan LR* 351-373 at 356; P Lenta “Muslim headscarves in the workplace and in schools” (2007) 124 *SALJ* 296-319 at 297; D Bilchitz & M Judge “For whom does the bell toll? The challenges of the Civil Union Act for family law in South Africa” 2007 (23) *SAJHR* 466-499 at 490-492; K Govender “Equality, sexuality and taking rights seriously” (2008) 29 (3) *Obiter* 1-18 at 15; Sinclair (n 172) at 404.
- 213 Minors who conclude either a customary or a civil marriage and thereby attained majority are not allowed to conclude a civil union if the civil or customary marriage is dissolved by either death or divorce while the person is still below the age of eighteen years. This is so because s 1 of the Civil Union Act 17 of 2008 expressly requires that the partners to a civil union must be “18 years of age or older”.
- 214 In terms of s 24(1) of the Marriage Act 25 of 1961 read with s 18(3)(c) and (5) of the Children’s Act 38 of 2005, a minor may enter into a civil marriage if he or she has the consent of all his or her guardians. The Recognition of Customary Marriages Act 120 of 1998 requires that both prospective spouses must be above the age of eighteen years: s (1)(a)(i).
- 215 *Fourie* (n 7) in pars [150], [152]. Heaton (n 109) at 194; De Ru (n 209) at 560-563; Sinclair (n 172) at 408 for discussions on the blanket ban on minors entering into a civil union.

As mentioned above the legal consequences of marriage as contemplated in the Marriage Act 25 of 1961 apply to a civil union: see Section 1 of the Civil Union Act 17 of 2008. In addition section 13(2) of the Act states that in so far as the Marriage Act 25 of 1961 and Recognition of Customary Marriages Act 120 of 1998 are concerned, any reference to “marriage” is equated with “civil union” and any reference to “husband”, “wife” or “spouse” with “civil union partner”. These sections create practical challenges in the adaption of our family law to accommodate same-sex civil union partners.

In terms of section 13(1) and (2) of the Civil Union Act 17 of 2008, the Matrimonial Property Act 88 of 1984 is applicable to civil unions. In instances where one of the same-sex civil union partners is domiciled in a foreign country the regulation of the proprietary consequences becomes problematic. In the absence of an express antenuptial agreement the patrimonial consequences of marriage are governed by the husband’s *lex loci domicilii* at the time of marriage.²¹⁶ However, in a same-sex civil union it is impossible to determine who the “husband” is and which legal system will regulate the patrimonial consequences of a same-sex civil union. The *lex loci domicilii*-rule can therefore not be applied to same-sex civil unions.²¹⁷

One of the invariable consequences of a civil marriage is that the *pater est quem nuptiae demonstrant*-presumption (that is, the marriage indicates who the father is) applies to any child to whom the wife gives birth. The presumption specifically refers to a father, whereas there are two females (two “mothers”) or two males (two “fathers”) in a same-sex civil union. Application of the *pater est quem nuptiae demonstrant*-presumption to same-sex civil unions is therefore not practically possible.²¹⁸

The provisions relating to the post-civil-union surname of the same-sex civil union partners also differ from those which apply to spouses in a civil marriage. Section 26(1) of the Births and Deaths Registration Act 51 of 1992 permits a wife to assume her husband’s surname (but not a husband to assume his wife’s surname) or, after having assumed his surname, to resume the surname she bore at any prior time, or create a double-barrelled surname consisting of her husband’s surname and the surname she bore at any prior time. This provision applies to both parties to a same-sex civil union. It may be submitted that this differentiation between the position of same-sex civil union

216 *Frankel’s Estate v The Master* 1950 (1) SA 220 (A); *Sperling v Sperling* 1975 (3) SA 707 (A).

217 For a discussion on the proprietary consequences of a same-sex civil union, see C McConnachie “‘With such changes as may be required by the context’: The legal consequences of marriage through the lens of section 13 of the Civil Union Act” (2010) 127 *SALJ* 424-442 at 434-441; De Ru (n 209) at 563-564; Heaton (n 109) at 200-201; Heaton (n 152) at 40-41; AS v CS 2011 (2) SA 360 (WCC) par [55]; *Fourie* (n 7) in pars [124], [125]. See, also, JL Neels & M Wethmar-Lemmer “Constitutional values and the proprietary consequences of marriage in private international law – introducing the *lex causae proprietatis matrimonii*” (2008) 3 *TSAR* 587-596 at 587; Schäfer *Family Law Service* (n 156) in par [R48].

218 Procreation in a same-sex civil union involves artificial fertilisation, and in the case of a male couple it involves surrogate motherhood too. The rules on artificial fertilisation and surrogate motherhood will determine who the child’s parents are. The application of the *pater est quem nuptiae demonstrant*-presumption is therefore probably not necessary: see Heaton (n 109) at 200; Heaton (n 152) at 56.

partners and spouses in a civil marriage is unconstitutional as it constitutes unjustifiable inequality.²¹⁹

Some academic authors argue that the Civil Union Act 17 of 2008 is a badly-drafted piece of legislation: the product of a rushed legislative process that will contribute to “an already disjointed legal landscape”.²²⁰ It may be concluded that the “equal but separate” legal recognition afforded by the Civil Union Act 17 of 2008 as indicated above acknowledges the majoritarian “desire for theocracy” and “absolute hegemony”; tactics associated with the totalitarian regime of apartheid.²²¹ The co-existence of the Marriage Act 25 of 1961 and the Civil Union Act 17 of 2008 creates a threefold hierarchy within the institution of marriage – the heterosexual superior marriage under the Marriage Act; then the inferior marriage or civil union between heterosexual couples; and lastly the marriage or civil union between same-sex couples.²²² It is submitted that the Civil Union Act 17 of 2008 is a “separate and *unequal*” Act which confers a second-class marital status on same-sex couples and further produces new forms of oppression. This is clearly in conflict with the Constitutional Court judgment in *Fourie* that the legislature should not provide a remedy that in its context and application would produce new forms of marginalisation.

