

**AN EMBARRASSMENT OF RICHES OR A PROFUSION OF CONFUSION? AN  
EVALUATION OF THE CONTINUED EXISTENCE OF THE *CIVIL UNION ACT 17*  
OF 2006 IN THE LIGHT OF PROSPECTIVE DOMESTIC PARTNERSHIPS  
LEGISLATION IN SOUTH AFRICA**

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## **1 Introduction**

Same-sex marriage became a reality in South Africa when the *Civil Union Act*<sup>1</sup> was enacted on 30 November 2006. This Act makes provision for same-sex and opposite-sex couples to formalise their relationships by entering into either a marriage or a civil partnership,<sup>2</sup> both of which enjoy the same legal recognition as, and give rise to the same legal consequences of, a civil marriage under the *Marriage Act*.<sup>3</sup> The latter Act remains however a vehicle by which only heterosexual couples may enter into the institution of matrimony; a state of affairs that has elicited severe criticism from a number of commentators.<sup>4</sup> This point of criticism, coupled with the potential enactment of domestic partnership legislation (in the form of a *Draft Domestic Partnerships Bill* that appeared in early 2008)<sup>5</sup> casts significant doubt on the viability of the *Civil Union Act* in general and the dualistic nature of the civil union (as either a marriage or civil partnership) in particular. Consequently, this paper aims, against the backdrop of the *Draft Domestic Partnerships Bill* to evaluate the desirability of the continued existence of the *Civil Union Act* by comparing the South African Law Reform Commission's 2006 recommendation<sup>6</sup> to the effect that separate legislation was required in order to allow for same-sex marriages on the one hand, with the legislature's response to the Constitutional Court's judgment in *Minister of*

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1 17 of 2006

2 S 1 definition of "civil union".

3 25 of 1961 – see S 13 *Civil Union Act*.

4 See for example De Vos and Barnard 2007 *SALJ* 821–822; Bilchitz and Judge 2007 *SAJHR* 487–490.

5 GN 36 in GG 30663 of 14 January 2008.

6 South African Law Reform Commission (hereafter SALRC) 2006 <http://www.justice.gov.za/>.

*Home Affairs v Fourie (Doctors for Life International as Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs*<sup>7</sup> on the other. As an example of an established and well-ordered family law system, the legal position in the Netherlands will be compared to that in South Africa with a view to ascertaining which approach is more acceptable. In this regard, a number of fundamental differences between the legal systems of the two countries will be highlighted, and a proposal will be made that is hoped will provide a less complicated and more streamlined family law dispensation in South Africa. As a point of departure, it is necessary briefly to examine the content of the proposed domestic partnership legislation.

## **2 Salient features of the *Draft Domestic Partnerships Bill***

In January 2008, the South African legislature unveiled its first concrete attempt to regulate the position of life partnerships in South Africa in the form of a *Draft Domestic Partnerships Bill*.<sup>8</sup> This Draft Bill provides for two forms of domestic partnership: registered and unregistered. Entering into a registered domestic partnership involves a public commitment in the form of a formal registration process that is undertaken by two persons (irrespective of their gender),<sup>9</sup> neither of whom is married or in a civil union or another registered domestic partnership with an outsider.<sup>10</sup> In consequence of registration, many of the legal consequences that attach to a valid marriage are extended to the partners. For instance, registered domestic partners will be placed under an *ex lege* duty to support one another according to their respective means and needs,<sup>11</sup> will be prohibited from disposing of joint property without written consent,<sup>12</sup> and will be entitled to occupy the family home irrespective of which partner owns or rents it.<sup>13</sup> A registered domestic partner will also automatically qualify as a "spouse" for the purposes of the *Intestate Succession Act*<sup>14</sup> and the *Maintenance of Surviving Spouses Act*,<sup>15</sup> and as a

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7 2006 1 SA 524 (CC); hereafter *Minister of Home Affairs v Fourie*.

8 See n 4.

9 Cf the preamble to the Draft Bill, which refers only to "opposite-sex couples" and therefore should be amended – see Smith *Domestic Partnership Rubric* 465-467.

10 Clause 4(1) and (2) read with Clause 6.

11 Clause 9.

12 Clause 10.

13 Clause 11(1).

14 81 of 1987.

15 27 of 1990.

"dependant" in terms of the *Compensation for Occupational Injuries and Diseases Act*.<sup>16</sup> Over and above termination through death, a registered domestic partnership can be terminated by mutual agreement coupled with a de-registration procedure,<sup>17</sup> unless minor children are involved, in which case a court procedure similar to divorce is required.<sup>18</sup>

On the other hand, the unregistered domestic partnership envisions a (generally monogamous)<sup>19</sup> relationship that has not been registered under the Draft Bill, and permits either or both partners to approach the High Court at the termination of the relationship for an order relating to property division, maintenance, or intestate succession.<sup>20</sup> In deciding whether to grant the order, the court must have regard to "all the circumstances of the relationship"<sup>21</sup> in addition to any specific requirements prescribed for the nature of the particular claim sought.<sup>22</sup> As such, the unregistered domestic partnership adopts an *ex post facto* judicial discretion model.<sup>23</sup>

From the outset, it must be noted that the Draft Bill is not flawless, and that a recent study<sup>24</sup> has proposed a number of amendments in order for the prospective legislation to function effectively and to be aligned with complementary legislation such as the *Children's Act*.<sup>25</sup> For this reason, references throughout this paper to the

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16 130 of 1993.

17 Clauses 13 and 14.

18 Clauses 15 and 16.

19 In accordance with Clause 26(4) "[a] court may not make an order under this Act regarding a relationship of a person who, at the time of that relationship, was also a spouse in a civil marriage or a partner in a civil union or a registered domestic partnership with a third party". It appears therefore that this provision will not preclude an application brought by a person whose partner was: (i) married to a third party in terms of customary law or in terms of a system of religious law that sanctions polygyny (such as Islam or Hinduism); or (ii) who was involved in multiple unregistered domestic partnerships – see Smith (n 9) 508.

20 Clause 26(1).

21 Clause 26(2). See Smith (n 9) 654-668 for a critique on this approach.

22 For example, in assessing whether a partner is entitled to claim for the redistribution of separate property, a court must be satisfied that such an order will be "just and equitable" by virtue of the "direct or indirect contributions" made by the claimant to the "maintenance or increase of the separate property or part of the separate property of the other unregistered domestic partner" while the partnership subsisted – Clause 32(5).

23 Contrary to the "*de facto*" or "ascription" model in terms of which status is automatically awarded to a relationship that satisfies certain criteria (such as a minimum period of duration) *during its existence*, the *ex post facto* model allows a court application to be brought only once the relationship has ended, at which point the status of the relationship is considered – see SALRC (n 6) 366–369.

24 See in general Smith (n 9) 461-746.

25 38 of 2005.

"(modified) *Domestic Partnerships Bill*" must be interpreted as referring to the Draft Bill as potentially amended in accordance with the proposals made in the study in question. The need for modification notwithstanding, it can be accepted that the Draft Bill provides a more than reasonable indication of the legislature's view of the format that prospective domestic partnership legislation should assume,<sup>26</sup> and for this reason this paper will take the Draft Bill as its point of departure. Moreover, the dire need for such legislation is patent in view of the "patchwork"<sup>27</sup> nature of the laws that currently govern non-formalised domestic partnerships in South Africa,<sup>28</sup> with the result that it can be accepted that it is only a question of time before such legislation will be promulgated. Bearing these introductory comments in mind, the history behind the *Civil Union Act* can now be considered.

### **3 The enactment of the *Civil Union Act 17 of 2006* and its aftermath**

In order fully to understand the submissions made in this article, the impact of the enactment of the *Civil Union Act* and its broadening effect on marriage and analogous interpersonal relationships that are recognised in South Africa must be considered. This will be preceded by a brief comparison between the South African Law Reform Commission's proposals regarding same-sex marriage and the legislature's response to case law that provided the impetus for the enactment of the Act.

#### **3.1 The South African Law Reform Commission**

The Constitutional Court's judgment in *Minister of Home Affairs v Fourie*<sup>29</sup> gave Parliament one year as from 1 December 2005 within which to enact legislation that provided for same-sex marriages, failing which the *Marriage Act* would automatically be read in such a way as to permit same-sex couples to marry in terms of that Act. The issue that however needs to be considered is whether the option exercised by the legislature in response to *Minister of Home Affairs v Fourie* was the correct one,

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26 Smith (n 9) 462-464.

27 *Minister of Home Affairs v Fourie* para 125.

28 See the discussion in S 3.3.6 below with reference to the patchwork of laws that currently governs domestic partnerships.

29 585G-586I.

and to this end a convenient point of departure is to consider the SALRC's recommendations in this regard.

The first steps towards assessing the post-1994 suitability of the South African law of marriage were taken in 1996 when the Minister of Home Affairs requested the SALRC investigate this matter.<sup>30</sup> In the light of case law such as the 1998 decision in *Langemaat v Minister of Safety and Security*,<sup>31</sup> the SALRC's investigation was subsequently expanded to include the issue of "domestic partnerships".<sup>32</sup> As a result of this development, two separate projects were launched, the first dealing with the technical aspects of the law of marriage (Project 109) and the second dealing with domestic partners as such (Project 118). Project 109 was completed in 2001<sup>33</sup> and in March 2006 the SALRC presented a report dealing with the second project.<sup>34</sup>

As can be deduced from this brief summary, the report produced in consequence of Project 118 saw the light of day only after the judgment in *Minister of Home Affairs v Fourie* had been delivered. A memorandum that summarised the SALRC's findings up until that point was however provided to the Constitutional Court at that court's request, and it is important to note from the outset that in his majority judgment Sachs J made it abundantly clear that one of the reasons for suspending his order was precisely to afford the legislature sufficient opportunity to take proper cognisance of the SALRC's comprehensive research.<sup>35</sup> In as far as they pertain to same-sex marriage, the recommendations made by the SALRC in the 2006 report can be summarised as follows:

- (i) The *Marriage Act* ought to be amended by:
  - the insertion of definitions of the concepts "spouse" and "marriage"; the latter of which should clearly provide for both heterosexual and homosexual marriages;<sup>36</sup> and
  - the inclusion of the words "or spouse" after the word "husband" in section 30(1) of the Act so as to provide a gender-neutral marriage formula;

and

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30 SALRC (n 6) 1.

