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## A judicial revolution? The court-led achievement of same-sex marriage in South Africa

Pierre de Vos\*

### 1. Introduction

At the end of 2006 South Africa became the first country in Africa to extend full marriage rights to same-sex couples. After a successful Constitutional Court challenge<sup>1</sup> to the exclusion of same-sex couples from the common law definition of marriage and the failure of the Marriage Act<sup>2</sup> to provide for same-sex marriage, the South African Parliament reluctantly passed the Civil Union Act<sup>3</sup> to extend marriage rights to same-sex couples who were until then denied the right to marry. This would not have been possible if the South African Constitution<sup>4</sup> did not explicitly prohibit discrimination on the basis of sexual orientation<sup>5</sup> and if the Constitutional Court had not ruled in several cases<sup>6</sup> that this meant that same-sex relationships deserve equal protection and respect and that same-sex couples are equally capable of forming caring long-term relationships and of raising children in a loving and caring environment.

However, in order to accommodate objections from religious groups, Parliament opted not to extend marriage rights to same-sex couples by simply changing the common law definition of marriage and the relevant provisions of the Marriage Act in a way that would allow same-sex couples to get married under the Marriage Act. Instead Parliament adopted a separate Civil Union Act – open to both same-sex and different-sex couples – that extended the right to marry to all unmarried couples over the age of 18. In order to understand the full import of the Civil Union Act it is therefore necessary briefly to sketch the legal path that led to the adoption of this Act before exploring its specific provisions. I will then evaluate the Act and assess whether it really provides equal marriage rights for same-sex couples or not and whether problems might remain.

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1 In the case of *Minister of Home Affairs v. Fourie*, 2006(3) BCLR 355 (CC).

2 Act 25 of 1961. Marriage in South Africa has traditionally been regulated by the Marriage Act but this regulation was based on the common law definition of marriage as determined by the judiciary. While the Act therefore provided for the formal requirements of how to enter into a valid marriage, the common law as determined by judges determined who would be entitled to marry whom.

3 Act 17 of 2006.

4 Constitution of the Republic of South Africa Act 108 of 1996.

5 Section 9(3) of the Constitution states: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth.' (my italics)

6 *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1998(12) BCLR 1517 (CC); *Satchwell v. President of the Republic of South Africa and Another*, 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC); *Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)*, 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC); *J and Another v. Director General, Department of Home Affairs, and Others*, 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC).

## 2. Overview of the Constitutional Court jurisprudence

By the time that applicants challenged the exclusion of same-sex couples from the right to get married, the Constitutional Court had confirmed on several occasions that the prohibition on unfair discrimination on the basis of sexual orientation meant that the state had to respect and protect the human dignity of gay men, lesbians and other sexual minorities in South Africa. In the process, it developed a detailed set of assumptions that it said should guide any enquiry as to whether unfair discrimination<sup>7</sup> on the basis of sexual orientation had taken place. In setting out its understanding of same sex love and same-sex relationships, the Court rejected many of the stereotypical assumptions made about gay men and lesbians and their intimate relationships that are prevalent in South Africa and most other societies in the world.

In the Constitutional Court judgment on marriage, these guiding assumptions were said to include that:<sup>8</sup>

- gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms including affection, friendship, eros and charity;
- they are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household;
- they are individually able to adopt children and in the case of lesbians to bear them;
- in short, they have the same ability to establish a *consortium omnis vitae*; and finally
- ‘(...) they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses’.

The Constitutional Court thus concluded that the family and family life of gay men and lesbians were in all significant respects indistinguishable from those of heterosexual spouses and in human terms as important.<sup>9</sup> Where the law fails to recognise the relationship of same-sex couples ‘the message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudice and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity’.<sup>10</sup>

When a female same-sex couple then challenged the legal exclusion of same-sex couples from the institution of marriage in the common, the Constitutional Court relied on these prece-

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7 Section 9 of the Constitution prohibits *unfair* discrimination on any ground including the sixteen grounds listed in Section 9 itself. The Constitutional Court has given this phrase a very specific meaning and has argued that where differentiation occurs between individuals belonging to different groups and where that differentiation is based on a listed ground, it would be assumed to constitute unfair discrimination. It would then be for the state or other role players trying to justify the discrimination to show that the discrimination was not unfair. In evaluating whether discrimination was unfair or not a court will take into account all relevant factors, including the position of the complainant in society and whether she or he belongs to a group that has been previously discriminated against; the purpose of the discrimination and whether it was aimed at rectifying past injustice or merely to perpetuate it and also whether the discrimination would be so serious as to affront the human dignity of the complainant and the group he or she belongs to. See *Harksen v. Lane NO*, 1997 11 BCLR 1489 (CC); 1998 1 SA 300 (CC), pp. 1508–1511.

