

*SAME-SEX MARRIAGE, CIVIL UNIONS AND  
DOMESTIC PARTNERSHIPS IN SOUTH AFRICA:  
CRITICAL REFLECTIONS ON AN  
ONGOING SAGA\**

PIERRE DE VOS†

*Professor, Faculty of Law, University of the Western Cape*

JACO BARNARD‡

*Senior Lecturer, Faculty of Law, University of Cape Town*

‘The right to marry whoever one wishes is an elementary human right compared to which “the right to attend an integrated school, the right to sit where one pleases on a bus, the right to go into any hotel or recreation area or place of amusement, regardless of one’s skin or colour or race” are minor indeed. Even political rights, like the right to vote, and nearly all other rights enumerated in the Constitution, are secondary to the inalienable human rights to “life, liberty and the pursuit of happiness” . . .; and to this category the right to home and marriage unquestionably belongs.’<sup>1</sup>

LOOKING BACK GOING FORWARD

‘South Africa,’ declares the preamble to South Africa’s 1996 Constitution, ‘belongs to all who live in it, united in our diversity’.<sup>2</sup> To ensure respect for

\* In this contribution the abbreviation ‘LGBTI’ is used to refer collectively and inclusively to the Lesbian, Gay, Transsexual, Transgendered and Intersexed members of society.

† BCom LLB LLM (Stellenbosch) LLM (Columbia) LLD (UWC).

‡ BCom LLB LLD (Pretoria). The authors wish to express thanks to Shaun Fergus for invaluable research assistance.

<sup>1</sup> Hannah Arendt ‘Reflections on Little Rock’ (1959) 6 *Dissent* as quoted in Andrew Sullivan *Same-Sex Marriage Pro & Con — A Reader* (2004) (hereinafter cited as ‘Reader’) at 145. This article is dedicated to the memory of Marié Adriaana Fourie who passed away shortly before the completion of the legislative process that would have allowed her to marry Cecilia Bonthuys, her partner of 12 years. In time to come ‘Fourie’ will be the name that unambiguously calls forth this chapter in South African legal history.

<sup>2</sup> Constitution of the Republic of South Africa, 1996 (hereinafter ‘the Constitution’). These words echo the famous opening words of the Freedom Charter, adopted on 26 June 1955 at Kliptown (available at <http://www.anc.org.za/ancdocs/history/charter.html>, last accessed on 12 October 2006), which states that:

‘South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people; that our

this noble sentiment, the Bill of Rights guarantees for everyone the right to equality, human dignity and freedom.<sup>3</sup> In a long line of judgments<sup>4</sup> the Constitutional Court has emphasized that these rights should be interpreted as giving effect to the promise of equality while respecting and accommodating the diversity that strengthens our society. Noting that the Constitution is a document of historical self-consciousness,<sup>5</sup> the Constitutional Court has often emphasized that one can only grasp the far-reaching, progressive effect of the constitutional protection if one remains aware of the dark apartheid past and understands that the Constitution was drafted in great part to prevent a recurrence of the dehumanizing oppression and marginalization that characterized the apartheid state.<sup>6</sup>

people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality. . . .’

<sup>3</sup> Constitution ss 1, 10 and 12.

<sup>4</sup> *S v Laurence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at 772F-773B/C; *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC); *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); *J v Director-General, Department of Home Affairs* 2003 (5) SA 621 (CC).

<sup>5</sup> See Lourens du Plessis ‘The South African Constitution as memory and promise’ in Charles Villa-Vicenzio *Transcending a Century of Injustice* (2000) 63.

<sup>6</sup> See for example *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at 1022H-1023B, where it was held that the equality provision had to be interpreted in relation to ‘the text and the context of the . . . Constitution’; *S v Laurence*; *S v Negal*; *S v Solberg* supra note 4 at 1222F-1223D, where the court held again that the freedom of religion clause must be interpreted with reference to the ‘text and the context of our own Constitution’. On the use of history see *S v Zuma* 1995 (2) SA 642 (CC) at 651F-H, where it was stated that ‘regard must be paid to the legal history, traditions and usages of the country concerned’; *S v Makwanyane* 1995 (3) SA 391 (CC) at 415D-E, where Chaskalson P held that ‘we are required to construe the South African Constitution . . . with due regard to our legal system, our history and circumstances’; at 488H-I, where Mahomed DP remarked that ‘[i]t is against this historical background and ethos that the constitutionality of capital punishment must be determined’; and at 504I-505B, where O’Regan J stated that ‘the values urged upon the Court are not those that have informed our past . . . [and in] . . . interpreting the rights enshrined in Chapter 3, therefore, the Court is directed to the future’. See also *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) at 903J-904B-C, where it was held (per Chaskalson P) that the nature and extent of the power of Parliament to delegate its legislative powers ultimately depends ‘on the language of the Constitution, construed in the light of the country’s own history’; *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) at 657B, where Sachs J said the following: ‘Rights are not self-explanatory. They are principled constructions informed by social history. . . .’ See also *Brink v Kitshoff* 1996 (4) SA 197 (CC) at 216I-217B, where the court held that the equality provision is the product of our own particular history and that ‘its interpretation must be based on the specific language of [the provision], as well as our own constitutional context’ and went on to say that our ‘history is of particular relevance to the concept of equality’; *Prinsloo v Van der Linde* loc cit at 1026D-E, where it was stated (per

Examples of apartheid legislation that contributed to this oppression include the Immorality Act,<sup>7</sup> which criminalized sexual intercourse between white and black people, and the Prohibition of Mixed Marriages Act,<sup>8</sup> which prohibited marriage between white and black people in South Africa. This legislation serves as a reminder of the long and painful history of a South Africa characterized by violent interference with the all-important, life-enhancing choices people make about their most intimate actions and relationships — violent interference that was based on naked hatred.

The Constitutional Court has also noted that during the apartheid era gay men, lesbians and other sexual minorities suffered a particularly harsh fate, having been branded as criminals and rejected by society as outcasts and perverts.<sup>9</sup> This exclusion and marginalization — and the concomitant hatred and violence that it invariably produced — was experienced more intensely by those South Africans already suffering under the yoke of apartheid because of their race and/or sex and/or economic status. In the spirit of this affirmation, gay anti-apartheid activist Simon Nkoli played a key role in forging a strategic alliance between the gay-rights movement and the mass democratic movement.<sup>10</sup> This alliance led to the inclusion in the African National Congress pre-democracy constitutional proposals<sup>11</sup> that the ‘right to be protected from unfair discrimination must specifically include those discriminated against on the grounds of ethnicity, language, race, birth, sexual orientation and disability’.<sup>12</sup> Given this insistence, it was no surprise

Ackermann, O’Regan and Sachs JJ) that ‘given the history of our country we are of the view that “discrimination” has acquired a particular pejorative meaning’; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) 912D-E/F, where it was held that the rights and freedoms in the Constitution viewed in the textual and historical context thereof have an unsurpassed poignancy and depth; and *Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC) at 686G-H, where it was again held that the provisions of the Constitution had to be construed purposively and in the light of the constitutional context in which they occurred.

<sup>7</sup> Act 21 of 1950.

<sup>8</sup> Act 55 of 1949.

<sup>9</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 4 at 27F-28B; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* supra note 4 at 31A-B and 32E-G.

<sup>10</sup> For an excellent rendition of this history see Jacklyn Cock ‘Engendering gay and lesbian rights: The equality clause in the South African Constitution’ (2002) 26 *Women’s Studies International Forum* 35 at 36–8.

<sup>11</sup> ANC Policy Proposals for a Final Constitution, available at <http://www.anc.org.za/ancdocs/policy/building.html#BILL> (last accessed on 1 October 2006). Adopted by the National Conference of the African National Congress on 31 May 2002.