31 1998 3 SA 312 (T); hereafter *Langemaat*.

32 SALRC (n 6) 1–2.

33 SALRC 2001 <http://www.justice.gov.za/>.

34 SALRC (n 6).

35 Para 156.

36 SALRC (n 6) 306 (para 5.6.6).

- (ii) The Commission was of the opinion, for considerations of policy, that it was necessary "to accommodate the religious and moral objections" that had been raised before the Commission against permitting same-sex marriage. In the result, the Commission opined that (over and above the amendments to the *Marriage Act* described above) a new Act should be promulgated that allowed only for the solemnisation of "orthodox marriages" involving one man and one woman. This Act would furthermore provide only for the solemnisation of religious marriages and only ministers of religion or other persons holding responsible positions in religious denominations or organisations would consequently be permitted to qualify as marriage officers for the purpose of that Act.<sup>37</sup>

As will be seen in the paragraphs that follow, the current position in South African family law does not reflect the SALRC's recommendations in any way.

### **3.2      *The legislature's response to Minister of Home Affairs v Fourie: The Civil Union Act 17 of 2006***

The *Civil Union Act* defines a "civil union" as:

the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of *either a marriage or a civil partnership*, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others.<sup>38</sup>

The concept "civil union partner" is defined as "a *spouse* in a marriage or a *partner* in a civil partnership, as the case may be, concluded in terms of this Act".<sup>39</sup>

The definitions quoted lead to the conclusion that the term "civil union" is merely semantic and that it has been employed merely to differentiate between marriage and civil partnership.<sup>40</sup> In addition, it is important to note that South African law permits marriages between persons of the same sex that are in all respects the equivalent of heterosexual marriages under the *Marriage Act*. This is facilitated by Section 13 of the *Civil Union Act*, which states:

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37 SALRC (n 6) 311–313 (para 5.6.23–5.6.24).

38 Emphasis added.

39 Emphasis added.

40 Smith and Robinson 2008 *BYUJPL* 426. See S 5.3.1.3 below.

- (1) The legal consequences of a marriage contemplated in the *Marriage Act* apply, with such changes as may be required by the context, to a civil union.
- (2) With the exception of the *Marriage Act* and the *Customary Marriages Act*, any reference to-
  - (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
  - (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.<sup>41</sup>

This brief summary shows that instead of expanding the *Marriage Act* in the manner suggested by the SALRC, the legislature instead opted to introduce a "separate but equal"<sup>42</sup> regime to cater for same-sex marriage.

### **3.3 Summary of marriage and analogous interpersonal relationships currently recognised in South African law**

For the sake of completeness, it is useful briefly to summarise the various interpersonal relationships that currently enjoy some form of legal recognition in South Africa. These are discussed below.

#### **3.3.1 Civil marriages**

Civil marriages are concluded in terms of the common law as amended by the *Marriage Act*. Only monogamous heterosexual marriages may be solemnised in terms of this Act. As a general rule both prospective spouses must have reached the age of majority (18 years) in order to marry in terms of this Act, but the Act makes provision for minors to be permitted to marry under certain circumstances.<sup>43</sup>

#### **3.3.2 Marriages under the Civil Union Act**

This Act caters for a specific form of marriage as a creature of statute. It provides for both opposite and same-sex couples to marry one another. Both prospective

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41 Emphasis added.

42 De Vos and Barnard (n 4) 821.

43 See S 24–26 of the Act.

spouses must be at least 18 years of age and, in contrast with the *Marriage Act*, no provision is made for persons younger than 18 to marry one another.

### 3.3.3 Customary marriages

The *Recognition of Customary Marriages Act*<sup>44</sup> makes provision for the legal recognition of both monogamous and polygynous customary marriages. This Act applies only to marriages concluded according to "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".<sup>45</sup> A customary marriage concluded in accordance with this Act is currently the only means by which a polygynous marriage can be clothed with complete legal validity in South African law.<sup>46</sup>

### 3.3.4 Civil partnerships

Over and above marriage, the *Civil Union Act* also provides for persons involved in a monogamous relationship to enter into a civil partnership with one another.<sup>47</sup> This concept is unfortunately not defined by the Act and doubt persists as to the precise legal nature thereof. It is submitted that the legislature has attempted to create a mechanism by which two persons can formalise their relationship in instances in which they do not wish to *marry* one another but nevertheless wish to ensure that their relationship obtains legal recognition.<sup>48</sup> According to De Vos,<sup>49</sup> an example of such a relationship may occur within the context of "more conservative same-sex couples who view marriage as an institution exclusively associated with heterosexual relationships". This would appear to tie in with Bilchitz and Judge's<sup>50</sup> opinion that the civil partnership provides an alternative to those who view marriage as an "oppressive institution marked by rigid gender roles and expectations" by providing

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44 120 of 1998.

45 Definition of "customary marriage" read with definition of "customary law" in S 1 of the Act.

46 Sonnekus 2009 *THRHR* 138.

47 See S 1 and 3.2 *ante*.

48 It is important to note that until domestic partnership legislation is enacted the civil partnership will be the only means by which such recognition can be obtained outside of marriage – see S 3.3.6 below.

49 2007 *SAJHR* 462.

50 (n 4) 484.



couples with a means of determining the social meaning of their relationship. This aspect will be considered in more detail later.

### 3.3.5 *Purely religious marriages*

Marriages that are entered into in accordance with the tenets of a specific religion without being solemnised or registered according to applicable marriage legislation (so-called "purely religious marriages") are not recognised as valid marriages by South African law.<sup>51</sup> The courts and the legislature have however been prepared to grant piecemeal extensions of the law of marriage to such relationships.<sup>52</sup> Legislation validating such marriages is therefore sorely needed, but attempts in this regard have thus far been restricted to marriages concluded in respect of Islamic religious law.<sup>53</sup>

### 3.3.6 *Domestic or life partnerships*

Domestic or life partners are persons who: (a) are not spouses in a purely religious marriage; and (b) are involved in permanent (intimate)<sup>54</sup> relationships that have not been formalised in terms of the *Marriage Act*, the *Recognition of Customary Marriages Act* or the *Civil Union Act*.<sup>55</sup>

The current legal position pertaining to life or domestic partnerships in South Africa is fraught with inconsistencies. To begin with, there is no "law of domestic partnerships"<sup>56</sup> so that, generally speaking, none of the invariable consequences that

51 Within the context of Hindu marriages, see *Singh v Ramparsad* 2007 3 SA 445 (D) para 30–34, para 47 and 52; hereafter *Singh*. As far as Islamic marriages are concerned see *Ismail v Ismail* 2007 4 SA 557 (E) para 7.

52 In respect of Islamic marriages see *Ryland v Edros* 1997 2 SA 690 (C); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality intervening)* 1999 4 SA 1319 (SCA); *Daniels v Campbell* 2004 5 SA 331 (CC); *Khan v Khan* 2005 2 SA 272 (T); and *Hassam v Jacobs* 2009 5 SA 572 (CC). As far as Hindu marriages are concerned, see *Govender v Ragavayah* 2009 3 SA 178 (D). An example of legislative recognition is provided by S 1 of the *Domestic Violence Act* 116 of 1998, which includes a marriage "according to any law, custom or religion" as a "domestic relationship".

53 See Smith (n 9) 134-140.

54 Intimacy does not appear to be a requirement for recognition – see *Bezuidenhout v ABSA Versekeringsmaatskappy Bpk* 40688/2008.

55 Smith (n 9) 182-183.

56 Hahlo 1972 SALJ 321.

attach to marriage attach to non-formalised domestic partnerships<sup>57</sup> and such couples only have the "ordinary rules and remedies of the law" (such as the law of contract, estoppel and unjustified enrichment) at their disposal.<sup>58</sup> This general position has been developed on an *ad hoc* basis by the legislature and the courts, so that domestic partnerships receive recognition under certain circumstances. As far as the judicial developments are concerned, this recognition has been limited to same-sex life partners, as, at the time of the applications for extension being brought, same-sex marriage was not yet legally permissible, with the result that a domestic partnership was "the only form of conjugal relationship open to gays and lesbians in harmony with their sexual orientation".<sup>59</sup> The courts were consequently readily prepared to find that the exclusion of such couples from the benefits heretofore limited to married couples constituted unfair discrimination. As a corollary hereof, the courts were not prepared to extend the invariable consequences of marriage to *heterosexual* life partners who, despite being legally permitted to do so, had nevertheless elected not to marry one another.<sup>60</sup> As the Constitutional Court has made it clear that the pre-*Civil Union Act* declarations of statutory unconstitutionality will continue to stand until expressly amended by the legislature,<sup>61</sup> the current legal position dictates that same-sex domestic partnerships enjoy significantly greater legal recognition and protection than their heterosexual counterparts.<sup>62</sup> As far as legislation is concerned, certain Acts (such as the *Medical Schemes Act*<sup>63</sup> and the *Pension Funds Act*)<sup>64</sup> provide recognition to domestic partnerships for the purposes of those specific Acts. Advising domestic partners on

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57 Heaton 2005 *THRHR* 662.

58 SALRC (n 6) 110–111.

59 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 36; hereafter *National Coalition for Gay and Lesbian Equality*. For examples of case law involving same-sex domestic partners, see *Langemaat*, *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) and 2003 4 SA 266 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *J v Director-General: Department of Home Affairs* 2003 5 SA 621 (CC) – hereafter *J-case*; *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) – hereafter *Du Plessis*; and *Gory v Kolver* 2007 4 SA 97 (CC); hereafter *Gory*.

60 *Volks v Robinson* 2005 5 BCLR 446 (CC) para 55–60 (hereafter *Volks*), read with Sachs J's dissenting judgment at para 154.

61 *Gory* para 28–30.

62 De Vos and Barnard (n 4) 462; Smith and Robinson (n 39) 439.

63 131 of 1998. In this Act, a "dependant" includes a "spouse or partner" (see S 1).