8 *National Coalition for Gay and Lesbian equality v. Minister of Home Affairs*, *supra* note 6, at 32F-33C, restated in *Fourie*, *supra* note 1, at 545F/G-546D/E.

9 *Fourie*, *supra* note 1, par. 54.

10 *Home Affairs*, *supra* note 6, par. 54; *Fourie*, *supra* note 1, par. 54.

dents to find in favour of the couple and declared invalid the common law definition of marriage which defined marriage as ‘a union of one man with one woman, to the exclusion, while it lasts, of all others’.<sup>11</sup> It also found that the Marriage Act, which provided only for the legal mechanisms for different-sex couples to enter into a marriage, to contravene the equality guarantee in the Constitution. In considering its options to remedy the unconstitutionality of the South African family law as it relates to marriage, the Constitutional Court opted for an approach that would give Parliament a chance to correct the defects in the law in an appropriate manner.<sup>12</sup> The South African parliament was therefore given 12 months to pass legislation that would either amend the existing Marriage Act or would create a new piece of legislation that would extend to same-sex couples the right to enter into a legally binding institution that would extend to same-sex couples the legal rights and duties as well as the same social status as that associated with marriage entered into by heterosexuals in terms of the existing Marriage Act. But the Court made it clear that Parliament was not free to fix this problem in any way it saw fit and thus circumscribed the way in which partnership rights had to be extended. Parliament could therefore not merely extend civil partnership rights to same-sex couples in a way that fell completely outside the marriage regime. It had to recognise same-sex relationships, said the Court, in a way that would not perpetuate the marginalisation and disrespect for same-sex couples. There are several aspects of the judgment that makes this conclusion inevitable.<sup>13</sup>

First, the court affirmed the importance of marriage in South African society. According to the *Fourie* judgment marriage was a unique institution that constituted ‘much more than a piece of paper’.<sup>14</sup> This was because until recently marriage was the only institution in South Africa from which a number of socio-economic benefits would accrue. These included the right to maintenance, medical insurance coverage, adoption, access to wrongful death claims and post-divorce rights.<sup>15</sup> But the Court also made it clear that marriage was important because it bestowed a myriad of *intangible* benefits on those who choose to enter into it. As such, marriage entitled a couple to celebrate their commitment to each other at a public event so celebrated in our culture. Well aware of and affirming the centrality attributed to marriage and its consequences in South African culture, the Court held that to deny same-sex couples a choice in this regard ‘is to negate their right to self-definition in a most profound way’.<sup>16</sup> The Constitutional Court thus asserted that to exclude same-sex couples from the benefits and responsibilities of marriage would not be:

‘a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and

11 This definition was provided by Chief Justice Innes in *Mashia Ebrahim v. Mahomed Essop*, 1905 TS 59, p. 61.

12 *Fourie*, *supra* note 1, par. 134.

13 See generally P. de Vos & Jaco Barnard, ‘Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga’, 2007 *South African Law Journal*, p. 795; P. de Vos, ‘The “inevitability” of same-sex marriage in South Africa’s post-apartheid state’, 2007 *SA Journal on Human Rights*, pp. 432-465.

14 *Fourie*, *supra* note 1, par. 70.

15 *Ibid.*

16 *Ibid.*, par. 72.

accepting responsibility is by definition less worthy of regard than that of heterosexual couples.<sup>17</sup>

Thus the exclusion of same-sex couples from marriage has both a *practical and symbolic* impact, which means that the unconstitutionality could not be rectified through the recognition of same-sex unions outside the law of marriage. In responding to the unconstitutionality of the existing marriage regime, both the *practical* and the *symbolic* aspects had to be addressed. According to the Constitutional Court it would therefore not be sufficient for the South African Parliament ‘merely to deal with all the practical consequences of exclusion from marriage. It would also have to accord to same-sex couples a public and private status equal to that which heterosexual couples achieve from being married’.<sup>18</sup>

In order to reach this conclusion the Constitutional Court had to deal with arguments put forward by opponents of same-sex marriage who conceded that given the prohibition against sexual orientation discrimination in the South African Constitution, same-sex couples were entitled to legal protection of their relationships but that the remedy did not lie in radically altering the law of marriage, which by its very nature and as it has evolved historically is concerned with heterosexual relationships, but instead merely required Parliament to provide an alternative form of legal protection for such couples.