<sup>12</sup> *Ibid.* For a detailed account of the way in which the sexual-orientation clause found its way into the South African Constitution see Eric C Christiansen ‘Ending the apartheid of the closet: Sexual orientation in the South African constitutional process’ (2000) 32 *International Law and Politics* 997. See also Marl F Massoud ‘The evolution of gay rights in South Africa’ (2003) 15 *Peace Review* 301; and Sheila

that South Africa became the first country in the world expressly to recognize in its Constitution sexual orientation as a ground on which discrimination would automatically be unfair until proven otherwise.<sup>13</sup>

It is against this background that the Constitutional Court handed down the judgment in *Minister of Home Affairs v Fourie*,<sup>14</sup> confirming that the right to marry is an inalienable right that belongs to all who live in South Africa — black or white, gay or straight — and that gay men and lesbians can only be affirmed as full and equal members of our society if this right is also fully extended to them. This being the case, the majority of the court (per Sachs J) held that it would be important first to afford Parliament the opportunity to cure the unconstitutionality of the existing law.<sup>15</sup> Should Parliament have failed to do this within a year of the *Fourie* judgment (by 30 November 2006), an automatic reading-in of the words ‘or spouse’ after the words ‘or husband’ in s 30(1) of the Marriage Act<sup>16</sup> would achieve that purpose.<sup>17</sup>

In response to the aforementioned decision, the Cabinet approved the first draft of the Civil Union Bill,<sup>18</sup> which was tabled in Parliament for the first time in September 2006. This version of the proposed legislation was debated throughout South Africa during the public participation hearings of the parliamentary portfolio committee. The version of the Bill that was finally signed into law<sup>19</sup> by the Deputy President on 28 November 2006<sup>20</sup> differed markedly from the original version. In what follows we consider the two versions of the civil-union legislation and, by way of a critique of the first draft of the Bill, we offer ethical, political and legal reasons why we did not consider the initial proposed legislation an adequate response to the demand placed on government by the Constitutional Court in the *Fourie* judgment. We will also reflect briefly on the role of the public participation process in this context, before we conclude with a critique of the current Civil Union Act<sup>21</sup> and the consequences of its enactment. In this regard, we will re-emphasize the need for domestic partnership legislation in South Africa.<sup>22</sup> It is, however, necessary first to track the development of South

Croucher ‘South Africa’s democratisation and the politics of gay liberation’ (2002) 28 *Journal of Southern African Studies* 315.

<sup>13</sup> Section 8(2) of the Constitution of the Republic of South Africa Act 200 of 1993; s 9(3) of the Constitution.

<sup>14</sup> 2006 (1) SA 524 (CC).

<sup>15</sup> *Ibid* at 576H-577B.

<sup>16</sup> Act 25 of 1961.

<sup>17</sup> *Fourie* supra note 14 at 586G-I.

<sup>18</sup> Bill 26 of 2006.

<sup>19</sup> Bill 26B of 2006.

<sup>20</sup> SAPA ‘Same-sex marriage now legal in SA’, available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=iol116488269569B256](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=iol116488269569B256) (last accessed on 3 December 2006).

<sup>21</sup> Act 17 of 2006.

<sup>22</sup> See Beth Goldblatt ‘Case note: Same-sex marriage in South Africa: The Constitutional Court’s judgment’ (2006) 14 *Feminist Legal Studies* 261 for a compelling socio-legal argument in favour of domestic partnership legislation.

Africa's equality jurisprudence on gay and lesbian rights (including a thorough analysis of the *Fourie* decision) in order to provide a better framework for an understanding of the issues we raise in this article.

## THE SOUTH AFRICAN CONSTITUTION, THE RIGHT TO EQUALITY AND THE *FOURIE* DECISION

### *Overview of the progression to Fourie*

As already mentioned, s 9(3) of the Constitution prohibits 'unfair' discrimination — whether of a direct or indirect nature — on any ground, including on the ground of 'sexual orientation'. The Constitutional Court has confirmed on several occasions that 'unfair discrimination' must be determined by asking, first, whether the difference in treatment is based on one of the grounds specified in s 9(3) (or on another ground sufficiently similar to the grounds that are listed).<sup>23</sup> If the answer is in the affirmative, secondly, to ask whether (given the specific South African context and history as well as the history of marginalization and oppression of the affected group) the impact of the different treatment is such that it impugns the human dignity of those affected.<sup>24</sup> It will impugn the human dignity of those affected if it sends a signal that the group is somehow less worthy of concern and respect than others in society.<sup>25</sup> Probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation constitutes unfair discrimination will be a showing that the affected group suffers from pre-existing disadvantage, vulnerability, stereotyping or prejudice. These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, he or she would often have a history of not having been given equal concern, respect, and consideration.<sup>26</sup> It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact on them, since they are already vulnerable.

It must be noted that even where the impact on the discriminated group is severe, where the nature or the purpose of the discrimination is of utmost

<sup>23</sup> See for instance *Harksen v Lane* NO 1998 (1) SA 300 (CC) at 321G-322C/D, *Larbi-Odam v Member Of The Executive Council For Education (North-West Province)* 1998 (1) SA 745 (CC) at 754G/H-756H/I, *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at 379A-380I, *National Coalition v Minister of Justice* supra note 4 at 24D-28A/B, *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) at 535D-F, 536B-C/D; 537A/B-E and *Van Der Merwe v Road Accident Fund (Women's Legal Centre Trust As Amicus Curiae)* 2006 (4) SA 230 (CC) at 260G.

<sup>24</sup> See the equality test in *Harksen* supra note 23 at 320A-325E as well as the application of the test in the cases cited in note 23 supra.

<sup>25</sup> *National Coalition v Minister of Justice* supra note 4 at 66E/F-G/H: 'To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality.'

<sup>26</sup> *Harksen* supra note 23 at 323Iff.

importance, a court may well find that the discrimination is not unfair. However, societal prejudice can never justify discrimination and an institution's wish to accommodate the prejudices of the majority of the people of the country can never make otherwise unfair discrimination fair.<sup>27</sup>

The Constitutional Court has constantly highlighted the obvious significance of the concepts of human dignity, equality and freedom for our equality jurisprudence on same-sex relationships. It has also developed a detailed set of assumptions that must guide any such enquiry. In the process of setting out these assumptions, it rejected many of the stereotypical assumptions made about gay men and lesbians and their intimate relationships. In *Fourie*, these guiding assumptions were said to include that:

- gays and lesbians have a constitutionally entrenched right to dignity and equality; sexual orientation is a ground expressly listed in section 9(3) of the Constitution and under section 9(5) discrimination on the basis thereof is unfair unless the contrary is established;
- prior criminal proscription of private and consensual sexual expression between gays, arising from their sexual orientation and which had been directed at gay men, has been struck down as unconstitutional;
- 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.<sup>28</sup>

The Constitutional Court thus concluded that the family life of gay men and lesbians is in all significant respects indistinguishable from those of heterosexual spouses and in human terms as important.<sup>29</sup> Where the law fails to recognize 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

<sup>27</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) 18G-19C/D.

<sup>28</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* supra note 4 at 32F-33C, restated in *Fourie* supra note 14 at 545F/G-546D/E.

<sup>29</sup> *Fourie* supra note 14 at 546D-E/F.

stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity.<sup>30</sup>

*Conservative arguments for the ‘preservation of marriage’, the decision in Fourie and the opportunity given to Parliament*

Conservative arguments before the court in *Fourie* nevertheless charged that even if one recognizes that the absence of a comprehensive legal regime to protect same-sex couples is discriminatory, the remedy does not lie in radically altering the law of marriage, which by its very nature, and in terms of its historical evolution, is concerned with heterosexual relationships.<sup>31</sup> The answer, they said, is to provide appropriate alternative forms of recognition for same-sex family relationships. The Constitutional Court rejected this line of reasoning in the clear terms we elaborate upon below.

The court first considered courteously the age-old argument that the constitutive and definitional characteristic of marriage is its procreative potential and can therefore never include same-sex couples.<sup>32</sup> It found this argument to be deeply demeaning to 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 is also demeaning for couples who start a relationship at a stage when they no longer have the capacity to conceive, and for adoptive parents.<sup>33</sup> Although this view might have some traction 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>34</sup>

Another familiar argument that was rejected is the assertion that marriage is by its very nature a religious institution and that to change its definition would violate religious freedom in a most fundamental way.<sup>35</sup> Although the court recognized that religious bodies play a large and important part in public life and are part of the fabric of our society,<sup>36</sup> in an open and democratic society contemplated by the Constitution there must be mutual respect and co-existence between the secular and the sacred:

[T]he acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by

<sup>30</sup> Ibid at 546E-G/H, quoting from the judgment in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* supra note 4 at 33E-G.

<sup>31</sup> Ibid at 556G-557A.

<sup>32</sup> Ibid at 558B-H. For a typical account of the ‘procreative potential’ argument see John Finnis ‘Law, morality and “sexual orientation”’ (1994) 69 *Notre Dame LR* 1049 at 1066.

<sup>33</sup> *Fourie* supra note 14 at 558E-F.

<sup>34</sup> Ibid at 558D.

<sup>35</sup> Ibid at 558H-563B.