64 25 of 1956. A "spouse" for the purposes of this Act includes "a permanent life partner or spouse or civil union partner in accordance with the *Marriage Act*, 1961 (Act 68 of 1961), the *Recognition of Customary Marriages Act*, 1998 (Act 68 of 1997), or the *Civil Union Act*, 2006 (Act 17 of 2006), or the tenets of a religion [...]" – see S 1 (emphasis added).

their rights and obligations therefore becomes, as Sinclair<sup>65</sup> rightly points out "an exercise in tracking what legislation or rule of common law [has] been successfully attacked and what [has] not".

The recognition of same-sex marriage further complicates this scenario, as the same rationale employed to refuse the extension of marriage benefits to heterosexual domestic partners in the past now *strictu sensu* also applies to same-sex partners who have not entered into a civil union despite being legally permitted to do so.<sup>66</sup>

In the end result, it is clear that until domestic partnership legislation is enacted the legal position pertaining to domestic partnerships will continue to be fragmented, inconsistent, and fraught with uncertainty.

### 3.3.7 Conclusion

The preceding discussion illustrates the complex manner in which marriage, civil partnership and unmarried life partnerships are currently regulated in South African law. The question that now arises is whether this state of affairs should persist, and, if not, what remedial action should be proposed. Before making suggestions in this regard, it is useful to consider the example provided by a well-structured family law system such as the one encountered in the Netherlands.

## 4 The legal position in the Netherlands

Smith and Robinson<sup>67</sup> opine that the family law framework in the Netherlands is clearly demarcated and is the product of "well-conceived and carefully considered Parliamentary procedures". As such, it is submitted that it provides an effective sounding board for evaluating whether the separate Act approach towards same-sex marriage occasioned by the enactment of the *Civil Union Act* was the correct one.

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65 Sinclair "South Africa" 398. Although Sinclair makes this comment in reference to same-sex domestic partnerships, it is clear that the same principle also applies to the piecemeal statutory recognition accorded to heterosexual partnerships.

66 Sinclair (n 64) 406–408.

67 2008 *IJLPF* 376–377.

Over the past decade or so Dutch family law has undergone a number of progressive and trend-setting developments that have galvanised jurisdictions across the globe. Unlike the position in South Africa, these developments have been occasioned by way of legislative processes as opposed to judicial pronouncements.<sup>68</sup> According to Maxwell,<sup>69</sup> the role played by the Dutch judiciary can be summarised as follows: In 1990, two Dutch courts (a District Court in Amsterdam<sup>70</sup> and the Dutch Supreme Court)<sup>71</sup> were requested to adjudicate on the possible recognition of same-sex marriages. Two arguments were raised in this regard: First, it was contended that, as Article 30 of the *Burgerlijk Wetboek* did not make any direct reference to gender (it simply stated that "*De wet beschouwt het huwelijk alleen in zijn burgerlijke betrekkingen*"), it could be interpreted so as to provide for same-sex marriages. Both courts however held that Article 30 was enacted with a view to heterosexual marriages only and was thus not capable of being interpreted in this fashion. Second, it was suggested that the limitation to heterosexual marriage infringed certain individual rights and discriminated against same-sex couples. This argument also failed as the Amsterdam court held that it was the task of the legislature to rectify differential treatment. The Supreme Court in turn relied on the "traditional" definition of marriage in order to justify its refusal to grant the relief sought by the applicants. The latter court did however concede that while the limitation of matrimonial benefits to heterosexual couples could in principle be unjustifiable, it should be left to the legislature to decide this issue. In contrast to the courts, the Dutch legislature has played a far more active role in reforming matrimonial law: Dutch legislation has not only provided for the formalisation of cohabitation relationships since 1998,<sup>72</sup> but in April 2001 the Netherlands also became the first country in the world to accord full legal recognition to same-sex marriages.<sup>73</sup> Dutch law currently provides couples wishing to formalise their unions with three methods of doing so.<sup>74</sup> These are discussed below.

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68 See S 5.1.1 below.

69 2000 *EJCL* S 2.2.1.

70 *Rb Amsterdam 13 februari 1990*, Boele-Woelki and Tange 1990 *NJCM Bulletin* 456–560, per Maxwell (n 69) S 2.2.1 and Merin *Equality for Same-Sex Couples* 123.

71 *HR 19 oktober 1990*, per Maxwell (n 69) S 2.1.1.

72 See S 4.2 below.

73 Waaldijk 2004 *NELR* 572.

74 See Smith and Robinson (n 66) 374–376 for a more detailed discussion.

#### 4.1 *Civil marriage*

As far back as April 1996, the Dutch Parliament passed a resolution in terms of which the extension of civil marriage to same-sex couples was demanded.<sup>75</sup> The *Burgerlijk Wetboek* was amended five years later so as to provide full legal recognition to gay and lesbian marriages.<sup>76</sup>

Previously the major difference between heterosexual and homosexual marriages in Dutch law was encountered in the law of adoption that only permitted heterosexual spouses to participate in inter-country adoptions. As of 1 February 2009, the *Wet Opnemng Buitenlandse Kinderen ter Adoptie*<sup>77</sup> was amended to permit same-sex spouses to adopt children from abroad.<sup>78</sup> A same-sex marriage has no effect on the legal relationship between a same-sex spouse and the biological child of his or her spouse,<sup>79</sup> unless the former person adopts the child.<sup>80</sup> (In this regard, it is worth mentioning that the adoption procedures pertaining to female same-sex couples were simplified as from 1 February 2009.)<sup>81</sup> Both spouses in a lesbian marriage automatically acquire parental responsibility over a child born to one of them during the currency of their marriage "tenzij het kind tevens in familierechtelijke betrekking staat tot een andere ouder".<sup>82</sup> If the child was conceived as a result of sperm donated by the father, the latter may, with the mother's consent, recognise the child, in which case he and the mother will be regarded as the legal parents of the child while the mother and her spouse will share parental responsibility.<sup>83</sup>

Irrespective of the gender of the spouses, Dutch law only recognises civil marriages<sup>84</sup> with the result that marriages solemnised only by way of a religious

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75 Maxwell (n 69) S 2.2.1.

76 This was achieved by amending Article 1:30 of the *Wetboek* to read: "1. Een huwelijk kan worden aangegaan door twee personen van verschillend of van gelijk geslacht".

77 Act of 24 October 2008.

78 Curry-Sumner and Vonk "It All Depends on Who You Ask" 330–331.

79 Waaldijk (n 72) 575; Vonk 2009 *ULR* 125.

80 Netherlands Ministry of Justice 2006 <http://english.justitie.nl/>.

81 Curry-Sumner and Vonk (n 77) 330–331.

82 Article 1:253sa.

83 Curry-Sumner and Vonk (n 77) 335.

84 Article 1:30(2) of the *Wetboek*: "De wet beschouwt het huwelijk alleen in zijn burgerlijke betrekkingen". Also see Waaldijk (n 72) 572.

ceremony are not legally valid.<sup>85</sup> The secular and religious components of marriage are therefore completely divorced from one another and marriages may only receive an ecclesiastical blessing after the completion of the civil ceremony.<sup>86</sup>

#### 4.2 *Registered partnership*

As from 1 January 1998, parties of the same or opposite sex may enter into a *geregistreerd partnerschap* with one another. Both parties must be at least 18 years of age and the partnership comes into existence as soon as the partners have signed and registered a so-called *akte van registratie van partnerschap*.<sup>87</sup> All of the consequences of a civil marriage apply to a registered partnership,<sup>88</sup> but certain differences occur with respect to children in that registered partners may not partake in inter-country adoptions, and where a child is born to a female partner in a lesbian relationship, her female partner is not regarded as the parent of that child unless she adopts the child.<sup>89</sup> In the case of a child born as a consequence of sexual intercourse to a female partner who is involved in a heterosexual registered partnership, the male partner is not presumed to be the father of the child, with the result that he can acknowledge the child if his partner consents hereto.<sup>90</sup> If the child was conceived artificially by making use of the male partner's sperm, the latter is regarded as a sperm donor with the result that he has no rights to the child unless his partner consents thereto or unless a "family life" exists between himself and the child.<sup>91</sup> If a child is born to lesbian or heterosexual partners, both partners acquire parental responsibility over such a child unless the biological father has – with the mother's consent – acknowledged paternity before the child's birth.<sup>92</sup>

A registered partnership can be terminated in the following ways: (a) by death of either or both partners; (b) where one partner has been missing for more than five

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85 SALRC (n 6) 167; Waaldijk (n 72) 572–573.

86 Netherlands Ministry of Justice (n 79).

87 Article 1: 80a.

88 Article 1: 80a.

89 SALRC (n 6) 174; Vonk (n 78) 125.

90 Vonk (n 78) 122; Waaldijk 2005 <https://same-sex.web.ined.fr/> 140.

91 Curry-Sumner and Vonk (n 77) 340, referring to a decision of the *Hoge Raad* (Supreme Court) of 24 January 2003 (NJ 2003/386).

92 Waaldijk (n 90) 140.

years; (c) by converting the partnership into a marriage; (d) by mutual agreement; and (e) by an order of court.<sup>93</sup>

### 4.3 Contract

Cohabitants may regulate the patrimonial consequences of their relationship by way of a contractual undertaking to this effect. The usual principles of the Dutch law of contract apply to such an agreement with the result that it binds only the parties thereto and does so only to the extent of the provisions therein.<sup>94</sup> As in South Africa, Dutch law provides only piecemeal recognition to non-formalised domestic partnerships.<sup>95</sup> It would however appear that this piecemeal recognition provides more comprehensive protection as far as the patrimonial consequences of such a union are concerned than in South Africa, as that the existence of a tacit cohabitation agreement is readily inferred implies that it is sometimes possible to "borrow" from certain patrimonial consequences of marriage, unless the parties have specifically elected not to marry.<sup>96</sup> So, for example, while general community of property applies in the case of a civil marriage,<sup>97</sup> Van der Burght<sup>98</sup> mentions that the facts of the case may permit a "limited community" to be found to exist between the parties to non-formalised unions.<sup>99</sup> Nevertheless, an important parallel that can be drawn between the position of cohabitants in the Netherlands and their South African counterparts is that no specific legislation as yet caters for such unions.<sup>100</sup> Consequently, Schrama<sup>101</sup> mentions that while approximately one half of all cohabitants in the Netherlands opt for entering into a cohabitation contract, this does little to solve the problems faced by the parties thereto when the relationship breaks down, as the "general rules of contract law and property law" that apply to such cohabitants are not only "primarily designed to regulate economically based relations", but are also not applied in a consistent fashion by the courts, leading to legal uncertainty and

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93 Article 1:80c.