The Court first considered and then rejected the argument that the constitutive and definitional characteristic of marriage is its procreative potential and that marriage – properly defined and understood – could therefore never include same-sex couples. The Court’s rejection of this argument was based on the insight that to base an understanding of marriage on the procreative potential of that marriage would be deeply demeaning to *heterosexual couples* (married or not) who, for whatever reason, either choose not to procreate or are incapable of procreating when they start a relationship or become so at any time thereafter. It would also be demeaning for couples who start a relationship at a stage when they no longer have the capacity to conceive or for adoptive parents. Although this view might have some attraction in the context of a particular religious world view, from a legal and constitutional point of view, the Court found, it could not hold.<sup>19</sup>

Second, the Court addressed an argument with a more obviously religious basis. According to this argument marriage was by its very nature a religious institution and to change its definition would violate the freedom of groups whose religious identities are wrapped up in a heterosexual definition of marriage. This argument was in no uncertain terms rejected by the Court. Although the Court recognised that religious bodies played a large and important part in public life and are part of the fabric of our society,<sup>20</sup> it affirmed that in an open and democratic society contemplated by the Constitution there was a need for mutual respect and co-existence between the secular and the sacred. The Court thus pointed out that the acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage that the South African law accords to heterosexual couples, would ‘in no way [be] inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages’. The two sets of interests involved were not in conflict, but rather they co-existed in a constitutional realm based on accommodation of diversity.<sup>21</sup> This was a logical consequence

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17 *Ibid.*, par. 71.

18 *Ibid.*, par. 81.

19 *Ibid.*, par. 86-87.

20 *Ibid.*, par. 90-93.

21 *Ibid.*, par. 98

of the constitutional imperative that the religious beliefs of some could not be used to determine the constitutional rights of others.<sup>22</sup>

Applying these views to the facts, the court held that the exclusionary common law definition of marriage and aspects of the Marriage Act which provided only for heterosexual marriage were unconstitutional.<sup>23</sup> Instead of an immediate reading-in of words into the Marriage Act to remedy this unconstitutionality, the court suspended the its order for one year to give Parliament a chance to addresses the unconstitutional exclusion of same-sex couples from enjoying the status and entitlements coupled with responsibilities that are accorded to heterosexual couples by the common law and by the Marriage Act.<sup>24</sup> If Parliament failed to deal with this matter within the year stipulated, the common law and the Marriage Act would automatically be changed to allow same-sex couples to enter into marriage.

It is important to note that the Court did not give Parliament a wide discretion on the manner in which this defect in the law had to be fixed. Although it never explicitly stated that Parliament was constitutionally obliged to extend full *marriage* rights (as opposed to some lesser partnership rights) to same-sex couples, the Court made it clear that the remedy fashioned by Parliament had to provide the same legal rights as well as the same status that is traditionally associated with heterosexual marriage. In this regard, the Court expressly held that whatever the legislative measures Parliament took, it could not subject same-sex couples to new forms of marginalisation or exclusion by the law, either directly or indirectly.<sup>25</sup> The Court provided Parliament with ‘certain guiding principles’ to be kept in mind when rectifying the injustice. The most important principle here was that Parliament had to be ‘sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation’.<sup>26</sup>

It would therefore be completely unacceptable for Parliament to adopt a ‘separate but equal’ approach and to provide same-sex couples with a separate legal institution that would not have the same status as traditional marriage because this would serve ‘as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation.’<sup>27</sup> The Court referred to the notorious apartheid-era Appeal Court judgment of *S v. Pitje*<sup>28</sup> where the appellant, an African candidate attorney employed by the firm Mandela and Tambo, occupied a place at a table in court that was reserved for ‘European practitioners’ and refused to take his place at a table reserved for ‘non-European practitioners’. The then Chief Justice upheld the appellant’s conviction for contempt of court as it was ‘(...) clear [from the record] that a practitioner would in every way be as well seated at the one table as at the other, and that he could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table’.<sup>29</sup> Such an approach, the Court argued in the *Fourie* case, would be ‘unthinkable in our constitutional democracy today not simply because the law has changed

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22 *Ibid.*, par. 92.

23 *Ibid.*, par. 114.

24 *Ibid.*, par. 132-153.

25 *Ibid.*, par. 147.

26 *Ibid.*, par. 150.

27 *Ibid.*, par 150. Sachs J explained this view with reference to South Africa’s apartheid past: ‘The very notion that integration would lead to miscegenation, mongrelisation or contamination, was offensive in concept and wounding in practice. Yet, just as is frequently the case when proposals are made for recognising same-sex unions in desiccated and marginalised forms, proponents of segregation would vehemently deny any intention to cause insult. On the contrary, they would justify the apartness as being a reflection of a natural or divinely ordained state of affairs. Alternatively they would assert that the separation was neutral if the facilities provided by the law were substantially the same for both groups.’

28 1960 (4) SA 709 (A).