<sup>36</sup> Ibid at 560 E-G.

invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide, they co-exist in a *constitutional realm* based on accommodation of diversity.<sup>37</sup>

This entails obviously that the religious beliefs of some cannot be used to determine the constitutional rights of others.<sup>38</sup> In an open and democratic society there should be a capacity to accommodate and manage difference, and recognition should not be given to the view of the (religious) majority on marginalized minorities in ways that would reinforce unfair discrimination against a minority.<sup>39</sup> A contrary view smacks unpleasantly of the authoritarian and totalitarian tactics so characteristic of the National Party government during the apartheid era.

In addition, the court rejected the argument that legalizing same-sex marriage in South Africa would put our law at odds with international law that protects heterosexual marriage only. The court rejected a literal reading of the phrase ‘men and women’ in the Universal Declaration of Human Rights and pointed out that this phrase was historically descriptive rather than normatively prescriptive.<sup>40</sup> Conceptions of rights take on new meaning as the conditions of humanity change — they are not cast in stone. Moreover, in light of the protection afforded on the basis of sexual orientation in s 9(3) of the Constitution, the court held that international law could not be utilized to take away a right guaranteed by the Constitution.<sup>41</sup>

### *Justification*

The court next considered the question whether justification existed under s 36 of the Constitution for the violation of the equality and dignity of same-sex couples.<sup>42</sup> Two interrelated grounds of justification were advanced that intricately related to the arguments for the preservation of marriage: First, the argument was made that the inclusion of same-sex couples would undermine the institution of marriage.<sup>43</sup> The second ground of justification was also founded in this view. It was argued that the inclusion would undermine and intrude upon strong religious beliefs about marriage.<sup>44</sup>

Both these grounds were rejected. The court held that granting same-sex couples the right to marry would in no way impair the capacity of heterosexual couples to marry in the form they wished and in accordance with their religious beliefs. As regards the second ground, the court held that

<sup>37</sup> Ibid at 562F–563B (our emphasis).

<sup>38</sup> Ibid at 560D–E.

<sup>39</sup> Ibid at 561A–D.

<sup>40</sup> Ibid at 564A–B.

<sup>41</sup> Ibid at 565C–D.

<sup>42</sup> Ibid at 567D.

<sup>43</sup> Ibid at 568A.

<sup>44</sup> Ibid at 568A–B.



it was based on a prejudice that is at odds with the constitutional requirements of equal treatment and respect for difference.<sup>45</sup>

The argument that same-sex marriage would have adverse effects on the dignity of heterosexual marriage and would destroy that institution, is not so different from arguing that the recognition of interracial marriage would have an adverse effect on the dignity of partners to a same-race marriage. This latter notion was of course embraced by the apartheid government when it passed the Mixed Marriages Act<sup>46</sup> in 1950. We have thankfully moved far beyond such offensive and racist logic. To accept this logic would also mean that the Recognition of Customary Marriages Act<sup>47</sup> would have adverse effects on the dignity of individuals in monogamous marriages and would destroy monogamous marriage as endorsed by most Christian churches. To make such an argument would be deeply insulting and demeaning to those who take part in customary polygamous marriages.<sup>48</sup> It is indeed unfortunate that some who embrace this traditional form of marriage do not show the same respect and tolerance for difference and diversity when it comes to the recognition of same-sex marriage.<sup>49</sup>

The court concluded that the common-law definition of marriage and the Marriage Act (to the extent that it relies on this definition) were unconstitutional.<sup>50</sup> Instead of an immediate reading-in to remedy the unconstitutionality, the court suspended the reading-in for one year to give Parliament a chance to address 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>51</sup> It was clear from the decision that the mandate to Parliament was extremely narrow. The court expressly held that whatever legislative measures Parliament takes, it could not subject same-sex couples to new forms of marginalization or exclusion by the law, either directly or indirectly.<sup>52</sup>

It is important to note in this regard that the court affirmed the importance of marriage in South African society. Marriage, held the court, is a unique

<sup>45</sup> Ibid at 568F-H.

<sup>46</sup> Act 55 of 1949.

<sup>47</sup> Act 120 of 1998.

<sup>48</sup> It is beyond the scope of this article to deal with the question whether the Recognition of Customary Marriages Act is unconstitutional because it possibly discriminates unfairly against women on the basis of sex, sexual orientation and gender.

<sup>49</sup> See A Quintal 'Same-sex marriage to become law by year-end' *Pretoria News* 2 August 2006 at 2: 'The National House of Traditional Leaders said soon after the judgment "that the practice of same-sex marriages is against most of African beliefs, cultures, customs and traditions and this in turn goes against the mandate of traditional leaders, which is to promote and protect the customs of communities."' We will return to the fallacies in this argument shortly.

<sup>50</sup> *Fourie* supra note 14 at 569C-E.

<sup>51</sup> Ibid at 576C-D.

<sup>52</sup> Ibid at 579G-H.

institution and constitutes ‘much more than a piece of paper’.<sup>53</sup> On the one hand, until recently marriage was the only institution from which a number of socio-economic benefits would accrue: for example, the right to maintenance, medical insurance coverage, adoption, access to wrongful death claims, and post-divorce rights. On the other hand, marriage also bestows a myriad intangible benefits on those who choose to enter into it.<sup>54</sup> As such, marriage entitles a couple to confirm their commitment to each other at a public event so cherished in our culture.<sup>55</sup> It has become custom for the married couple to be showered with presents as a symbol of congratulation and throughout their lives married persons are able to commemorate the event of their marriage at anniversaries, while pictures of the day can be displayed in their house and in the houses of their families. Well aware of, and affirming, the centrality attributed to marriage and its consequences in our 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>56</sup> As Sachs J put it:

‘The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not 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 accepting responsibility is by definition less worthy of regard than that of heterosexual couples.’<sup>57</sup>

It is clear that the court contemplated in its judgment that 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 taken into account.<sup>58</sup>

<sup>53</sup> Ibid at 552F.

<sup>54</sup> See Lawrence Schäfer ‘Marriage and marriage-like relationships’ (2006) 123 *SALJ* 624 at 633 on the intangible advantages of marriage and D Wides ‘Family and equality in post-constitutional South Africa: An argument for same-sex marriage’ 2003 *Responsa Meridiana* 81, who argues that the jurisprudence developed in such a way that the only way in which a successful constitutional challenge could be avoided would be to legislate for no other form of recognition but same-sex marriage.

<sup>55</sup> *Fourie* supra note 14 at 553C-D.

<sup>56</sup> Ibid at 554B.

<sup>57</sup> Ibid at 552G-553C.

<sup>58</sup> Ibid at 557D-E, where Sachs J stated the following: ‘Thus, it would not be sufficient merely to deal with all the practical consequences of exclusion from mar-

Therefore, 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>59</sup> It would therefore be completely unacceptable for Parliament to adopt a 'separate but equal' approach 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>60</sup> The court referred to the famous case of *S v Pitje*<sup>61</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'. Steyn CJ 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>62</sup>

According to Sachs J '[t]he above approach is *unthinkable* in our constitutional democracy today not simply because the law has changed dramatically, but because our society is completely different'.<sup>63</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>64</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>65</sup>

riage. 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.' (Our emphasis.)

<sup>59</sup> *Fourie* supra note 14 at 580E.

<sup>60</sup> *Ibid* at 580E-F. 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.'

<sup>61</sup> 1960 (4) SA 709 (A).

<sup>62</sup> *Ibid* at 710.

<sup>63</sup> *Fourie* supra note 14 at 581A (our emphasis).

<sup>64</sup> *Ibid* at 582D-E.

<sup>65</sup> *Ibid* at 582E-583A.

In light of the above, the Constitutional Court, first, held that the common-law definition of marriage was inconsistent with the Constitution and invalid 'to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples' and, secondly, it held that the omission from s 30(1) of the Marriage Act after the words 'or husband' of the words 'or spouse' was inconsistent with the Constitution, with the result that the Marriage Act was declared to be invalid to the extent of this inconsistency.<sup>66</sup> In the result, Parliament was given one year to remedy the defect.<sup>67</sup>

#### THE LAW REFORM COMMISSION'S RECOMMENDATIONS

In March 2006 the South African Law Reform Commission (SALRC) (having provided the Constitutional Court in the *Fourie* matter with a progress memorandum) published its report on domestic partnerships in which it recommended that the institution of 'civil unions' without the simultaneous institution of 'marriage' for same-sex life partnerships would not, in its opinion, satisfy the Constitutional Court's judgment in *Fourie*.<sup>68</sup> These recommendations were based on the Commission's understanding of the requirements set out in the *Fourie* judgment for the constitutionally valid regulation of same-sex relationships. The Commission referred to the fact that Sachs J 'clearly stated that the solution lay in the correction of the Marriage Act and the common-law definition of marriage, hence the order for the amendment of the Marriage Act if Parliament fails to correct the defects in the legislation by 1 December 2006'.<sup>69</sup> In the Commission's opinion, civil unions (as the only remedy) could be successfully challenged constitutionally. It concluded as follows: 'Since the tenet of equal treatment was an important part of the motivation for permitting same-sex marriage, the creation of a separate but equal status would be discriminatory.'<sup>70</sup>

The SALRC thus recommended, as its first choice, that the Marriage Act be amended by:

- inserting the following definition of 'marriage' into the Act: 'marriage' means the union, while it lasts, between two adult persons to the exclusion of all others for life;
- inserting the words 'or spouse' after the words 'or husband' in s 30 of the Act; and
- inserting the following definition of 'spouse' in the Marriage Act: 'spouse' means a partner in a marriage as defined by this Act.<sup>71</sup>

<sup>66</sup> Ibid at 586E–G.