94 Waaldijk (n 90) 139.

95 See Van der Burght 2000 *De Jure* 78–80; SALRC (n 6) 167.

96 Van der Burght (n 95) 78.

97 Netherlands Ministry of Justice (n 79).

98 (n 95) 78.

99 In South Africa, the partners would have to rely on a universal partnership, provided of course that they can prove the existence thereof – see SALRC (n 6) 111–117.

100 Schrama 2008 *JLPPF* 321.

101 (n 99) 321.

"injustice towards partners who have substantially invested in the relationship by taking care of children or contributing to the other partner's assets."

## 5 Evaluation of the current position in South Africa

In the section that follows, the current position in South Africa will be evaluated by considering a number of similarities and differences between South African and Dutch law, as well as the cases for and against repealing the *Civil Union Act*.

### 5.1 *Important similarities and differences between South African and Dutch law*

The cursory analysis conducted above shows that the family law system in the Netherlands provides its citizens with a well-structured and relatively straightforward framework within which to regulate their interpersonal relationships. In contrast with the position in South Africa, all drastic changes and developments have been occasioned by the legislature in consequence of judicial pronouncements to the effect that this arm of government was best suited to this task.<sup>102</sup> On the other hand, in South Africa the courts have initiated change by way of *ad hoc* pronouncements in consequence of which the legislature has (at times) been prompted or instructed to act.<sup>103</sup> (It must be mentioned that this legislative activity has not always been progressive. One thinks, for example, of the development occasioned by the decision in *J v Director General, Department of Home Affairs*<sup>104</sup> that was not reflected in the subsequently enacted Section 40 of the *Children's Act*.)<sup>105</sup> The difference in approach between South Africa and the Netherlands is however not

102 Maxwell (n 69) S 2.1.1–2.1.2 and 2.2.1.

103 It can however be agreed with Robson's observation (2007 SAJHR 429) that the order of the Constitutional Court in *Minister of Home Affairs v Fourie* actually had the effect of "maintain[ing] judicial supremacy".

104 2003 (5) SA 621 (CC).

105 In the *J*-case, S 5 of the *Children's Status Act* 82 of 1987 was declared unconstitutional to the extent that it did not permit the "permanent same-sex life partner" of a woman who had given birth to a child in consequence of artificial fertilisation to be regarded as the birth parent of that child. While the *Children's Status Act* was repealed by the coming into operation of certain sections of the *Children's Act* on 1 July 2007, S 40 of the latter Act contains the same deficiency as S 5 of the repealed Act in that it provides only for the "spouse" of a "married person" to whom a child has been born in consequence of artificial fertilisation to be regarded as the child's birth parent. S 40 is consequently *prima facie* unconstitutional – see Cronjé and Heaton *Family Law* 233, (n 47); Smith (n 9) 330.



surprising given the fact that the Dutch Constitution does not provide for judicial review of legislation – a fact that explains the less active role played by the courts.<sup>106</sup> The position in Dutch law has however not escaped criticism, with the ever-narrowing gap between marriage and registered partnership prompting the question as to whether Dutch law provides couples with "a real choice, rather than simply a hollow shell".<sup>107</sup> The same question can also be asked of South African law: As the law stands, couples who do not wish to marry one another but still wish to formalise their relationships only have the option of entering into a civil partnership open to them. However, the legal consequences of (civil) marriage and civil partnership are not merely similar as in the Netherlands (regarding civil marriage and registered partnership) but are in fact identical.<sup>108</sup> As will be seen below, this raises serious doubts as to whether the *Civil Union Act* provides a true alternative to marriage and also greatly strengthens the case for the enactment of the (modified)<sup>109</sup> *Domestic Partnerships Bill*. Nevertheless, despite its well-structured framework, Dutch law lacks comprehensiveness in that it contains no specific legislation regulating non-formalised life partnerships. In this regard, it is submitted that the enactment of legislation akin to the unregistered domestic partnership in the (modified) South African *Domestic Partnerships Bill* may be a salutary development.

Dutch law has, since the early nineteenth century, provided for a clear separation between state and church as far as the solemnisation and registration of marriages is concerned, and in this regard only the state – the so-called *Burgerlijke Stand* – is permitted to solemnise a marriage.<sup>110</sup> On the other hand, South African law permits both state and religious officials to qualify as competent marriage officers. This aspect is considered in more detail in Sections 5.3.1.3 and 5.3.3 below.

A clear distinction between Dutch and South African law presents itself when the developmental processes of the family law legislation of the two countries is compared: In the Netherlands, the legislature gradually paved the way for the validation of same-sex marriages over a period of five years. Regarding registered

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106 SALRC (n 6) 166–167.

107 Curry-Sumner "The Netherlands" 274.

108 S 13 of the *Civil Union Act*.

109 See S 2 *ante*.

110 Waaldijk (n 72) 572–573.

partnerships, the *Commissie voor de toetsing van wetgevingsprojecten* published the first report concerning the possible recognition of the same a full six years before the legislation in question was eventually enacted in 1998. When compared with the position in South Africa, it can be seen that not only was the South African legislature only granted a period of twelve months to enact same-sex marriage legislation, but – more alarmingly – the document eventually promulgated as the *Civil Union Act* was first tabled a mere three weeks before its enactment. To make matters worse, this document was never made available for public scrutiny or comment.<sup>111</sup>

Dutch law makes use of one provision in one piece of legislation in order to provide for both heterosexual and homosexual marriages. In addition, no inconsistent terminology is used, as the word "*huwelijk*" is universally applied. In contrast, South African law not only employs a separate piece of legislation to provide for "civil unions", but these unions moreover differ markedly from the generic international conception thereof, in terms of which "[a]s a duplicate of marriage, civil unions award couples all the rights and obligations of a marriage relationship *without actually providing for them to get married*".<sup>112</sup> South African law thus provides for a unique "civil union" concept: No other jurisdiction employs a similar dualistic use of this term in the sense of using it to create an institution that potentially qualifies either as a "full" marriage or as a civil partnership that enjoys identical legal status to and the same legal consequences as a civil marriage.

Having considered these differences, the desirability or otherwise of maintaining the *status quo* in South Africa can now be assessed.

## **5.2 The case for retaining the Civil Union Act**

Bilchitz and Judge<sup>113</sup> classify the "purposes and goals" behind the validation of same-sex marriage into three main categories: (a) a "formal rights" perspective in terms of which the rights and benefits of marriage are extended to same-sex couples without necessarily equalising the "social meaning" of marriage; (b) a "substantive

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111 See Smith and Robinson (n 66) 1A for a comprehensive discussion of the strange circumstances under which the *Civil Union Act* was drafted and enacted.

112 SALRC (n 6) 285 (emphasis added).

113 (n 4) 467–468.

rights" perspective that, by granting same-sex couples the full right to marry, equalises the "social meaning" but retains marriage as the central form of intimate relationship; and (c) the "transformative" perspective that "seeks to de-centre marriage as the sole and primary legal (and social) form for the recognition of interpersonal relationships and seeks to create legal possibilities for the recognition of a plurality of familial forms". According to them, the *Civil Union Act* has the ability to achieve all three of these ideals, particularly because by introducing the concept of a civil union that allows the parties to such a union to choose between marrying one another or concluding a civil partnership, the pre-eminence traditionally accorded to marriage can to some extent be displaced.<sup>114</sup> The essence of this contention therefore is that the South African legislature's unique use of the term "civil union"<sup>115</sup> implies that marriage is not the only means of securing legal and societal recognition of an interpersonal relationship.<sup>116</sup> Moreover, by offering the parties an alternative to marriage, the authors contend that the Act provides those who wish to disassociate their relationship from marriage with the scope to determine the "social meaning" that is to attach to their relationship.<sup>117</sup> From this postulation, Bilchitz and Judge proceed to contend that the *Marriage Act* is superfluous and that it should be repealed. Further reasons for this assertion include:

- (a) That it is "irrational" to have two Acts that perform the same function; and, moreover, "an affront" to same-sex couples to force them to marry in terms of separate legislation;<sup>118</sup>
- (b) That the effect of the continued existence of the *Marriage Act* on the "status equality" of same-sex couples may either: (i) be non-existent, in which case the Act will become redundant; or (ii) have a symbolic effect that prevents full equality for same-sex couples and therefore necessitates its repeal;

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114 Bilchitz and Judge (n 4) 485.

115 See S 5.1.4 above.

116 Bilchitz and Judge (n 4) 486.

117 Bilchitz and Judge (n 4) 484.

118 Bilchitz and Judge (n 4) 487. See De Vos and Barnard (n 4) 821–822.

- (c) That the 1961 Act is a product of the apartheid era and that some of its provisions (such as those prescribing different ages pertaining to the consent required for male and female minors to marry) are outdated and based on gender distinctions that are "constitutionally suspect";<sup>119</sup> and
- (d) That repealing the Act will contribute towards attaining both the "substantive rights" and "transformative" ideals identified above.

Bearing the arguments supporting the case for repealing the *Marriage Act* in mind, the counter-argument for retaining the Act and instead repealing the *Civil Union Act* can now be considered.

### 5.3 *The case for repealing the Civil Union Act*

The case for repealing the *Civil Union Act* is based on the premise that, in as far as same-sex marriage is concerned, both the SALRC and the legislature erred in their respective approaches to the validation of same-sex marriages. This point of view is substantiated by the following considerations.

#### 5.3.1 *The nature of the institution of civil marriage in South Africa*

There can be no doubt that, from a legal point of view, the South African civil marriage is a secular institution.<sup>120</sup> As observed by Farlam JA in his minority judgment in *Fourie v Minister of Home Affairs*:<sup>121</sup>

I have dealt in some detail with the history of the law of marriage because it throws light on a point of cardinal importance in the present case: namely, that *the law is concerned only with marriage as a secular institution. It is true that it is seen by many as having a religious dimension also, but that is something with which the law is not concerned.*<sup>122</sup>

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119 Bilchitz and Judge (n 4) 488–489.