29 *Ibid.*, p. 710.

dramatically, but because our society is completely different'.<sup>30</sup> The Court warned explicitly against providing an apparently neutral remedy that could have a severe impact on the dignity and sense of self-worth of the persons affected. Although different treatment itself does not necessarily violate the dignity of those affected, as soon as 'separation implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status it becomes constitutionally invidious'.<sup>31</sup>

'This means that whatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved. In a context of patterns of deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples.'<sup>32</sup>

### **3. First draft of the Civil Union Bill**

Many gay and lesbian activists and other members of the Lesbian Gay Bisexual Transgendered and Intersex (LGBTI) community were deeply upset by the remedy offered by the majority of the Court in the *Fourie* judgment, arguing that the majority of the Court failed to provide an effective remedy and condemned same-sex couples who wished to get married to another year in legal limbo.<sup>33</sup> Because the judgment never used the word 'marriage', there was also some anxiety that Parliament would try to avoid its responsibilities by providing a 'separate but equal' regime of legal protection in the form of partnership rights that would not comply with the letter and spirit of the majority judgment. It was therefore with some trepidation that LGBTI activists greeted the original version of the Civil Union Bill<sup>34</sup> when it was tabled in Parliament at the end of August 2006. The Bill proposed the creation of a separate institution for same-sex couples – called a civil partnership – which purported to bestow exactly the same legal rights on same-sex civil partners as on heterosexual married couples.<sup>35</sup> There were, however, three pivotal ways in which the proposed civil partnership differed from traditional marriage:<sup>36</sup> it would not be called a marriage (except at the ceremony if the partners so choose);<sup>37</sup> marriage officers employed by the state would have a right to refuse to solemnise a civil partnership;<sup>38</sup> and it would only be open to same-sex couples, not to heterosexual couples.<sup>39</sup>

LGBTI activists criticised the Bill, arguing that it represented an attempt to create a 'separate but equal' marriage regime that would 'protect' 'real marriage' from 'contamination' and 'defilement' by same-sex couples, while pretending to provide such couples with equal partnership rights. This move was deeply upsetting to many in the LGBTI community, not only because it failed to respect the human dignity of gay men and lesbians which are protected in the

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<sup>30</sup> *Fourie*, *supra* note 1, par. 151.

<sup>31</sup> *Ibid.*, par. 152.

<sup>32</sup> *Ibid.*, par. 153.

<sup>33</sup> See De Vos, *supra* note 13, p. 458. As I have pointed out before, many of us who had criticized the majority in this regard, changed our minds. Although the public participation process that accompanied discussions about the adoption of the Civil Union Act was deeply flawed, it did open up a conversation about sexual orientation and provided an unprecedented platform in the media for those arguing in favour of respect of gay men and lesbians.

<sup>34</sup> Draft Civil Union Bill, published in the *Government Gazette* No. 29169 of 31 August 2006.

<sup>35</sup> *Ibid.*, Section 13.

<sup>36</sup> De Vos, *supra* note 13, p. 458.

<sup>37</sup> *Ibid.*, Section 11.

<sup>38</sup> *Ibid.*, Section 6.

<sup>39</sup> *Ibid.*, definition Section 1.

Constitution, but also because, so it was argued, it obviously contradicted the very clear instructions set out by the Constitutional Court.<sup>40</sup>

This view was based on the fundamental assumption at the heart of the *Fourie* judgment that the institution of marriage indeed had a special *status* in our society and that access to the institution of ‘marriage’ would be the only way to truly give effect to the Constitutional promise of equality. The Bill, it was argued, created a separate and inferior regime and failed to recognise – as the Constitutional Court did – that both tangible legal consequences and intangible benefits flow from the act of entering a marriage. The problem, it was said, was clearly that a Bill that did not allow same-sex couples the right to get married and call their union a marriage, would not provide for an institution of equal *status*. It seemed to propose a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation. This was problematic, given the fact that the Constitutional Court made clear that ‘separate but equal’ partnership rights would not be good enough because it would serve as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to discrimination.