<sup>67</sup> Ibid at 584A.

<sup>68</sup> South African Law Reform Commission *Report on Domestic Partnerships* (Project 118) (2006) at 292 para 5.3.15, 296 para 5.4.11 and 305 para 5.6.2.

<sup>69</sup> Ibid at 300 para 5.5.15.

<sup>70</sup> Ibid at 296 para 5.4.11.

<sup>71</sup> Ibid at 306 para 5.6.4–5.6.6.

The second route that the SALRC indicated was the Dual Act option. This option was accepted as an alternative in the *Fourie* matter. In terms of this option an Orthodox Marriage Act would be enacted together with a Reformed Marriage Act. The Orthodox Marriage Act would have the same format as the current Marriage Act with a limited definition of ‘orthodox marriage’ as ‘the voluntary union of a man and a woman concluded in terms of this Act to the exclusion of all others’.<sup>72</sup> The Commission justified the need for this Act on the basis of the ‘religious concerns’ expressed by opponents to same-sex marriage. The Reformed Marriage Act proposed to be enacted simultaneously with the Orthodox Marriage Act would be the generic Act, open to everybody, and the Commission insisted specifically that state marriage officers had to be appointed under the generic Act.<sup>73</sup> The Commission also envisaged that the Orthodox Marriage Act would ultimately resort with an Islamic Marriages Act, the Recognition of Customary Marriages Act 120 of 1998 and perhaps a Hindu Marriage Act in a ‘religious marriages’ category of legislation.<sup>74</sup> Ultimately, the recommendation of the Orthodox Marriage Act would be a concession to the religious majority which, in the opinion of the Commission, would not impugn the dignity of homosexual couples, because the differential treatment of opposite-sex couples who would choose to be treated differently would not violate the dignity of same-sex couples.<sup>75</sup> ‘Nor would the dignity of same-sex couples be infringed’, according to the Commission, ‘if specific provision were made in legislation for a particular religious group’.<sup>76</sup>

However laudable this option may be as a means of reconciliation between religious concerns about same-sex marriage and same-sex couples who demand to be treated on equal footing, it has to be taken into account, nevertheless, that there are many religious people in the LGBTI community who would not be able to conclude religious marriages were their religious institution to register only under the Orthodox Marriage Act. Many gays and lesbians live with the tension between their sexual orientation and their church’s religious beliefs. Often, a person becomes a member of a particular religious congregation by virtue of parental influence, long-standing tradition and deep cultural affiliation. For these people it would be very difficult simply to denounce their religion in order to marry. Recognizing that the Constitution protects freedom of religion, and recognizing particularly that it would be unlikely that the law would ever provide a remedy to people who live with this contradiction, it is perhaps this very aspect of the matter that reminds us that the law can only take us to a certain point and no further.

<sup>72</sup> Ibid at 310 para 5.6.17. Also see *Fourie* supra note 14 at 578G–579H.

<sup>73</sup> Ibid at 310 para 5.6.19

<sup>74</sup> Ibid at 311 para 5.6.20.

<sup>75</sup> Ibid at 310 para 5.6.18

<sup>76</sup> Ibid.

*FOURIE* AND THE FIRST DRAFT OF THE CIVIL UNION BILL:  
THE CONSTITUTIONALITY OF A CIVIL PARTNERSHIP  
REGIME FOR SAME-SEX UNIONS IN SOUTH AFRICA

Parliament's response to *Fourie* eventually came in September 2006,<sup>77</sup> two months before the legislative deadline of 30 November 2006 imposed by the Constitutional Court. The *Memorandum on the Objects of the Civil Union Bill* (released simultaneously with the first draft of the Bill) provided that one of the objects of the Bill was to provide 'for the conclusion of a *civil union or marriage* between persons of the same sex'.<sup>78</sup> This provision of the memorandum not only differentiated semantically between a 'civil union' and a 'marriage' but — at least on a bona fide reading — also provided that one of the objects of the legislation was, at the time that the memorandum was drafted, to afford same-sex partners a choice between a civil union and a marriage.

It was thus ironic that the first draft of the Civil Union Bill<sup>79</sup> accompanying this memorandum did not provide same-sex couples with the choice to enter into a marriage or to conclude a civil union. That this version of the Bill did not provide for same-sex marriage was immediately apparent from its very first provision. The long title stated, inter alia, that the Bill's purpose was to 'provide for the solemnisation of *civil partnerships* [and] the legal consequences of *civil partnerships* . . .'.<sup>80</sup> Another way of stating the long title of the Bill would simply have been: 'to preserve the traditional, historic nature and meaning of the institution of civil marriage'.<sup>81</sup>

This Bill created two categories of 'civil unions', namely a civil partnership and a domestic partnership.<sup>82</sup> The provisions of this draft of the Bill that were challenged by many groups lobbying for same-sex marriage at the public participation hearings, were those that pertained to a 'civil partnership'.<sup>83</sup> There was no provision in the Bill for same-sex couples to conclude a marriage and thus, not only was no effect given to the stated purpose in the memorandum to provide 'for the conclusion of a *civil union or marriage* between persons of the same sex', but, more importantly, the 'civil partnership' provisions did not give effect to the Constitutional Court's directions.

The argument was made that although it was not called 'marriage', in substance the 'civil partnership' provisions of the first draft complied with the

<sup>77</sup> A Quintal 'Same-sex marriages bill tabled in Parliament' available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=vn2006082501114223C978307](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn2006082501114223C978307) (last accessed on 15 December 2006).

<sup>78</sup> *Memorandum on the Objects of the Civil Union Bill 26 of 2006* para 2.

<sup>79</sup> Civil Union Bill supra note 18.

<sup>80</sup> Ibid (our emphasis).

<sup>81</sup> This was in fact the long title of the Massachusetts Civil Union Bill (Senate No 2175) that was struck down as unconstitutional by the highest court of that state.

<sup>82</sup> See the definition of 'civil union' in clause 1 of the Bill supra note 18.

<sup>83</sup> Which was defined in clause 1 of the first draft as 'the voluntary union of two adult persons of the same sex'.

Constitutional Court's directions.<sup>84</sup> However, it was never made clear why it would be necessary to create the separate institution of 'civil partnership' for same-sex couples, if this was in substance exactly the same as heterosexual marriage. As there was absolutely no rational justification for this differentiation between same-sex and different sex couples, it was clear that the civil partnership provisions of the first draft of the Civil Union Bill discriminated unfairly against homosexual couples on the ground of sexual orientation.

The Bill further stated in clause 13 that the legal consequences of a marriage would apply to a 'civil partnership' and that 'all references to marriage in any other law, including the common law' includes a civil partnership — but for one exception. A reference to 'marriage' in the Marriage Act did not include a reference to civil partnership. The practical effect of these provisions was simply that same-sex partners were still prohibited from getting married. The Bill repeatedly reserved the category of 'marriage' for relationships other than same-sex partnerships (ie heterosexual relationships) and so denied the redefinition of 'marriage' endorsed in *Fourie*. Ultimately the Bill purported to create precisely the separate but equal regime declared as 'absolutely unthinkable' in the *Fourie* decision.

Clause 8(2) of the Bill provided further support for the above interpretation in that it stated that married persons could not conclude a civil partnership. In addition, clause 16(2) provided that 'a person who is married or a partner in a civil partnership' was not allowed to register a domestic partnership. It was thus clear that throughout the Bill, the distinction between heterosexual marriage and same-sex civil partnership was maintained and relied upon, rather than obliterated.<sup>85</sup> This meant of course that after a reading of the first draft of the Civil Union Bill, there was no room for an interpretation of the memorandum to the Bill to the effect that 'marriage' and 'civil union' might have been used interchangeably in that document. Clearly, no effect was given to either the memorandum or the *Fourie* judgment.