120 See *Minister of Home Affairs v Fourie* para 63, in which Sachs J stated that while marriage was highly personal in nature, "the words 'I do' bring the most intense private and voluntary commitment into the most public, law-governed and State-regulated domain".

121 2005 3 SA 429 (SCA) para 80; hereafter *Fourie*.

122 Emphasis added.

Despite the fact that the law regards marriage as a purely secular institution, it is nevertheless important to remember that South African law provides for both state and church to solemnise civil marriages.<sup>123</sup> The *Marriage Act* thus permits duly authorised ministers of religion or other similarly situated persons to act as marriage officers and to solemnise marriages in accordance with the prescripts of their religion while simultaneously solemnising that marriage as a civil marriage.<sup>124</sup> Although a single ceremony may therefore consist of both a civil and a religious component, it is compliance with the civil component, as opposed to participating in the religious ceremony, that creates legal consequences for the marriage.<sup>125</sup> As opposed to the law of the Netherlands, South African law therefore does not require an absolute separation between state and church regarding the formation of a civil marriage.<sup>126</sup> Section 31 of the *Marriage Act* does however permit a religious marriage officer<sup>127</sup> to refuse to solemnise a marriage that does not "conform to the rites, formularies, tenets, doctrines or discipline" of his or her religion. (It is to be noted that the *Marriage Act* does not permit an *ex officio* marriage officer to refuse to solemnise any marriage that complies with civil requirements, or to refuse to do so on the basis of his or her religious beliefs.)

Bearing the nature of the South African civil marriage in mind it becomes clear that the proposals of both the legislature (in terms of the form and structure of the *Civil Union Act*) and the SALRC are off the mark. In terms of point (i) of the SALRC's recommendations (see Section 3.1 above) there is no problem. However, it is submitted that the second point of the proposal is problematic, as it is questionable whether it was necessary to promulgate separate legislation in order to realise the eventual aim of validating same-sex marriages without prejudicing religious freedom in any way. It is submitted that the reasons in the following sections can be proffered in support of the contention that the legislature should have confined its reaction to

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123 Bonthuys 2008 *SALJ* 475.

124 See S 3 *Marriage Act* and *Singh* para 34 and 52. S 33 of the 1961 Act expressly provides for a marriage that has been solemnised by a marriage officer subsequently to be blessed by a minister of religion or a person holding a responsible position in a religious denomination.

125 SALRC (n 6) 284; *Singh* para 34.

126 See S 4.1 and 5.1 above.

127 That is to say a minister of religion or a person who holds a responsible position in a religious denomination or organisation.

*Minister of Home Affairs v Fourie* to point (i) of the SALRC's proposal and should thus simply have expanded the *Marriage Act*.

### 5.3.1.1 The wording of the *Civil Union Act* creates uncertainty

In two recent publications,<sup>128</sup> it was pointed out that the *Civil Union Act* causes a number of interpretative problems, one of the most glaring of which is the Act's references to gender.<sup>129</sup> The problem caused in this regard can be summarised by stating that wherever the Act refers to gender it only refers to *same-sex couples*,<sup>130</sup>

128 See in general Smith and Robinson (n 66) and (n 39).

129 Also see Van Schalkwyk 2007 *De Jure* 168 and 172–173, who exposes a further interpretative difficulty, namely that it is unclear whether the Act permits civil unions that are concluded according to customary law (see further in this regard Bakker 2009 *JJS* 8–9). It is submitted that the Act may contain another interpretative difficulty over and above those created by its references to gender and the uncertainty regarding "customary" civil unions identified by Van Schalkwyk. This difficulty is created by a conflict that appears to exist between S 8(6) of the Act and S 13(2) thereof. First, S 8(6) states that "[a] civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the *Marriage Act* [25 of 1961] or the [*Recognition of Customary Marriages Act* [120 of 1998]]" (emphasis added). On the other hand, S 13(2) informs the reader thereof that:

With the exception of the *Marriage Act* and the *Customary Marriages Act*, any reference to-

- (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
- (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

At first glance these two sections may appear to conflict with one another as it could be argued that while S 8(6) states that any impediment to marriage that is specifically prescribed in the *Marriage Act* or the *Recognition of Customary Marriages Act* would prevent the conclusion of a civil union, S 13(2) on the other hand tells us that a reference to "marriage", "husband", "wife" or "spouse" under the latter legislation does not include a civil union. To illustrate: it is clear that S 8(6) intends, for example, to make the provisions relating to marriages between a person and the relatives of his or her deceased or divorced spouse (S 28 *Marriage Act*) applicable to civil unions. However, on the wording of S 13(2) this would not be possible. It is submitted that the answer to this predicament lies in the headings to the respective sections in question – S 8(6) falls under the heading "[r]equirements for solemnisation and registration of civil union" while S 13 is entitled "[l]egal consequences of civil union". If the use of headings in South African jurisprudence is considered, it becomes clear that they may be used as an interpretative tool in apposite circumstances – see *Turffontein Estates Ltd v Mining Commissioner, Johannesburg* 1917 AD 419 431 and *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 12. This would probably support the contention that, although the *Civil Union Act* is not divided into chapters, it can be deduced from the headings employed throughout the Act that it envisions two separate scenarios: S 4–12 of the Act deal with the solemnisation of the civil union *per se* while S 13 deals with the consequences that follow once the requirements in S 4–12 have in fact been complied with. Under this dichotomy, it could be contended that the headings indicate that S 8(6) and 13(2) have nothing to do with one another. It is worth pointing out that this argument may be flawed in that S 13(2) does not specifically indicate that it applies to legal consequences *per se* but instead has a rather generic look to it. Nevertheless, the conflict between S 8(6) and 13(2) once again proves that the drafting of the Act is problematic.

130 See S 6 and 8(6) of the Act.

with the result that it is uncertain whether it is possible for a heterosexual couple to conclude a civil union.<sup>131</sup> At the time of promulgation of the Act, the Minister of Home Affairs intimated that both homosexual and heterosexual couples were included within the ambit of the Act,<sup>132</sup> but irrespective of whether or not this occurs in practice *the fact remains that a literal reading of the Act conveys the message that it only applies to homosexual couples*. This unsatisfactory situation may well imply that, if constitutionally challenged, the Act would, in accordance with Section 39(2) of the *Constitution of the Republic of South Africa*<sup>133</sup> need to be *interpreted* in such a manner as to be aligned with the Bill of Rights;<sup>134</sup> a state of affairs that proves that the Act was not drafted in such a way as to enable the average South African citizen or official to understand what the law expects of him or her.<sup>135</sup>

### 5.3.1.2 The anomalies pertaining to heterosexual life partners

Over and above the interpretative difficulties posed by the *Civil Union Act*, Smith and Robinson<sup>136</sup> highlight the fact that its enactment has also either created or in other instances perpetuated certain legal anomalies. One of the anomalies identified by these authors is that the Act did not address the legal position that prevailed at the time of its enactment in terms of which same-sex life partners were entitled to adopt children jointly while heterosexual life partners could not do the same.<sup>137</sup> Although this anomaly was subsequently removed as from 1 April 2010 by the enactment of Section 231 of the *Children's Act*, the fact remains that it was not resolved by the *Civil Union Act* itself. The anomalies that persist are:

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131 The answer to this question is particularly relevant as far as the civil partnership is concerned, as this partnership is currently the only alternative means by which an unmarried couple may obtain full legal recognition of their relationship – see S 3.3.4 above.

132 Statement made by the then Minister of Home Affairs NN Mapisa-Nqakula (2006) <http://home-affairs.pwv.gov.za/>.

133 1996; hereafter *Constitution*.

134 Smith and Robinson (n 66) 367, 368.

135 See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 24, in which Langa DP observed that the obligation to interpret legislation in line with the Constitution at times needs to be weighed up against the legislature's duty to promulgate legislation that is clear and precise.

136 (n 66) 368–374.

137 Smith and Robinson (n 66) 370.

- (a) The *Civil Union Act* provides no indication as to why same-sex couples do not – in the wake of a decision such as *Du Plessis*<sup>138</sup> – need to take the proactive step of entering into a civil union in order to have a claim for loss of support extended to the surviving life partner, while heterosexual life partners will – in consequence of *Volks*<sup>139</sup> – have to register a civil union in order to do the same;<sup>140</sup> and
- (b) The *Civil Union Act* has not altered the fact that the heterosexual life partnership is still the only form of interpersonal relationship that has no right of intestate succession in terms of the *Intestate Succession Act*.<sup>141</sup>

Smith and Robinson may have expected too much from the *Civil Union Act* in terms of clarifying all of these anomalies – the Act was, after all, promulgated with the chief aim of legalising same-sex marriage. Nevertheless, the fact remains that by specifically enacting the civil partnership *as an alternative to marriage*, the legislature did in fact – perhaps unwittingly – enter into the realm of the life partnership.<sup>142</sup> This being the case, it might not have been unreasonable to expect at least some of the anomalies identified above to have received legislative attention. The inescapable fact is however that when considered in conjunction with the interpretative difficulties referred to above it becomes clear that the *Civil Union Act* has further complicated an already complicated legal framework. It will however be seen below that the (modified) *Domestic Partnerships Bill*<sup>143</sup> – and not the *Civil Union Act* – is best suited to remove the anomalies identified by Smith and Robinson.

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138 In this case, the action of dependants for loss of support was extended to same-sex domestic partnerships in which reciprocal duties of support had been undertaken during the subsistence of the relationship.

139 *In casu* the Constitutional Court refused to find the *Maintenance of Surviving Spouses* to be unconstitutional to the extent that it did not permit a heterosexual surviving domestic partner to claim maintenance from the deceased partner's estate.