LGBTI activists, assisted by the language deployed by the Constitutional Court, launched a sustained attack on the draft legislation.<sup>41</sup> By pointing out that the concept of marriage has a profound symbolic, emotional and political power in our culture that gives it a special status, it became easier for LGBTI activists and academics to show that by refusing same-sex couples the right to enter into an institution called ‘marriage’, the Bill would deprive same-sex couples of the right to access the status associated with the term ‘marriage’. It was also easier to show how deeply problematic it was that civil partnerships were envisaged as being exclusively for same-sex couples who would still be prohibited from accessing the institution of marriage reserved for heterosexuals.<sup>42</sup> Civil partnerships entered into by same-sex couples would therefore continue to have a lesser status than traditional marriage and would infringe on the rights of such couples not to be discriminated against. Activists furthermore could point to the Constitutional Court warning that creating a special institution for same-sex couples would invariably send the signal that bringing same-sex couples under the umbrella of marriage law would taint those already within its protection. Such a move would endorse the view that homosexuals are somehow depraved, impure and tainted and that ‘pure’ heterosexual marriage must be protected from this abomination. As the Constitutional Court pointed out in the *Fourie* judgment, such a view – no matter how seriously and sincerely held – can only be based on prejudice against, or hatred of, homosexuals. And prejudice, the Court has said on many occasions, can never justify discrimination in our constitutional dispensation. It was furthermore argued that the effects of the Bill were potentially more severe because so many gay men and lesbians still experience tremendous oppression, marginalisation and vilification in our society. Some are still raped, assaulted or even killed because they are lesbians or gay. In this context, the creation of an apartheid style separate civil partnerships for same-sex couples, it was argued, would merely confirm that the law did not consider our relationships equal in status and worthy of equal concern and respect. In short, a doctrine of ‘separate but equal’ was deeply humiliating and insulting when applied to black South

40 De Vos & Barnard, *supra* note 13, pp. 808-811.

41 See for example P. de Vos, ‘Gays and Lesbians now “separate but equal”’, *Mail & Guardian*, 17 September 2006, accessed on 18 July 2007 at [http://www.mg.co.za/articlePage.aspx?articleid=284218&area=/insight/insight\\_comment\\_and\\_analysis/](http://www.mg.co.za/articlePage.aspx?articleid=284218&area=/insight/insight_comment_and_analysis/)

42 See Parliamentary Monitoring Group Report on the Portfolio Committee of Home Affairs on Peoples’ Public Hearings in Provinces on the Civil Union Bill, 20 September to 9 October 2006, and the Public Submissions, accessed on 8 September 2007 at <http://www.pmg.org.za/docs/2006/061031hearings.htm>



Africans. It remains humiliating and insulting (and now also unconstitutional) when applied to homosexuals.

The argument put forward by LGBTI activists resonated with some members of the ruling party, the Africa National Congress (ANC), exactly because it powerfully reminded them of the similarities with apartheid.<sup>43</sup> After political intervention, the ANC members of the relevant Parliamentary Committee decided at the last possible moment that it would be necessary to amend the first version of the draft Bill.

#### **4. The amended Civil Union Act**

##### **4.1. General description**

Ultimately, arguments put forward by activists and academics were at least partly successful and early in November the National Assembly adopted a substantially amended Bill which provided for same-sex couples to enter into a Civil Union marriage which could be called either a ‘marriage’ or a ‘civil partnership’. This was because a Civil Union is defined in the Act 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>44</sup> The Act also makes it clear that those who enter into a Civil Union marriage would be accorded the same rights as those who enter a traditional Marriage in terms of the Marriage Act.<sup>45</sup> The Civil Union Act thus amended all existing legislation in South Africa in which references are made to ‘marriage’, ‘husband’, ‘wife’ or ‘spouse’, so that these Acts which bestow rights and privileges and duties on married heterosexual couples would now also apply equally to those couples – heterosexual or same-sex – who had registered a marriage or a civil partnership in accordance with the Civil Union Act. The Act thus now provided for the recognition of same-sex relationships in a way that extends to same-sex couples the same rights and duties and the same status as that traditionally enjoyed by different-sex couples.

It is important to note that the amended Bill eventually passed by Parliament provided for both same sex and different sex couples to enter into a marriage or a civil partnership.<sup>46</sup> The Act also prescribed the formal requirements for entering into such a civil union marriage and in many ways mirrors the provision of the Marriage Act, which was not repealed or amended and remained open exclusively to facilitate marriage by heterosexual couples who chose not to get married in terms of the new Act. This means that the Act allows both same-sex and different-sex couples to register their relationship in terms of this legislation. It also means that it provides

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43 I was told this personally by a member of the ANC caucus in Parliament who took part in the debate in the caucus on the Civil Union Bill on the condition that I would not mention his name. Similar sentiments were expressed to me by an advisor to the Minister of Home Affairs. See De Vos, *supra* note 13, p. 459.

44 Civil Union Act 17 of 2006, Section 1.

45 *Ibid.*, Section 13, which states:

‘(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.’