The proposal of the Civil Union Bill was accompanied by the absence of a legislative effort to amend, abolish or rename the Marriage Act. In *Fourie* the court held that the Marriage Act and not "the law" as an abstraction 'excludes from its reach persons entitled to be protected by [it]'.<sup>86</sup> The Marriage Act was held to rely on the common-law definition of marriage and since the common-law definition of marriage included only a consortium omnis vitae between a man and a woman, the Marriage Act was found to be unconstitutional to the extent that it does not allow 'for gay and lesbian people to celebrate their unions in the same way that they enable heterosexual couples to do'.<sup>87</sup> Sachs J held specifically that 'the failure of the

<sup>84</sup> See A Quintal 'Civil Union Bill will codify inequality' *Cape Times* 23 October 2006 at 4.

<sup>85</sup> See the discussion of clause 11 below.

<sup>86</sup> *Fourie* supra note 14 at 557B-C (our emphasis).

<sup>87</sup> *Ibid* at 557E-F.

common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law' under the equality clause of the Constitution; and also that '[t]he problem is not what is included in the common law definition and the Act, but what is left out'.<sup>88</sup>

Clause 13 of the Bill, however, provided that 'with the *exception* of the *Marriage Act*'<sup>89</sup> references to 'marriage' in the common law and all other law include civil partnerships. The implication was fatal: for purposes of the Marriage Act and to the extent that the Marriage Act relies on the common-law definition, same-sex unions ('civil partnerships') as contemplated were, in fact, not included in references to marriage. In light of clause 13 referred to above, the first draft of the Civil Union Bill purported to remedy only the practical consequences of exclusion from 'marriage' and was in this respect not in accordance with the *Fourie* decision. The knock-on effect was of course, quite simply, that for the purposes of the Marriage Act, the common-law definition of 'marriage' remained unchanged, which was an effect entirely at odds with the redefinition of marriage in *Fourie*.

Conservatives pointed to clause 11 of this draft of the Bill, which required a marriage officer to refer to the civil partnership as a 'marriage' upon the request of the parties during the solemnization of the civil partnership and argued that this meant that the terms 'civil partnership' and 'marriage' could indeed be used interchangeably.<sup>90</sup> While this clause seemed to be an attempt to address the *Fourie* judgment's concern with the negative *symbolic* impact of exclusion, the clause did not have the effect of providing 'same-sex couples a public and private status equal to that which heterosexual couples achieve from *being married*'.<sup>91</sup> As opposed to a mere contingent reference upon solemnization contemplated in clause 11, *being married* implies a continuing state of existence under a legal category with representational and practical consequences.<sup>92</sup> Clause 11 and the Bill as a whole did not afford this opportunity to same-sex partners — an assertion which is supported by the fact that a couple that entered into a 'civil partnership' would be registered under a separate register and would receive a registration certificate as opposed to a marriage certificate.<sup>93</sup>

From the above it should be clear that the Bill created a second-class form of legal recognition for same-sex relationships. Given the Constitutional Court's view that the concept of marriage has a profound symbolic, emotional and political power in our culture that gives it a special status, the refusal to allow same-sex couples the right to enter into an institution called

<sup>88</sup> Ibid at 570E-F.

<sup>89</sup> Our emphasis.

<sup>90</sup> See Quintal *op cit* note 84.

<sup>91</sup> *Fourie* *supra* note 14 at 557E.

<sup>92</sup> Our emphasis.

<sup>93</sup> Civil Union Bill *supra* note 18, clause 12.



‘marriage’ meant that the Bill deprived them of the right to access the status associated with the term ‘marriage’. Members of the LGBTI community throughout South Africa were outraged<sup>94</sup> — and not unjustifiably so. The provisions of the Bill that were supposed to vindicate gay and lesbian rights instead became a source of insult and humiliation.

This draft of the Bill simply endorsed the view that homosexuals are somehow depraved, impure and tainted and that ‘pure’ heterosexual marriage had to 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 — could only be based on prejudice against or hatred of homosexuals.<sup>95</sup> And prejudice, the court has said on many occasions, can never justify unfair discrimination.<sup>96</sup> No wonder that this move was equated to an ‘Apartheid Grand Re-Opening’.<sup>97</sup>

The effects of the legislation in this form would of course, be far more severe because so many gay men and lesbians still experience tremendous oppression, marginalization and vilification in our society. Some men and women are still raped, assaulted or even killed because they are lesbians or gay.<sup>98</sup> In this context, the creation of an apartheid-style, separate ‘civil partnership’ for same-sex couples merely confirmed that the law did not consider their relationships equal in status and worthy of equal concern and respect. On an even more fundamental level, the very attempt to pass this legislation as a response to *Fourie* constituted an insult to the intelligence of the LGBTI community.

## THE CHOICE NOT TO MARRY AND THE IMPORTANCE OF AN EQUAL ALTERNATIVE TO MARRIAGE

Political philosopher Drucilla Cornell links the decision to marry, or not, to the fundamental constitutional value of freedom:

‘When we think of orienting ourselves as sexuate beings, we think not only of with whom we will have sex and what kinds of relationships we will have with lovers, questions that are basic and personality defining, *but about whether to marry or not*, a question whose answer is fundamental to a person’s life.’<sup>99</sup>

Clause 13 of the first draft of the Civil Union Bill did bring ‘civil partnerships’ under the umbrella of the Matrimonial Property Act<sup>100</sup> which

<sup>94</sup> Janine du Plessis ‘Gay activists see red over Civil Union Bill’ *Pretoria News* 18 October 2006 at 3; Wendy Jasson da Costa ‘Same-sex Bill will make it harder for gays’ *Cape Times* 17 October 2006 at 4; Geoff Bough ‘Same-sex union Bill gets passions going’ *Fourie Times* 10 October 2006 at 4.

<sup>95</sup> *Fourie* supra note 14 at 568G.

<sup>96</sup> See, for instance, *Hoffmann* note 27 supra at 19D and the references cited there.

<sup>97</sup> See Jonathan Shapiro ‘Cartoon’ *Cape Times* 21 September 2006 at 4.

<sup>98</sup> Anon ‘South Africa: Murder highlights violence against lesbians’ *Human Rights Watch* 3 March 2006 available at <http://hrw.org/english/docs/2006/03/02/safri12753.htm> (last accessed on 10 January 2007).

<sup>99</sup> Drucilla Cornell *At the Heart of Freedom* (1998) 41 (our emphasis).

<sup>100</sup> Act 88 of 1984 (as amended).

regulates the ‘economic’ or ‘commercial’ consequences of a marriage. Furthermore, the Divorce Act<sup>101</sup> and the Maintenance of Surviving Spouses Act<sup>102</sup> are important statutes that would apply to the termination of the civil partnership and that would regulate the economic consequences of such a termination.

But what would be the position in a situation where the partners to a same-sex union did not wish to enter into a civil partnership? Clause 18(1) of the Bill provided that ‘any two persons may register their relationship as a domestic partnership’. It appeared thus that same-sex couples who did not wish to enter into a civil partnership would have the opportunity to register a domestic partnership and have the economic consequences of that partnership regulated by the domestic partnership provisions of the Bill. A same-sex couple who did not register the partnership at all (for whatever reason), would be subject to the provisions of the Bill as it pertained to unregistered domestic partners. The choice that the Bill provided for same-sex couples would thus have been a choice between a civil partnership and a domestic partnership. The choice for heterosexual couples would be the choice between *marriage* under the Marriage Act and domestic partnerships which (taking into account our argument relating to the civil-partnership regime as a second-class institution) means of course that the choice for homosexual couples would be an inferior one to that of heterosexual couples.<sup>103</sup>

Above, we emphasized the importance of the positive side of the choice *to* conclude a marriage. However, the Constitutional Court in *Fourie* also addressed the importance of the choice *not to* enter into a *marriage*. The court addressed specifically the arguments of many same-sex couples who ‘would abjure mimicking or subordinating themselves to heterosexual norms’.<sup>104</sup> ‘Others’, the court continued, ‘might wish to avoid what they consider the routinisation and commercialisation of their most intimate and personal relationships, and accordingly not seek marriage . . .’.<sup>105</sup>

Yet, the court held:

‘[W]hat is in issue is not the decision to be taken, but the choice that is available. If heterosexual couples have the option of deciding to marry or not, so should same-sex couples. . . . It follows that, given the centrality attributed to *marriage* and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.’<sup>106</sup>

The other side of the coin was thus that the first draft of the Civil Union Bill did not allow same-sex couples the choice *not to* marry and in this way

<sup>101</sup> Act 70 of 1979 (as amended).