9 Conclusion

The pre-constitutional period in South Africa was characterised by the presence of a distinct bias in favour of a certain brand of Christianity, which inevitably created a church-state consubstantiality within the apartheid regime. This church-state relationship provided a religious foundation for the political and social exclusion of those members of society who dared to deviate from what was regarded as normal behaviour. When a new constitutional democracy was created, based on affirmed principles of equality, dignity and freedom, the ensuing political transition made it evident that the exclusion of certain members of our society on the basis of their sexual orientation belonged to a past era. Unfortunately, formal legal equality will only gradually be translated into social equality, so that continued discrimination on the basis of sexual orientation remains inevitable.²²³ In *Minister of Justice* the Constitutional Court emphasised that the right to equality does not encompass the elimination of all differences but entails “equal concern and respect across difference” and that equality “does not imply a levelling or homogenisation of behaviour”, but instead indicates that we must acknowledge and accept the differences in our society.²²⁴ The right to equality is conceptualised as the right to be different from

219 Heaton (n 109) at 200. See, also, McConnachie (n 217) at 425-434.

220 Smith & Robinson (n 186) at 356.

221 Barnard (n 17) at 510.

222 De Vos & Barnard (n 48) at 822.

223 Bilchitz & Judge (n 212) at 498. See JC Mubangizi & BK Twinomugisa “Protecting the right of freedom of sexual orientation: What can Uganda learn from South Africa?” (2011) 2 *Stell LR* 330-351 at 338-339 on challenges faced by LGBT people in South Africa.

224 *Minister of Justice* (n 47) in par [132].

stated or unstated norms without suffering unfavourable consequences because of such difference.²²⁵ Ironically, in most of the judgments in which social recognition was sought for same-sex life partners that were heard after the *Minister of Justice*, the courts reverted to a more inclusionary approach to equality. The extension of rights to same-sex life partnerships has been permitted to the extent that the life partnerships conform to the characteristics of an ideal traditional marriage.²²⁶

Although individuals may obtain certain rights as gay men, lesbians, bisexuals or other sexual minorities, they cannot fully claim their citizenship because they are assumed to warrant protection only in as much as they conform to the hierarchical assumptions of the heteronormative state.²²⁷

The result is therefore “a society in which social inclusion is based on sameness, rather than difference, and which limits choice unless exercised within the stated boundaries of acceptable relationships”.²²⁸ The Constitution imposes an obligation on the law to acknowledge the variability of human beings. It further requires the abolition of the notion of marriage as legally normative.²²⁹

In *Fourie* the Constitutional Court required that the legislative remedy must accord same-sex couples a public and private status equal to heterosexual couples and must treat same-sex couples and heterosexual couples equally with regard to the tangible and intangible benefits associated with marriage.²³⁰ At first glance the Civil Union Act 17 of 2008 appears to comply with all the guiding principles provided by the Constitutional Court, but in view of the general overview above it becomes apparent that the Act is not the panacea some people hoped or believed it would be. Certain provisions of the Act apply only to same-sex couples, which renders questionable the legislature’s objectivity and constitutional commitment to conferring an equal status on same-sex couples and heterosexual couples. The Civil Union Act 17 of 2008 as a separate and *unequal* measure to govern same-sex marriage indicates the prevalence of civil marriage as an exclusive institution available to heterosexual couples only. In sum, South Africa has made a giant leap forward by providing marriage rights to same-sex couples. Nevertheless, it is impossible to ignore the fact that the Civil Union Act 17 of 2008 represents a cautious and tentative approach that is synonymous with the view of the majority in *Fourie* and the hostile majority of our society.

225 De Vos (n 108) at 185.

226 See 7 2 2 *supra*.

227 P de Vos “From heteronormativity to full sexual orientation? Equality and sexual freedom in Laurie Ackermann’s constitutional jurisprudence” (2008) *Acta Juridica* 254-272 at 257. See, also, J Barnard-Naudé & P de Vos “Disturbing heteronormativity: The ‘queer’ jurisprudence of Albie Sachs” (2010) 25 *SAPL* 209-233.

228 C Albertyn “Substantive equality and transformation in South Africa” (2007) 23 *SAJHR* 253-276 at 272.

229 *Minister of Justice* (n 47) in par [134].

230 *Fourie* (n 7) in par [152].

Abstract

In pre-1994 South Africa the discourse on sexuality was rigidly controlled by apartheid and a distinct bias in favour of a certain brand of Christianity. Based on the concept of marriage as defined in Christendom, any kind of recognition of same-sex unions was prohibited in South Africa, and sexual relations between persons of the same-sex were characterised as deviant and criminal behaviour. With the abolition of apartheid and the establishment of a new constitutional dispensation based on the values of equality, human dignity and freedom, discrimination against homosexuals was officially relegated to the past. The relegation is attributed to the political alliances formed between minority and marginalised members of our society. Political alliances inevitably led to the acceptance in the South African Constitution, 1996, that discrimination on the ground of sexual orientation would automatically be unfair until proven otherwise. This constitutional commitment led to various piecemeal legislative and judicial developments after 1994, when the recognition and protection of same-sex life partnerships have been at issue. The Constitutional Court declared the common-law definition of marriage to be inconsistent with the Constitution and as a result the Civil Union Act 17 of 2006 was enacted to govern same-sex marriage. This article demonstrates how same-sex couples are made to feel like outsiders due to certain legal provisions, and that the guarantee of democratic tolerance for all South Africans still remains somewhat illusory.