46 It has been suggested that Section 8(6) of the Act muddies the waters in this regard and may be interpreted as restricting marriage under the new act to same-sex couples. Section 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 or the Customary Marriages Act.’ I contend that it is clear from the context that this section does not prohibit different sex couples from entering a marriage in terms of the Civil Union Act. It merely states that such different sex couples would only be able to enter into a Civil Union marriage if they would also have been allowed to enter into a marriage in terms of one of the two other laws regulating marriage in South Africa.

such couples a choice, either to register a ‘marriage’ or a ‘civil partnership’. Whether one chooses to register a marriage or a civil partnership, the legal consequences would be exactly the same. At first blush, it seems somewhat perplexing that this choice was provided at all. Most couples would probably not choose to register ‘civil partnerships’ if they have the choice of registering a ‘marriage’, given the powerful symbolic power of entering into an institution called ‘marriage’ in our society and given the absence in the public discourse of a critique of the institution of marriage. This choice was most probably retained as a compromise to placate more conservative critics. This is ironic because given the contested nature of heterosexual marriage and feminist critiques regarding the alleged patriarchal nature of the institution,<sup>47</sup> the inclusion of this option seems like a net gain for progressives because it allows both heterosexual and homosexual couples to enter into a civil partnership without having to call their union a ‘marriage’ but would nevertheless give such couples access to a union that will provide them with the full range of legal rights and duties associated with that institutions of ‘marriage’. Some more conservative same-sex couples who view marriage as an institution exclusively associated with heterosexual relationships, may well also choose to enter into a civil partnership instead of a ‘marriage’.

Some of the most important legal consequences associated with entering both the traditional marriage in terms of the Marriage Act, and a Civil Union marriage entered into in terms of the Civil Union Act are as follows.

*(a) Changing of the status of spouses*

Upon entering either a traditional marriage in terms of the Marriage Act or a marriage in terms of the Civil Union Act, the legal status of spouses changes. For example, neither spouse may marry anyone else while the marriage subsists.<sup>48</sup> When a valid marriage under either regime is concluded a right arise for a surviving spouse to inherit intestate from a deceased partner in the event where no will was made by the deceased.<sup>49</sup> Furthermore, where one of the partners to the marriage had children prior to the conclusion of the marriage, both spouses automatically become the legal guardians of the children<sup>50</sup> and the children are legitimated by the marriage.<sup>51</sup>

*(b) Consortium omnis vitae*

In South African law a marriage creates a *consortium omnis vitae* between the spouses.<sup>52</sup> This turn of phrase is supposed to capture in the abstract the ‘totality of a number of rights, duties and advantages accruing to the spouses in a marriage’.<sup>53</sup> As Cronjé and Heaton points out this includes, *inter alia*, companionship, love, affection, comfort, mutual services and sexual intercourse. The *consortium omnis vitae* is not directly enforceable in a court but is indirectly protected by the threat of divorce.<sup>54</sup>

*(c) Maintenance of a spouse*

In South African law marriage imposes a reciprocal duty of support on both spouses from the moment spouses enter into a marriage until the marriage is terminated – provided that the spouse

47 See P. Ettelbrick, ‘Since When is Marriage a Path to Liberation?’, in R. Baird & S. Rosenbaum (eds.), *Same Sex Marriage: the Moral and Legal Debate*, 1997, pp. 164-168.

48 See Civil Union Act, *supra* note 3, Section 8 and D.S.P. Cronjé & J. Heaton, *South African Family Law*, 2004, p. 30.

49 Intestate Succession Act 81 of 1987, ss. 1(1)(a) and (c).

50 Guardianship Act 192 of 1993, s. 1(1).

51 Children’s Status Act 82 of 1987, s. 4.

52 See generally Cronjé & Heaton, *supra* note 47, pp. 49-50.

53 *Grobbelaar v. Havenga*, 1964 (3) SA 522 (N) 525.

54 Cronjé & Heaton, *supra* note 47, p. 50.

who claims maintenance is in need of maintenance and the spouse from whom it is claimed is able to provide it.<sup>55</sup> Maintenance is generally assumed to include the provision of accommodation, clothing, food, medical services and other necessities.<sup>56</sup> This general duty of support will come to and end at the dissolution of the marriage – either because of the death of one of the parties or because of a divorce. But legislation does provide for spouses to claim maintenance even after the dissolution of the marriage. The Maintenance of Surviving Spouses Act<sup>57</sup> provides for the surviving spouse to claim for maintenance against the deceased spouse's estate.<sup>58</sup> Moreover when a couple divorces the court which grants the divorce order can make a maintenance order in favour of one of the spouses in terms of the Divorce Act.<sup>59</sup>

*(d) The matrimonial home*

During the marriage entered into in terms of the Marriage Act or the Civil Union Act both spouses are entitled to live in the matrimonial home and to use the household assets – such as furniture and appliances – irrespective of whether they are married in or out of community of property and irrespective of which spouse owns or rents the matrimonial home or household assets.<sup>60</sup> This is a right that is not conferred by one spouse on the other but arises automatically and as a rule the spouse who owns or rents the house may not eject the other spouse from the matrimonial home without providing him or her with suitable alternative accommodation. But the other spouse may also not eject the owning or renting spouse from the matrimonial home.<sup>61</sup>