<sup>102</sup> Act 27 of 1990.

<sup>103</sup> We will return to the crisis of partners in relationships who do not have the necessary agency to negotiate a registered form of partnership.

<sup>104</sup> *Fourie* supra note 14 at 553D–E.

<sup>105</sup> *Ibid* at 553E.

<sup>106</sup> *Ibid* at 554A–B.

also violated the judgment of the court. The importance of an equal alternative to marriage has been explicitly recognized internationally by members of the LGBTI community who believe that exercising the choice to marry ‘will constrain us, make us more invisible, [and] force our assimilation into the mainstream’.<sup>107</sup> However, the choice to enter into a civil partnership or a domestic partnership is an important form of dissent only when it is understood as a true alternative to marriage<sup>108</sup> and for homosexual couples this was not the case under the first draft of the Civil Union Bill. This inequality was just a further consequence of the refusal to allow same-sex marriage under the new legislation.

As will be seen below, the Civil Union Act addresses the issue of an equal alternative to marriage by allowing the registration of a civil partnership or a marriage. Any evaluation of this dispensation should however factor in that the original Marriage Act (and its implications) remains on the statute books. In addition, the Civil Union Act did away with the provisions of the Bill regarding unregistered domestic partnerships. In doing so, Parliament has failed to address the role patriarchy plays in relationships where primarily women are unable to forge a marriage. We will elaborate on these issues in the final section of this article.

## THE PUBLIC PARTICIPATION HEARINGS ON THE FIRST DRAFT OF THE CIVIL UNION BILL

### *Parliament’s responsibility*

In the *Fourie* judgment the Constitutional Court provided clear guidelines to Parliament to assist it with the drafting of the new legislation. It noted that the law served as a ‘great teacher, established public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse’.<sup>109</sup> It also noted that one of the principle functions of Parliament was to ensure that the values of the Constitution as set out in the Preamble and s 1 permeate every area of the law.<sup>110</sup> In this context, it encouraged Parliament to consult widely before adopting legislation in this regard.

<sup>107</sup> Paula Ettelbrick ‘Since when is marriage a path to liberation?’ in *Reader* op cit note 1 at 128. See generally Pierre de Vos ‘Same-sex sexual desire and the re-imagining of the South African family’ (2004) 20 *SAJHR* 179 and Morris B Kaplan ‘Constructing queer communities: Marriage, sex, death and other fantasies’ (2001) 8 *Constellations* 57. Also see Frank Browning ‘Why marry?’ in *Reader* op cit note 1 at 132.

<sup>108</sup> See Celia Kitzinger & Sue Wilkinson ‘Social advocacy for equal marriage: The politics of “rights” and the psychology of “mental health”’ (2004) 4 *Analyses of Social Issues and Public Policy* 173 at 174: ‘[I]t is only when same-sex partners have equal rights of access to marriage that radical rejection of . . . it becomes a meaningful political position.’

<sup>109</sup> *Fourie* supra note 14 at 557A.

<sup>110</sup> *Ibid* at 557B.

Unfortunately, during this consultation process Parliament failed in its constitutional duty, because it failed to inform the public of the constitutional and legal parameters within which the consultation was supposed to take place.<sup>111</sup> This meant that the crisp legal question posed by the court, namely what legal mechanism should be adopted in order to provide same-sex couples with equal legal protection, was lost on most of those who came to participate in the hearings. Instead the hearings often turned into homophobic rants in which members of the public took the opportunity to rail against the evils of homosexuality.<sup>112</sup> It also led to the raising of legal issues which have long since been settled by the Constitutional Court. For example, many contributions objected to the recognition of same-sex marriage because it would allow such couples to adopt and raise children, something which has been legal in South Africa for several years.<sup>113</sup>

Given Parliament's failure properly to inform the public regarding the context of the public participation about the Civil Union Bill, it is no wonder that opponents of same-sex marriage raised objections to the Bill based on stereotypical misconceptions and widely accepted myths often raised in moral debates about the desirability of same-sex marriage.<sup>114</sup> In addition to what has already been said about the potential procreation

<sup>111</sup> See ss 59(1) and 72(1)(a) of the Constitution. In *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 131 it was held that the meaning of the word 'facilitate' in these sections requires Parliament to 'provide education that builds capacity for such participation' and to facilitate 'learning and understanding in order to achieve meaningful involvement by ordinary citizens'. This should be done 'in order to ensure that the public participates in the law-making process consistent with our democracy' (para 135).

<sup>112</sup> This aspect of the hearings was well documented in the press. See Wendy Jasson da Costa 'Hearings "a platform for hate speech"' *Cape Times* 11 October 2006 at 4; W Jasson da Costa 'Gays protest tone of Civil Union Bill debate' *Cape Times* 16 October 2006 at 4 and W Jasson da Costa 'Activists slam hearings on same-sex unions' *Pretoria News* 11 October 2006 at 4.

<sup>113</sup> See *Du Toit v Minister of Welfare and Population Development* supra note 4.

<sup>114</sup> See, inter alia, *Civil Union Bill: A Response by His People Christian Ministries (South Africa)* available at <http://www.pmg.org.za/docs/2006/061016hispeople.htm> (last accessed on 18 November 2006), *Southern African Catholic Bishops' Conference Submission To The Portfolio Committee On Home Affairs On The Civil Union Bill* available at <http://www.pmg.org.za/docs/2006/061016catholic.htm> (last accessed on 3 March 2007), *Gerformeerde Kerke in Suid-Afrika Presentation to the Portfolio Committee on Home Affairs regarding the amendment of the Marriages Act (25/1961): Reaction to the proposed Civil Unions Bill* available at <http://www.pmg.org.za/docs/2006/061016reformed.htm> (last accessed on 3 March 2007), *Muslim Judicial Council (SA) Submission on Civil Union Bill* available at <http://www.pmg.org.za/docs/2006/061016mjc.pdf> (last accessed on 18 November 2006), *Christian Lawyers Association Submission To The Portfolio Committee Of Home Affairs Stakeholder Public Hearings October 2006: Civil Union Bill* available at <http://www.pmg.org.za/docs/2006/061017vilakazi.doc> (last accessed on 19 November 2006), *Christian Brethren on the Civil Union Bill* available at <http://www.pmg.org.za/docs/2006/061017stakeholder.pdf> (last accessed on 19 November 2006), *Couples for Christ Submission to Parliamentary Portfolio Committee* available at <http://www.pmg.org.za/docs/2006/061017couples.pdf> (last accessed on 19 November 2006) and *Christian Action*

argument and the religious ‘contamination’ argument, we deal below with some of the most popular of these myths and misconceptions as they were presented at the public participation hearings.

*More flawed arguments*

First, it is not true, as some opponents to same-sex marriage argued at the public participation hearings and widely in the media, that the institution of marriage in South Africa has since time immemorial been defined by all as that of ‘a union of one man with one woman, to the exclusion, while it lasts, of all others’.<sup>115</sup> This contention is often put forward as part of an argument that the definition of marriage cannot be changed because marriage in our society and culture has only one ‘true’ definition that has been accepted by all — including the legislature — since the earliest times and that any change of this definition would thus be ‘unnatural’ or even ‘impossible’.

The very definition of marriage now said to be sacred and unchanging is, in fact, a product of South Africa’s colonial past. As the Supreme Court of Appeal pointed out, the definition of marriage as between one man and one woman is a colonial imposition, imported via the Roman-Dutch law into our legal system.<sup>116</sup> This definition and the legislation accompanying it addressed the needs of white colonizers only and ignored the various other forms of permanent life partner relationships to be found in indigenous cultures and in religious practices in South Africa. Thus for a very long time the law in South Africa failed adequately to recognize customary marriages,<sup>117</sup> marriages concluded according to Muslim personal law,<sup>118</sup> or other religious marriages.

At the same time, even the traditional assumptions about marriage and the family have been substantially eroded over the past decade or more. As the Constitutional Court remarked:

‘It is important to emphasise that over the past decades an accelerating process of transformation has taken place in family relationships as well as in societal and legal concepts regarding the family and what it comprises. Sinclair and

*Network Submission regarding Civil Union Bill* available at <http://www.pmg.org.za/docs/2006/061017couples.pdf> (last accessed on 19 November 2006).

<sup>115</sup> This definition was provided by Chief Justice Innes in *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 at 61.

<sup>116</sup> For a history of the reception of Western-style marriage into South African law see the judgment of Farlam JA in *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) 460C–462F.