140 Smith and Robinson (n 66) 372.

141 Smith and Robinson (n 66) 373–374.

142 See Sinclair(n 64) 404.

143 See S 2 *ante*.



### 5.3.1.3 The concept "civil union" is purely semantic and in fact meaningless

Although the *Civil Union Act* compels same-sex couples to marry one another in terms of separate legislation, their union is not termed a "civil union" but is instead referred to as a "marriage".<sup>144</sup> This strengthens the assumption referred to earlier<sup>145</sup> that the reference to "civil union" is merely of a semantic and cosmetic nature, as there is no doubt that this Act in fact allows parties *to marry* one another. Furthermore, the legal consequences of a marriage concluded under the *Civil Union Act* are identical to those of a "traditional" civil marriage under the *Marriage Act*,<sup>146</sup> as a result of which it can be concluded that same-sex marriages are accorded a "public and private status"<sup>147</sup> that is indistinguishable from that enjoyed by heterosexual spouses under the 1961 Act. The question therefore arises: why was it necessary to promulgate a separate Act if precisely the same legal content would be ascribed to marriages concluded in terms thereof as those ascribed to the "traditional" heterosexual marriage under the 1961 Act?

In *Minister of Home Affairs v Fourie*, the Constitutional Court emphasised that in selecting an appropriate legislative format for same-sex marriage it was important to note that "symbolism and intangible factors play a particularly important role" and that "[w]hat might appear to be options of a purely technical character could have quite different resonances for life in public and private".<sup>148</sup> It is however questionable whether the mere provision of a separate piece of legislation assigns appropriate significance to these symbolic considerations and intangible factors. That there is no clear answer to this question becomes apparent when the following considerations are borne in mind:

- Although the *Marriage Act* of 1961 permits religious marriages to be solemnised by religious marriage officers, the Act remains a "secular" piece of legislation.<sup>149</sup> This is confirmed by the fact that the Act applies in a

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144 See S 12(3) of the Act as well as forms B–E in the addenda to the regulations of the Act.

145 See S 3.2 above.

146 S 13.

147 *Minister of Home Affairs v Fourie* para 81.

148 Para 139.

149 *Fourie* para 78; Van der Vyver and Joubert *Persone- en Familiereg* 457; Robinson *et al South African Family Law* 28–29.

uniform fashion to all civil marriages irrespective of the prescripts of any particular religious dogma, and irrespective of whether the parties adhere to any form of religion whatsoever.<sup>150</sup>

- As seen in the preceding discussion, it is (and has always been) possible for a religious marriage officer to refuse to solemnise a marriage that conflicts with the tenets or beliefs of his or her religious denomination or organisation.<sup>151</sup> In consequence, it is submitted that even if same-sex marriages were in principle permitted to be solemnised in terms of the 1961 *Marriage Act*, Section 31 of that Act would still provide adequate means by which any religious organisation or denomination could protect its beliefs by simply permitting its ministers of religion to refuse to solemnise marriages between persons of the same sex.
- The *Civil Union Act* does not alter the fact that South African law does not require a complete separation between "religious" and "purely civil" marriages. Both the *Marriage Act* and the *Civil Union Act* provide for "religious" as well as "purely civil" marriages. It can therefore rightly be asked whether it is worth having a separate Act (that brings about precisely the same consequences as the original Act) or whether such a state of affairs does not create unnecessary obfuscation.

In view of these considerations, it is submitted that it would have been far simpler to have followed the Dutch example by simply expanding the *Marriage Act* instead of promulgating a new Act that in reality does little (if anything at all) in terms either of assigning appropriate significance to the symbolic considerations and intangible factors associated with marriage or of giving effect to the SALRC's recommendations. A preliminary conclusion therefore is that the mere expansion of the *Marriage Act* would have been the preferred option.

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150 *Singh* para 45; *Robinson et al* (n 150) 28–29.

151 *Minister of Home Affairs v Fourie* para 97.

5.3.2 *The effect of repealing the Civil Union Act on Bilchitz and Judge's "transformative" perspective*

It will be recalled that Bilchitz and Judge<sup>152</sup> opine that the validation of same-sex marriage should ideally achieve the combined "purposes and goals" of both the "substantive rights" perspective (according to which granting same-sex couples the full right to marry equalises the "social meaning" of marriage but retains marriage as the central form of intimate relationship) and those of the "transformative" perspective (in terms of which marriage is de-centred by creating "a plurality of familial forms").<sup>153</sup> With specific reference to the latter perspective, Bilchitz and Judge<sup>154</sup> submit that "the creation of an equal alternative option to marriage [that is the civil partnership] also in some way de-centres marriage as the primary and privileged social option for committed interpersonal relationships".

As a point of departure it may be conceded that repealing the *Civil Union Act* so as to require all marriages henceforth to be performed in terms of the *Marriage Act* will most likely satisfy only the requirements set by the "substantive rights" perspective and will therefore do little to erode the pre-eminence enjoyed by marriage. Nevertheless, an important question to be asked is why Bilchitz and Judge insist that the validation of same-sex marriage should be required to achieve anything beyond the "substantive rights" perspective in the first place. In fact, it seems illogical to lay the responsibility for de-centring marriage on the law of marriage itself. After all, it is the extension of *marriage* that is at issue, nothing more and nothing less. The validation of same-sex marriage should be left at that and therefore limited to achieving the goals set by the "substantive rights" perspective, thus guaranteeing equality of marriage *per se*. In the end result, the goals sought to be achieved in terms of the "transformative" perspective cannot be achieved by the simple act of extending marriage to same-sex couples but must instead be achieved by creating a broader family law system of which marriage forms but one part. This is so because

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152 (n 4) 466 f.

153 Bilchitz and Judge (n 4) 468.

154 (n 4) 485.

marriage can only be de-centred by providing realistic alternatives thereto. This is where the (modified)<sup>155</sup> domestic partnerships legislation comes in.

Viewed in this light, it is submitted that Bilchitz and Judge overestimate the extent to which the introduction of the civil partnership in the *Civil Union Act* achieves the objectives of the "transformative" perspective. In fact, by creating an institution that is identical to marriage in all but name, it is submitted that the norm of marriage is not de-centred but in fact reinforced. Indeed, as Goldblatt states:<sup>156</sup> "The [objection in this regard] is that marriage and domestic partnership will become identical and that this may undermine marriage and the idea of pluralism within family law". This objection strengthens the argument for the enactment of domestic partnerships legislation that provides a true alternative to marriage.

Having said this, the "civil partnership" requires closer analysis. This will be done after the further arguments raised by Bilchitz and Judge have been considered in the section that follows.

### 5.3.3 *Countering Bilchitz and Judge's additional reasons for asserting that the Marriage Act should be repealed*

In Section 5.2, Bilchitz and Judge's main reasons for suggesting that the *Marriage Act* should be repealed and that the *Civil Union Act* should henceforth govern the solemnisation of all civil marriages in South Africa were set out. Over and above the "transformative" arguments that have been dispensed with in the preceding paragraph, a few brief comments are apposite regarding the additional reasons proffered by these authors:

- (a) The assertion can be accepted that it is irrational to have two pieces of legislation that have the effect of forcing same-sex couples to marry in terms of only one of them. However, this reason could just as well apply in favour of retaining a broadened version of the *Marriage Act* and repealing the *Civil Union Act*.

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155 See S 2 *ante*.

156 2003 SALJ 621.

- (b) Regarding the uncertain effect of retaining the 1961 *Marriage Act* on the "status equality" of same-sex marriages, it is submitted that the entire reason for this uncertainty would fall away if all spouses were henceforth to be required to marry in terms of the 1961 Act. This fact alone provides a good reason for repealing the *Civil Union Act*. Furthermore, the "status equality" of same-sex couples would be enhanced by compelling them to marry in terms of the very Act that traditionally only catered for heterosexual marriages.<sup>157</sup>
- (c) Although it is true that certain provisions of the *Marriage Act* are outdated in as far as they prescribe differing age requirements in order for male and female minor persons to marry, these and other "outdated" aspects of the Act are currently receiving legislative attention. The *Draft Marriage Amendment Bill*<sup>158</sup> *inter alia* aims to streamline the 1961 Act by bringing it into line with other legislation and by effecting a number of technical corrections to the Act.<sup>159</sup> An important outflow of this process is that the 1961 Act will be aligned with the *Children's Act* in as far as the reduction of the age of majority is concerned and, equally importantly, regarding the requirements in order for minor persons to marry. The amending legislation aims to standardise the consent requirements for boys and girls who wish to marry by requiring all persons under the age of 15 to obtain the written consent of the Minister of Home Affairs in order to marry.<sup>160</sup> This will imply that all minors of 15 years or older but under the age of 18 will require parental consent (or the equivalent thereof) to marry. A minor who cannot obtain parental consent will be entitled to approach the Children's Court for permission to marry, provided that such impossibility is not due to a parent's refusal to consent.<sup>161</sup> In the event of refusal, the *Draft Marriage Amendment Bill* retains the legal position in terms of which the High Court

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157 These considerations are of particular relevance as far as Bakker's (n 129) hierarchy argument is concerned.

158 GN 149 in GG 31864 of 13 February 2009.

159 See the long title to the Draft Bill.

160 Amended S 26. The ages are currently set at 18 for boys and 15 for girls, with the result that, bearing the common law ages of puberty in mind, boys of 14 years or older but under the age of 18 require the consent of the Minister, while girls of 12 years of age or older but under the age of 15 require the same.

161 Amended S 25(1).

can be approached for permission to marry, which will be granted if the court is of the opinion that the refusal "is without adequate reason and contrary to the interests" of the applicant minor.<sup>162</sup> As an aside, mention must be made of a problematic aspect of the 2009 Draft Bill in that it is silent on whether the common law minimum age requirements for marriage (presently 14 for boys and 12 for girls) are to be retained. In this regard the 2009 Draft Bill's predecessor (the *Draft Marriage Amendment Bill*),<sup>163</sup> proposed that the minimum age for marriage would be set at 12 years for both sexes<sup>164</sup> – a development that would have served to iron out the current gender-based distinction. If the proposals of the 2009 Draft Bill were to be enacted in their current form, the law of marriage would retain the *prima facie* "unjustifiable" distinction between boys and girls.<sup>165</sup>

In as far as customary marriages are concerned, the *Recognition of Customary Marriages Act* generally requires all prospective spouses to be at least 18 years of age,<sup>166</sup> but permits minor persons to marry in certain instances, provided that the requisite consent is obtained.<sup>167</sup> In many instances, these consent requirements are similar to those prescribed by the *Marriage Act* and, moreover, Act 120 of 1998 contains a number of cross-references to the consent provisions contained in the 1961 Act.<sup>168</sup> If the latter Act were therefore to be amended in the manner intended by the *Marriage Amendment Bill*, this would imply that these amendments would also pertain to customary marriages under the 1998 Act. On the other hand, if Bilchitz and Judge's recommendation in terms of repealing the *Marriage Act* were ever to be followed, this would have a definite impact on the *Recognition of Customary Marriages Act*, as the latter Act would need to be amended. Moreover, if it is borne in mind that the *Civil Union Act* prescribes an absolute age requirement of 18 before two persons may

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162 S 25(4) *Marriage Act*.