**4.2. Criticism of the Civil Union Act<sup>62</sup>**

The Civil Union marriage regime remains problematic in at least one important technical sense relating to the solemnisation of marriages in terms of the Act. In terms of the Marriage Act and the Civil Union Act marriages can be solemnised either by religious officials, or by public servants designated to fulfil this task. According to the Marriage Act, certain civil servants like magistrates and commissioners are, by reason of their office, automatically deemed to be marriage officers, while other state officials and diplomatic officers may be appointed as marriage officers by the relevant Minister.<sup>63</sup> In order to accommodate religious practices and beliefs, the Marriage Act also provides for another kind of marriage officer to be appointed to ensure that marriages are conducted according to 'Christian, Jewish or Mohammedan rites or the rites of any Indian religion'.<sup>64</sup> Thus officials from these religious groups may also be appointed as marriage officers. In practice, religious bodies of Christian and Jewish faith groups apply on behalf of the individual members who want to become marriage officers.<sup>65</sup> However, in terms of the Marriage Act religious marriage officers are not obliged to marry any couple who asks them to marry them because in terms of Section 31 of the Act they may object to conducting marriages which do not conform to the 'rites, formularies, tenets, doctrines or disciplines' of their religions.

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55 *Oberholzer v. Oberholzer*, 1947 (3) SA 294 (O). See generally Cronjé & Heaton, *supra* note 47, p. 50.

56 *Ex parte Hugo*, 1960 (1) SA 773 (T).

57 Act 27 of 1990.

58 *Ibid.*, Section 2(1).

59 Act 70 of 1979, Section 7(1) and (2).

60 Cronjé & Heaton, *supra* note 47, p. 65.

61 *Badenhorst v. Badenhorst*, 1964 (2) SA 676 (T).

62 See for example E. Bonthuys, 'The Civil Union Act: more of the same', in M. Judge *et al.* (eds.) *To have and to hold: the making of same-sex marriage in South Africa*, 2007, p. 171.

63 Marriage Act, *supra* note 2, Section 2.

64 *Ibid.*, Section 3(1).

65 Regulations under the Marriage Act GN R2207, *Government Gazette* No. 10500 of 24 October 1986, as amended, reg 2. Muslim religious officials do not act as marriage officers, because the common law still does not recognize Muslim marriages on the grounds that they are 'potentially polygamous'. See *Ismail v. Ismail*, 1983 (1) SA 1006 (A).

The Marriage Act does not provide for a similar exemption for civil servants who are marriage officers. Only religious marriage officers may therefore refuse to conduct marriages under the Marriage Act (which will always be heterosexual in nature) and they may only do so on the grounds of their religious beliefs.

Unfortunately the Civil Union Act deals with this matter in an entirely different – and constitutionally problematic – way. It distinguishes between religious marriage officers and non-religious marriage officers in the same way that the Marriage Act does. However, in respect of religious marriage officers the Act requires first, that a religious denomination or organisation must apply for approval to conduct civil unions.<sup>66</sup> Once the religious organisation has been approved, an official from the organisation may apply to be appointed as a marriage officer.<sup>67</sup> Individuals who belong to a specific religious order cannot apply individually to become religious marriage officers and it therefore seems that becoming a marriage officer to conduct marriages in terms of the Civil Union Act is more cumbersome than becoming a marriage officer in terms of the Marriage Act. In the case of civil union marriages, both the institution and the individual religious official must apply, while in the case of marriage in terms of the traditional Marriage Act, one application suffices.

But there are other anomalies in the Civil Union Act regarding religious marriage officers. The Act does not provide for such officers to refuse to conduct civil union marriages which do not comply with the dictates of the particular religion they belong to. This might be because both the religious institution and the individual marriage officer must apply to conduct civil unions and it could, therefore, have been assumed that the issue of conscientious or religious objection would not arise. However, this overlooks the situation where, for instance, a Jewish marriage officer is asked to conduct a civil union for a Christian same-sex couple. In such a case the Act would not allow a marriage officer in this position to refuse to conduct the marriage on religious grounds.

The Civil Union Act also provide for designated marriage officers to conduct civil union marriages in their capacity as civil servants. In terms of the Civil Union Act any marriage officer designated as such in terms of the original Marriage Act would also automatically become a marriage officer for the purposes of the Civil Union Act. However, it is highly problematic that the Civil Union Act allows these marriage officers – representing the state – to refuse to conclude a civil union marriage ‘on the ground of conscience, religion and belief’.<sup>68</sup> This right to refuse to solemnise a marriage is not provided for in the Marriage Act dealing with traditional heterosexual marriages. This means, for example that a devoutly Christian civil servant may not object to marry a heterosexual couple in terms of the Marriage Act who are atheist or Muslim and a racist marriage officer may not object to marrying an interracial couple when a heterosexual couple chooses to marry in terms of the traditional Marriage Act. Civil servants may therefore only object to conduct marriages under the Civil Unions Act and, moreover, only to same-sex marriages under this Act. The only ground upon which they can object is therefore the sexual orientation of the couple.