<sup>117</sup> These marriages were recognized throughout South Africa only since 1998 when Parliament adopted the Recognition of Customary Marriages Act supra note 47.

<sup>118</sup> See *Daniels v Campbell NO* 2003 (9) BCLR 969 (C) at 980: ‘[M]arriages by Muslim rites have . . . not been recognised by South African courts as valid . . . marriages, firstly, because such marriages are potentially polygamous and hence contrary to public policy (whether or not the actual union is in fact monogamous) and secondly, because such marriages are not solemnised by authorised marriage officers in accordance with the provisions of the Marriage Act 25 of 1961.’

Heaton, after alluding to the profound transformations of the legal relationships between family members that have taken place in the past, comment as follows on the present: "But the current period of rapid change seems to 'strike at the most basic assumptions' underlying marriage and the family. . . . Itself a country where considerable political and socio-economic movement has been and is taking place, South Africa occupies a distinctive position in the context of developments in the legal relationship between family members and between the state and the family. Its heterogeneous society is 'fissured by differences of language, religion, race, cultural habit, historical experience and self-definition' and, consequently, reflects widely varying expectations about marriage, family life and the position of women in society".<sup>119</sup>

There has been a notable and significant trend by the legislature for express and implied recognition of same-sex relationships. The Constitution itself acknowledges recognition of non-marital relationships when it guarantees for every detained person the right to be visited by that person's 'spouse or partner'.<sup>120</sup> A range of statutory provisions have included such unions within their ambit.<sup>121</sup> As already indicated, the Constitutional Court has also extended rights for same-sex couples jointly to adopt children.<sup>122</sup> Same-sex partners also enjoy the same immigration rights as married heterosexual couples,<sup>123</sup> and partners of judges in same-sex relationships enjoy the same medical aid and retirement benefits.<sup>124</sup> Most importantly, by adopting the Recognition of Customary Marriages Act,<sup>125</sup> Parliament rejected the notion that marriage is inevitably a union of one man and one woman to the

<sup>119</sup> *National Coalition for Gay and Lesbian Equality v Home Affairs* supra note 4 at 30C-E (original references omitted).

<sup>120</sup> Constitution s 35(2)(f)(i).

<sup>121</sup> See, for example, the use of the expressions 'spouse, partner or associate' in s 6(1)(f) of the Independent Media Commission Act 148 of 1993 and ss 5(1)(e) and (f) of the Independent Broadcasting Authority Act 153 of 1993 and the fact that, for purposes of these provisions, 'spouse' includes 'a *de facto* spouse'; 'life-partner' in ss 3(7)(a)(ii), 3(8) and 7(5) of the Lotteries Act 57 of 1997 and s 27(2)(c)(i) the Basic Conditions of Employment Act 75 of 1997; the definition of spouse in s 31 of the Special Pensions Act 69 of 1996 to mean 'the partner . . . in a marriage relationship' which latter relationship is defined to include 'a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years'; the definition of 'family responsibility' in s 1 of the Employment Equity Act 55 of 1998 which includes 'responsibility of employees in relation to their spouse or partner'; the definition of 'dependant' in the Medical Schemes Act 131 of 1998 which includes the 'the spouse or partner, dependant children or other members of the member's immediate family in respect of whom the member is liable for family care and support'; and the definition of 'spouse' in s 8(6)(e)(iii)(aa) of the Housing Act 107 of 1997 which includes 'a person with whom the member lives as if they were married or with whom the member habitually cohabits'; ss 9(4) and 11(5)(b) of the South African Civil Aviation Authority Act 40 of 1998; and 'life partners' in ss 10(2) and 15(9) of the Road Traffic Management Corporation Act 20 of 1999.

<sup>122</sup> See *Du Toit v Minister of Welfare and Population Development* supra note 4.

<sup>123</sup> See *National Coalition for Gay and Lesbian Equality v Home Affairs* supra note 4.

<sup>124</sup> See *Satchwell v President of the Republic of South Africa* supra note 4.

<sup>125</sup> Act 120 of 1998.

exclusion of all others.<sup>126</sup> In doing so, Parliament recognized the diversity of family arrangements in need of legal protection in our society and also that the recognition of polygamous marriages did not imply a lack of respect for the religiously inspired view that a marriage is by its very definition a monogamous union between two people. This firmly establishes the principle that the respect for diversity demanded by the Constitution requires Parliament to recognize different forms of relationships, and that such recognition does not negate or attack other forms of relationships recognized by the state.

Another popular argument at the public participation hearings against same-sex marriage was based on the suitability of same-sex parents to adopt or raise children.<sup>127</sup> Arguments about whether same-sex couples are good parents or whether they should be allowed jointly to adopt children might have been relevant as a motivation *in favour of* the recognition of same-sex marriage, but such arguments were completely irrelevant when deployed by the opponents of the recognition of same-sex marriage. South African law has never explicitly prohibited a gay man or a lesbian from adopting a child as a single parent. In 2002 the Constitutional Court found that the existing legislation which prohibited same-sex couples from adopting children constituted unfair discrimination and thus declared s 17 of the Child Care Act<sup>128</sup> invalid.<sup>129</sup> The court emphasized that the best interests of the child will always be paramount. To bar parents who would otherwise be suited to adopt, and to do so merely on account of their sexual orientation, would defeat the very reason for adoption.<sup>130</sup>

At the time of the public participation hearings South Africa found itself in the anomalous position that same-sex couples could legally adopt children (and form a family) but could not legally marry each other. Children of same-sex couples would thus be faced with a situation where their parents are by law not allowed to get married and where they are forbidden by law to share in the legal and social benefits that accrue to a child because of the marriage entered into by his or her parents. It could therefore be argued, instead, that the failure fully to recognize same-sex marriage infringes the rights of children as set out in s 28 of the Constitution and is not in the best interests of the child. It can also be argued that such a failure undermines the traditional institution of the family and marriage because it prevents some families from gaining the legal protection needed to thrive. Instead of seeing the logical outcomes of this argument, participants in the public participation

<sup>126</sup> Section 2 of the Recognition of Customary Marriages Act 120 of 1998.

<sup>127</sup> See the references cited in note 114. All the submissions cited there have some argument relating to the ‘unsuitability’ of members of the LGBTI society to raise or adopt children.

<sup>128</sup> Act 74 of 1983.

<sup>129</sup> *Du Toit v Minister of Welfare and Population Development* supra note 4 at 214D-G/H.

<sup>130</sup> *Ibid* at 207F-208B.

hearings incessantly referred to isolated cases of domestic violence in gay families, while underscoring the excessive incidence of domestic violence in heterosexual marriage. They also repeatedly refused to take the point that the question about the suitability of gay couples to raise children was irrelevant because of the Constitutional Court's decision in *Du Toit*.

Some opponents also misconstrued the very nature of homosexuality and consequently failed to understand the demands of diversity placed on us by the Constitution. In this regard it is important to address the argument that same-sex marriage is 'un-African' or against African culture. It is well documented that same-sex sexual activity has occurred all over Africa through all periods of time.<sup>131</sup> Where such activity occurred before the twentieth century, those who engaged in it were not referred to as 'homosexuals'. This is because the concept of homosexuality (as well as heterosexuality) is a Western concept invented in the late nineteenth century to label those who engaged in same-sex sexual activity. In different and complex ways, and often through the work done by European missionaries, the notion of homo- and heterosexuality was introduced into Africa as part of the colonial project. While many traditional African societies frowned upon same-sex sexual activity, other societies accommodated such behaviour in different ways.

What is clear is that no such concept as homophobia existed in Africa before its introduction by Western missionaries. It can therefore be said that while homosexuality is indeed 'un-African', so is homophobia an 'un-African' construction. Some academics have also pointed out that arguments about the 'un-African' nature of homosexual identity serve as a colonially inspired misrepresentation of Africa as a monocultural entity. This would ignore the 'richness of differing cultural constructions of desire' which would simply be to 'replicate much of the colonial discourse on African sexuality'.<sup>132</sup> But even if some view same-sex marriage as being in conflict with African culture (or with the teachings of the Bible), the Constitution requires that we all respect the diversity in our society and that the views of some should not be used to justify discrimination against others. To accommodate the needs of all South Africans and to respect their inherent human dignity

<sup>131</sup> Gilbert Herdt *Same Sex Different Cultures: Exploring Gay and Lesbian Lives* (1997) 37–8 and 76–81. Also see M J Herskovitz 'A note on "woman marriage" in Dahomey' in *Reader op cit* note 1 at 32. In this piece (written in 1937) the author calls attention to and documents the occurrence of lesbian matrimony in 'parts of Africa as far distant from one another as northern and southern Nigeria, the Anglo-Egyptian Sudan, and the Union of South Africa'. Also see Ruth Morgan & Saskia Wierenga *Tommy Boys, Lesbian Men, and Ancestral Wives: Female Same-Sex Practices in Africa* (2005).