163 GN 35 in GG 30663 of 14 January 2008, which, incidentally, was the same Gazette in which the draft *Domestic Partnerships Bill* 2008 appeared.

164 Clause 15 2008 Draft Bill.

165 See *Eskom Holdings Ltd v Hendricks* 2005 5 SA 503 (SCA) para 16.

166 S 3(1).

167 S 3(3)–(6).

168 See S 3(b) and 5.

marry or enter into a civil partnership with one another,<sup>169</sup> repealing the *Marriage Act* would imply that the legal position would remain inconsistent (and *prima facie* unconstitutional), as persons under the age of 18 would then be permitted to enter into customary marriages but would not be capable of entering into civil marriages or civil partnerships under the *Civil Union Act*. It is submitted that repealing the latter Act and simultaneously updating the *Marriage Act* in the manner described above would iron-out these inconsistencies.

- (d) Concerning Bilchitz and Judge's argument that the *Civil Union Act* realises the goals and objectives of the "transformative" perspective, it has already been pointed out that the validation of same-sex marriage need only succeed from the "substantive rights" perspective, and that domestic partnerships legislation should instead be tasked with the objective of de-centring marriage.
- (e) A final aspect to consider is that the *Civil Union Act* creates a problem as far as the position of the marriage officer is concerned. While the *Marriage Act* permits "religious" marriage officers to refuse to solemnise marriages that are not aligned with their religious beliefs,<sup>170</sup> Section 6 of the *Civil Union Act* goes a step further by permitting even *ex officio* marriage officers employed by the state to refuse to solemnise marriages between persons of the same sex "on the grounds of conscience, religion and belief".<sup>171</sup> This provision appears to have been included in the latter Act on the basis of Sachs J's observation in *Minister of Home Affairs v Fourie* that the principle of reasonable accommodation could possibly permit such officers who had

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169 Sinclair (n 64) 408 raises the possibility that the age differentiation encountered in the *Marriage Act* and the *Civil Union Act* may have been occasioned "on the 'moral' basis that gay and lesbian persons under the age of 18 years are too young to be taking a decision to marry. But this is pure conjecture. A mistaken inconsistency is the more likely answer. Either way, the differentiation may amount to unfair discrimination, and a constitutional challenge may be lurking here". The opinion of possible unconstitutionality is shared by Van Schalkwyk (n 130) 168.

170 S 31 of Act 25 of 1961.

171 Bonthuys (n 122) 474 makes the interesting comment that it is ironic that at the time of voting the second *Civil Union Bill* into law in November 2006 the Members of Parliament of the ruling party (the African National Conference) were not permitted a "conscience vote", while the Act allows *ex officio* marriage officials to refuse to solemnise same-sex civil unions on this ground.

"sincere religious objections" to same-sex marriages to refuse to solemnise the same.<sup>172</sup>

It is interesting to note that a similar debate regarding conscientious objection has also been raging in the Netherlands, where the Government Coalition Agreement has permitted registrars to refuse to solemnise same-sex unions on such grounds since 2007.<sup>173</sup> Curry-Sumner<sup>174</sup> reports that many municipalities nevertheless force registrars to solemnise marriages regardless of sex, while others permit registrars "to voice their objections and find an alternative registrar".

Section 6 of the *Civil Union Act* has come under fire in recent times, with authors such as De Vos and Barnard<sup>175</sup> opining that a provision of this nature "provides further evidence that [the inequality posed by the Act's co-existence with the *Marriage Act*] is perpetuated and not eradicated". On the basis of similar reasoning, Bilchitz and Judge<sup>176</sup> hold that such a provision cannot be countenanced in that it "reinforces the message that same-sex relationships, as a class, merit different and unequal treatment to heterosexual relationships". In a thorough analysis of the matter, Bonthuys<sup>177</sup> points out that the "cumulative effect" of granting *ex officio* marriage officers the right to object coupled with the more rigorous appointment procedures prescribed by the *Civil Union Act*<sup>178</sup> along with the effects of "widespread homophobia" could imply that a same-sex couple may experience difficulty in finding a civil servant who is willing to marry them, with the result that such a couple would not have "access to the basic social services that are freely available to opposite-sex couples". Bilchitz and Judge conclude that "[p]ublic officials should be required to

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172 Para 159. Also see Bonthuys (n 122) 474.

173 Curry-Sumner (n 106) 259.

174 (n 106) 259.

175 (n 4) 821. See Robson (n 102) 430, who opines that this "opt-out" clause is "constitutionally suspect."

176 (n 4) 491–492.

177 (n 122) 476–477.

178 In terms of S 5 of the *Civil Union Act*, an application must be made both by the religious organisation or denomination, as well as by the prospective marriage officer him or herself, while S 3 of the 1961 *Marriage Act* requires only the individual minister of religion to apply.



uphold the law in an impartial manner and not cast judgment on people who approach them to fulfil an official function [...] public officials should be bound to apply the law of the country without fear, favour or prejudice". This sentiment is in essence shared in the Dutch context by Curry-Sumner,<sup>179</sup> who opines:

In the end, the law is, and should always remain, the law. Since marriage as regulated in Art 1:30, Dutch Civil Code, is a civil ceremony, a civil servant must abide by the law and execute his or her tasks in accordance with the law. Allowing registrars to express conscientious objections undermines the very essence of separation of Church and State, and should not be permitted under any circumstances.

When transposed into the South African context the opinion expressed by Curry-Sumner may at first appear unnecessarily rigid. It is however important to remember that Dutch law is far less accommodating of religious marriages and marriage officers than South African law.<sup>180</sup> It is submitted that by providing for the latter, South African law already complies with the constitutional imperative to protect religious freedom regarding marriage – granting a right of conscientious objection to civil marriage officers may be pushing the boundaries too far, and may violate the constitutional rights of the same-sex couple in question.<sup>181</sup> An alternative may be to follow the approach alluded to earlier by Curry-Sumner<sup>182</sup> in terms of which a civil marriage officer is permitted to object, but is then obliged to arrange for an alternative marriage officer. Whether this would be a realistic and constitutionally tenable alternative is however debatable, for the fact would remain that the objection is based solely on the sexual orientation of the prospective spouses, a situation that implies that homophobia is effectively condoned by the state, while no other form of prejudice is.<sup>183</sup> When all is said and done the inescapable fact remains that in solemnising a marriage a civil marriage officer is tasked with performing

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179 (n 106) 260.

180 See S 4.1 above.

181 Bonthuys (n 122) 478.

182 (n 106) 259.

183 Bonthuys (n 122) 479–480.

a secular as opposed to a religious function.<sup>184</sup> For this reason, it is submitted that the ability to object on religious grounds should therefore, as in Section 31 of the *Marriage Act*, be limited to religious marriage officers.

It is however important to refer to one further observation made by Bonthuys that when the conscientious objection clauses in the *Marriage Act* and the *Civil Union Act* are compared, it becomes clear that the provision in the latter Act is more widely phrased than its counterpart in that it allows objections on the basis of "conscience" and "belief" in addition to those based on religious beliefs *per se*. As a result, she is of the view that "the legislation, as it stands, does not consistently, rationally and efficiently protect the religious and conscience rights of marriage officers".<sup>185</sup> This in turn leads Bonthuys<sup>186</sup> to conclude that any conscientious objection permitted by same-sex marriage legislation on the basis of reasonable accommodation should be aligned with the *Marriage Act* and therefore limited to religious marriage officers who may object *on religious grounds only*. This argument is not only to be supported, but it also lends further credence to the contention that the expansion of the *Marriage Act* to encompass same-sex marriage would have been the better option, hence necessitating the repeal of the *Civil Union Act*.

#### 5.3.4 Preliminary conclusion

It is submitted that repealing the *Civil Union Act* would serve to simplify the complex system of laws that currently regulate inter-personal relationships in South African family law. It is however important to note that repealing the *Civil Union Act* would obviously imply that the civil partnership would no longer exist. With a view to ascertaining whether this would be a salutary development, two important questions need to be answered: (a) what exactly is a civil partnership; and (b) is the continued

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184 Also see Bonthuys (n 122) 476.

185 Bonthuys (n 122) 481.

186 (n 122) 483.

existence of this form of partnership an absolute necessity in view of the proposed (modified)<sup>187</sup> domestic partnership legislation?

## 6 Is there still a need for the civil partnership?

If the arguments in Section 5.3.1.3 pertaining to the needlessness of separate legislation to validate same-sex marriage without infringing religious freedom are borne in mind it becomes clear that, in real terms, the *Civil Union Act's* only contribution is the introduction of the civil partnership institution. It is however regrettable that the legislature made no attempt to define this institution, particularly in view of its novel nature. It appears that a civil partnership will be used as a vehicle by means of which the legal consequences of a civil marriage can be attached to an otherwise non-formalised life partnership without the parties having to marry one another. Bearing the lack of legal protection currently provided to unmarried life partnerships in mind (particularly in instances in which they involve opposite-sex couples),<sup>188</sup> this institution could surely be of value, although – as has been seen above – it is debatable whether the civil partnership provides any real alternative to marriage. The situation becomes even more complicated when the provisions of the *Draft Domestic Partnerships Bill, 2008*, are borne in mind. As seen in the introduction to this paper, this Draft Bill provides for both registered and unregistered *domestic* partnerships, and extends many of the legal consequences of civil marriage to such partnerships. If one considers that our legal system currently provides for (undefined) *civil* partnerships and in future may provide for registered and/or unregistered *domestic* partnerships, it becomes clear – from a purely pragmatic point of view – that this multitudinous, illogical and overly complicated legal system would be confusing for legal practitioners, officials and the public.<sup>189</sup> (This confusing picture would be complicated further by the fact that the term "*life* partnership" has also become entrenched in post-1994 South African family law.)<sup>190</sup>

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187 See S 2 *ante*.