This provision thus clearly endorses sexual orientation discrimination by state officials and will most probably be struck down by the Constitutional Court if challenged. But apart from the legal problem with this provision, it also represents a potential practical problem for same-sex couples who wish to tie the knot. This is because it may make it more difficult for especially less

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66 Section 5(1).

67 Section 5(4).

68 Civil Union Act, s. 6.

wealthy and less educated same-sex couples who live in small towns in South Africa to get married. Such a couple would typically go to the local magistrates court where the local magistrate would act as the state's designated marriage officer. When such a magistrate then refuses to marry a couple, they might not pursue the matter out of ignorance or a lack of resources. This clause has therefore been strongly criticised by the activists in the GLBTI community.

## **5. Rights of non-married same-sex couples**

It is ironic that with the adoption of the Civil Union Act, same-sex couples will, in effect now have more legal rights than different sex couples. Over the past ten years the Constitutional Court has extended many of the rights enjoyed by married heterosexual couples to (obviously unmarried) same-sex couples in life partnerships.<sup>69</sup> These rights include the right of same-sex couples to jointly adopt children, to enjoy immigration rights, pension benefits and the right to inherit from a same sex life partner. Limiting these rights to heterosexual married couples were found to be discriminatory exactly because same-sex couples could not get married and were thus automatically excluded from enjoying these rights.<sup>70</sup> The question was raised whether unmarried same-sex couples who had gained these rights over the previous ten years would automatically lose these rights from the date that the Civil Union Act came into force on 1 December 2006. In *Gory v. Kolver and Others*, the Constitutional Court recently confirmed that these hard-won rights would not *automatically* be amended merely because same-sex couples are now allowed to get married. Even if same-sex couples do not get married they will have, for example, the right to inherit from their life partner – even where no will was left. But, as the Court pointed out, Parliament will have the right to amend this kind of legislation to take away the rights of non-married same-sex couples so that they are treated the same as heterosexual couples.<sup>71</sup>

## **6. Conclusion**

Since the inception of the Civil Union Act at the end of 2006 there has not been a rush of same-sex couples to the marriage altar. Almost one year after the inception of this Act, only 1,070 couples had tied the knot in terms of the new Act.<sup>72</sup> It is difficult to say why this is so. Perhaps because same-sex couples with access to resources and with the sufficient access to emotional and family support, already enjoy many of the rights associated with marriage in South Africa. It is also unclear to what extent the Court judgment in the *Fourie* case and the subsequent legal process that led to the adoption of the Civil Union Act may have contributed or will continue to contribute to changes in attitudes among the broader population about same-sex desire and those who experience it in South Africa.

In many ways the compromised reached by Parliament – by adopting a separate Civil Union Act that nevertheless extends full marriage rights to all qualifying same-sex and different-sex couples – is an inelegant one. It has unnecessarily complicated South Africa's family law

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69 *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others*, 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC); *Satchwell v. President of the Republic of South Africa and Another*, 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC); *Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)*, 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC); *J and Another v. Director General, Department of Home Affairs, and Others*, 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC); *Gory v. Kolver NO and Others*, 2007 (3) BCLR 249 (CC).

70 *Gory v. Kolver*, supra note 69, par. 26-27.

71 *Ibid.*, par. 28.

72 M. Judge *et al.*, 'Introduction', in M. Judge *et al.* (eds.), *To have and to hold: the making of same-sex marriage in South Africa*, 2007, p. 14.

regime by providing heterosexual couples with a choice to marry under the old or the new Act while providing same-sex couples only with the option of entering into a marriage or a civil partnership under the Civil Union Act. Moreover the new Act is silent on some difficult legal issues that necessarily flow from the fact that same-sex marriages are not gendered in nature. For example, in South African law when a family law dispute arise in terms of heterosexual marriages it is assumed that the legal solution will be found with reference to the country where the man who has entered in to the marriage presently resides. As no provision has been made for such an eventuality in the case of same-sex marriages, it is unclear how legal disputes about same-sex marriages will be resolved. At the same time it might be argued that the compromise reached by a democratically elected Parliament bestows the kind of legitimacy on same-sex relationships that would have been unthinkable only ten short years ago. Given the fact that South Africa is not a developed country and given, moreover, that attitudes towards same-sex desire amongst ordinary South Africans can hardly be described as enlightened, the adoption of legislation that now allows same-sex couples the choice of entering into a marriage seems little short of revolutionary.