188 See S 3.3.6 *ante*.

189 See Goldblatt (n 157) 624 and 628, in which she opines that recognition of "domestic partnerships" should involve minimal formality and that any new legislation should be drafted with caution as "many disadvantaged people may not benefit from new laws. Ignorance of the law, illiteracy and lack of access to the courts are barriers to justice that face many".

190 See *National Coalition for Gay and Lesbian Equality* para 36.

This raises a further important question: If the 2008 Draft Bill were to be enacted, would there be any room for the civil partnership to co-exist with the registered domestic partnership? A point of departure from which this question may be answered is to assume that both institutions exist with a view to providing a means by which life partners can formalise their unions *without marrying one another*. Secondly, it has been seen that a system that merely replicates marriage is undesirable: What is required is a realistic *alternative* to marriage.<sup>191</sup> However, if one considers the legal position that would result were the Draft Bill to be enacted in its current form, a problematic state of affairs would arise, as, although both forms of partnership share the same point of departure, a significant distinction exists between the legal consequences attached to each.<sup>192</sup> This is clearly undesirable, as there simply is no logical reason that the law should on the one hand provide for a form of partnership that is a marriage in all but name, and on the other for a registered domestic partnership that, despite being based on the identical notion of *consortium omnis vitae*,<sup>193</sup> differs so markedly from marriage. While it has already been seen that the current state of affairs (in terms of which civil partnership is the only "alternative" to marriage) is problematic, it appears that the dichotomous approach that would be created by recognising both civil and domestic partnerships does little more in terms of providing an uncomplicated and realistic alternative to marriage. In fact, enacting the Draft Bill in its current form would only serve to superimpose an inchoate domestic partnership regime onto an already flawed and

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191 See SALRC (n 6) 320; Goldblatt (n 157) 621–622; Smith (n 9) 567-588 and 742-746.

192 An example of such a difference is that a registered domestic partnership is not automatically concluded in community of property (see Clause 7(1) of the Draft Bill) while the opposite is true of a civil partnership, in which this regime is the default regime. In addition, certain invariable consequences of marriage (or civil partnership) do not apply to domestic partnerships. For example, the privilege relating to marital communications (see S 195 *Criminal Procedure Act* 51 of 1977) applies to married spouses to a civil, customary or religious marriage – see S 195(2) – and as a consequence, also to partners to a civil partnership (by virtue of S 13 of Act 17 of 2006). In contrast, the 2008 Draft Bill does not currently provide for the same privilege to be extended to domestic partners. (This discrepancy is addressed by Smith (n 9) 525-530.) Furthermore, partners involved in a civil partnership will have to divorce one another in terms of the *Divorce Act* 70 of 1979 if they wish to terminate their partnership *inter vivos*. This implies that all the (patrimonial) consequences of divorce will apply to such a termination. So, for example, the partners would not be able to rely on the court's power to redistribute assets in terms of S 7(3)–(6) of the Act, owing (*inter alia*) to the time limits imposed by S 7(3). In contrast, registered domestic partners can terminate their union in a less formal manner and only need approach the courts for a termination order in cases in which minor children are involved (Clause 15). Regarding the patrimonial consequences of the termination of the partnership, a redistribution order is competent irrespective of the date on which the partnership was entered into (see Clause 22).

193 Smith (n 9) 519-530 and 589-591.

overly complicated system. It is submitted that this is precisely where the (modified) domestic partnerships legislation<sup>194</sup> that provides an alternative that co-exists with (and in so doing supplements) the institution of marriage in a meaningful, effective and realistic manner comes into its own. On the basis of these considerations, it is submitted that were the (modified) *Domestic Partnerships Bill* to be enacted there would be no need for the "hollow shell"<sup>195</sup> civil partnership institution to be available any longer.

## 7 The course of action suggested

One of the most important differences between the prevailing legal positions in South Africa and in the Netherlands is that the latter country's family law system is well demarcated and clearly regulated.<sup>196</sup> Parties wishing to solemnise their relationships are provided with three options, each of which functions within set parameters and exists independently of the others. For example, while Dutch law draws a clear distinction between marriages and registered partnerships, the confusing and overlapping terminology such as "civil partnership", "civil union", "domestic partnership" and "life partnership" proves that the same cannot be said of South African family law. This notwithstanding, Dutch law can possibly be criticised for providing two choices that, in the words of Curry-Sumner<sup>197</sup> are "more-or-less identical". In this regard, the Dutch legislature may do well to consider enacting unregistered domestic partnership legislation along the lines of that proposed in Chapter 4 of South Africa's *Draft Domestic Partnerships Bill, 2008*.

Second, it is insightful to consider that in *Minister of Home Affairs v Fourie* Sachs J cautioned:

The circumstances of the present matter call out for enduring and stable legislative appreciation. A temporary remedial measure would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action compliant with the Constitution.<sup>198</sup>

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194 See S 2 *ante*.

195 To borrow Curry-Sumner's (n 106 274) description of contemporary Dutch law.

196 See Smith and Robinson (n 66) 376–379.

197 (n 106) 274.

198 Para 136.

The legal position sketched above shows that the *Civil Union Act* was unfortunately not the product of "enduring and stable legislative intervention". In addition, the fact that the Minister of Home Affairs expressly stated that the Act was merely a temporary measure<sup>199</sup> serves to underscore the contention that the legislature paid scant attention to Sachs J's cautionary remarks.

It is submitted that the *Civil Union Act* is an unnecessary piece of legislation and that the mere amendment of the *Marriage Act* (in accordance with point (i) of the SALRC's recommendations)<sup>200</sup> would have been a more effective option. This opinion is bolstered by the possibility of the enactment of domestic partnerships legislation: It stands to reason that such legislation should be aligned with and should supplement existing legislation such as the *Marriage Act* and the *Civil Union Act*. The problem is however that the dichotomy that would be created by the enactment of the *Draft Domestic Partnerships Bill* in its current form along with the continued existence of the civil partnership would not only fail to achieve such an alignment, but would also create an overly complicated legal position that provides no effective, realistic or clearly understandable alternative to marriage. On the other hand, the enactment of the (modified) domestic partnership legislation<sup>201</sup> would facilitate a better alignment with marriage and would prove that the civil partnership (as an effective carbon copy of as opposed to realistic alternative to marriage) is superfluous and unnecessary. In addition, enacting the legislation while simultaneously repealing the *Civil Union Act* would imply that the interpretative and legal anomalies that Smith and Robinson,<sup>202</sup> for example, describe as either being created or perpetuated by the *Civil Union Act* would fall away. Such a development would also go a long way towards providing the means by which not only the pre-eminence enjoyed by marriage could to some extent be displaced, but also by which better legal protection could be provided for the vulnerable members to whom Bonthuys<sup>203</sup> refers when she states that the enactment of same-sex marriage legislation that is effectively based on the civil marriage "not only reinforces the centrality of existing marriage rules and requirements, holding them up as the ideal

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199 South African Broadcasting Corporation <http://www.sabcnews.com/>.

200 See S 3.1 above.

201 See S 2 *ante*.

202 (n 66) and 2008 *BYUJPL*.

203 2007 *SAJHR* 542.

which all should aspire to, but it also fails to address the inadequacy of marriage law to protect the interests of vulnerable family members, often women and children".

In the final analysis, it must be concluded that the legislature should dispense with the *Civil Union Act* by: (a) incorporating same-sex marriage into the *Marriage Act*,<sup>204</sup> and (b) simultaneously doing away with the civil partnership by replacing the *Civil Union Act* with the (modified) *Domestic Partnerships Bill*, 2008.

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204 It goes without saying that the *Marriage Act* would have to contain a provision guaranteeing the validity of all marriages and civil partnerships concluded under the *Civil Union Act*. The Act could also provide a period of grace within which all civil partnerships could be converted into marriages or domestic partnerships.

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***List of abbreviations***

BYUJPL	Brigham Young University Journal of Public Law
EJCL	Electronic Journal of Comparative Law
IJLPF	International Journal of Law, Policy and the Family
JJS	Journal for Juridical Science
NELR	New England Law Review
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
ULR	Utrecht Law Review

**AN EMBARRASSMENT OF RICHES OR A PROFUSION OF CONFUSION? AN  
EVALUATION OF THE CONTINUED EXISTENCE OF THE *CIVIL UNION ACT 17*  
OF 2006 IN THE LIGHT OF PROSPECTIVE DOMESTIC PARTNERSHIPS  
LEGISLATION IN SOUTH AFRICA**

**BS Smith and JA Robinson**

**Summary**

As it stands, South African family law currently holds that the *Marriage Act 25* of 1961 applies exclusively to the solemnisation of heterosexual civil marriages while same-sex couples have no choice but to formalise their relationships in terms of the *Civil Union Act 17* of 2006. In addition, the legal position is complicated by the fact that the latter Act not only allows both heterosexual and homosexual couples to conclude a civil union, but also provides that a civil union may take the form of either a marriage or a civil partnership, both of which enjoy the same legal recognition as, and give rise to the same legal consequences, as a civil marriage under the *Marriage Act*.

In January 2008, a draft *Domestic Partnerships Bill* saw the light of day, the potential enactment of which casts significant doubt as to whether the prevailing framework should be retained. With this potential development in mind, this paper considers the desirability of maintaining the "separate but equal" *status quo* by: (a) comparing the South African Law Reform Commission's pre-*Civil Union Act* proposals with the approach eventually adopted by the legislature; (b) comparing and contrasting the post-*Civil Union Act* position in South Africa with that of an established and well-ordered jurisdiction such as the Netherlands and, in the light hereof, considering the cases for and against repealing the *Civil Union Act*; and (c) by considering the desirability and practicality of the civil partnership's potential co-existence with the *Domestic Partnerships Bill* (as modified in accordance with a recent study). A proposal is made that could provide a less complex and better streamlined family law dispensation in South Africa.

**Keywords:** Domestic partnership; Life partnership; *Domestic Partnerships Bill*, 2008; *Civil Union Act 17* of 2006; Civil union; Civil partnership; *Marriage Act 25* of 1961; Marriage; Civil marriage