<sup>132</sup> Oliver Phillips 'Zimbabwean law and the production of the white man's disease' (1997) 6 *Social and Legal Studies* 474. Also see Robert Morrell 'Of boys and men: Masculinity and gender in Southern African studies' (1998) 24 *Journal of Southern African Studies* 605 and Thérèse Migraine-George 'Beyond the "internalist" vs "externalist" debate: The local-global identities of African homosexuals in two films, Woubi Chéri and Dakan' (2003) 16 *Journal of African Cultural Studies* 45.



does not, as argued above, in any way question the beliefs and views of others in society.

#### THE SECOND DRAFT OF THE CIVIL UNION BILL ENACTED AS THE CIVIL UNION ACT

Ultimately, it was the pressure exerted by legal advisors, as well as the support of these views by the SALRC (discussed above) and a significant number of submissions authored by constitutional lawyers, that resulted in the radical amendment of the first draft of the Civil Union Bill. From the outset, the first draft of the Civil Union Bill did not carry the stamp of approval from governmental legal advisors. First, the State Law Advisor refused to certify the Bill before it was tabled in Parliament.<sup>133</sup> Secondly, the parliamentary legal advisors continuously advised the portfolio committee that the Bill would probably not survive a constitutional challenge.<sup>134</sup> The Democratic Alliance was easily convinced by these views and addressed a letter to the chairperson of the portfolio committee on 6 November 2006 in which it categorically stated that ‘it is clear that the abovementioned Bill [first draft of the Civil Union Bill] is unconstitutional in respect of the equality rights clause in the Constitution’.<sup>135</sup> At the portfolio committee meeting on the above date Dr Linette Louw from the Department of Justice told the committee that it was a requirement of the *Fourie* judgment that marriage had to be provided to same-sex couples by supplementary legislation should the Marriage Act not be amended to achieve this.<sup>136</sup>

Despite these initiatives, conservative political parties did not take heed of, particularly, that portion of the *Fourie* judgment which held that the religious beliefs of some cannot determine the constitutional rights of others. Representatives from these political parties continued throughout the deliberations with arguments in support of ‘marriage’ as a sacred, exclusively heterosexual concept.<sup>137</sup> However, the ruling African National Congress expressed itself in favour of a sober (if somewhat conservative) interpretation of the Constitutional Court’s judgment on 7 November 2006 when it tabled

<sup>133</sup> Angela Quintal ‘Concern about Civil Union Bill’ *Daily News* 8 September 2006 at 8.

<sup>134</sup> See *Minutes of the Home Affairs Portfolio Committee Civil Union Bill Deliberations* 1, 7 and 8 November 2006 available at <http://www.pmg.org.za/minutes.php?q=2&comid=11> (last accessed on 9 November 2006).

<sup>135</sup> Democratic Alliance (Sandy Kalyan & Marius Swart) ‘Proposed amendments to the Civil Union Bill’ available at <http://www.pmg.org.za/docs/2006/061107da.pdf> (last accessed on 9 November 2006).

<sup>136</sup> See *Minutes of the Home Affairs Portfolio Committee Civil Union Bill Deliberations* 7 November 2006 available at <http://www.pmg.org.za/viewminute.php?id=8488> (last accessed on 9 November 2006).

<sup>137</sup> See the continuous interventions made by Mr Steve Swart (who represents the African Christian Democratic Party on the Home Affairs Portfolio Committee) during the deliberations op cit note 134.

a proposal that would become the Civil Union Act.<sup>138</sup> This version of the legislation differed markedly from the first draft. Gone were the provisions relating to domestic partnerships. Gone was the proposed ‘civil partnership’ institution exclusively for same-sex couples. In came the right to conclude a civil union by way of either a civil partnership *or* a marriage. Clearly, this version of the legislation was a vast improvement on the regime initially proposed. And, despite the religious outcries, the charges that Parliament had gone too far in testing the patience of God,<sup>139</sup> the ANC eventually used its political power in the committee and in the houses of Parliament to pass this version of the legislation in time to meet the deadline of the Constitutional Court. That the ANC was, to a significant extent, obliged to exert its power so forcefully is, in our opinion, a moral and political issue too complex to do justice to here. Suffice it to say that the Constitutional Court’s judgment left the ANC in a precarious position: it had to comply with the court’s judgment while aware that the vast majority of its voters were strongly opposed to it. But in a constitutional democracy this is a common position for a ruling party to be in. It is one of the implications of favouring the rule of law that it will not always accord with public opinion.<sup>140</sup>

The Civil Union Act now allows for the registration of a marriage or a civil partnership. Whatever the practicalities involved in such a choice, it is clear that the Act finally entrenches (at least on a formal level) the choice between civil *marriage* or the registration of a civil partnership, which embodies both the positive and negative sides of the marriage choice. The importance of this legislation (as the first of its sort in Africa) as well as, the importance of the choice it affords, cannot be over-emphasized. The choice to enter a civil partnership as a true alternative to marriage, is as important a form of dissent as the choice to enter into a marriage is a form of assent to the mainstream. In a constitutional democracy, attaching the same legal consequences to both forms of union affirms the fundamental democratic separation between church and state.<sup>141</sup> It also implies a certain severance of the concept of marriage from conservative religious connotations, while emphasizing that a marriage can be a sacred ritual without conforming to any particular religious proscriptions.

<sup>138</sup> Act 17 of 2006.

<sup>139</sup> ‘Same sex couples can now legally tie the knot’ available at <http://www.sabcnews.com/politics/government/0,2172,138457,00.html> (last accessed on 11 December 2006) quoting the African Christian Democratic Party President, Kenneth Meshoe.

<sup>140</sup> See *S v Makwanyane* supra note 6 at 430I-432D.

<sup>141</sup> See David Bradley ‘Radical principles and the legal institution of marriage: Domestic relations law and social democracy in Sweden’ (1990) 4 *International Journal of Law, Policy and the Family* 154. Also see Jean-Luc Nancy ‘Church, state, resistance’ (2007) 34 *Journal of Law and Society* 3–13.

## WHERE TO FROM HERE? CONCESSIONS TO COLONIALISM, ITS PARADOXES AND CHALLENGES

While the Civil Union Act represents a significant moment in the ongoing quest for transformation of family law in South Africa, we contend that much still needs to be done to democratize marriage law in South Africa. We wish to address two aspects of the Civil Union Act which we would describe as concessions to colonialism — that is, colonialism in its widest sense, the sense in which it is used to denote a *take-over*.<sup>142</sup>

In taking over the legal consequences of a permanent same-sex union, the new Act maintains a masquerade, where its predecessor was much more overt in its establishment of a marriage regime that could only be described as ‘separate and unequal’. In our view, the greatest problem with the current Act is and remains its co-existence with the Marriage Act, which relies on the common law (one could also say the colonial) definition of marriage as the exclusive union between a man and a woman. The problem here is that the choice for heterosexual couples is a choice between the Marriage Act and the Civil Union Act, whereas homosexual couples who want to marry can only do so by way of the new Civil Union Act.

While this inequality may seem inconsequential, one is tempted to ask why the Marriage Act has been retained in circumstances where the Constitutional Court held explicitly that it is the Marriage Act and the common-law definition of marriage that is unconstitutional. Invariably, the signal that is sent out to society is that somehow heterosexual couples remain ‘special’ or ‘superior’ in that they have the choice (and in fact the need) to separate or exclude themselves from ‘tainted’ and ‘inferior’ homosexual couples by accessing the institution of marriage through the traditional Marriage Act of 1961.

The Civil Union Act itself provides further evidence that this inequality is perpetuated and not eradicated. The Act provides explicitly that a marriage officer employed by the state can object to solemnizing a civil union between persons of the same sex but cannot object to solemnizing a union between heterosexual couples.<sup>143</sup> In a critical slippage, the Act still seems to suggest that civil partnerships can only be concluded by same-sex couples.<sup>144</sup> This harks back at the ‘separate but equal’ regime envisaged in the first draft of the Civil Union Bill.

For the above reasons, it is not difficult to discern that an agenda remains that would now have a threefold hierarchy within the concept of ‘marriage’ itself — the heterosexual superior marriage, under the Marriage Act; then the

<sup>142</sup> See C Douzinas ‘Human rights and post-modern utopia’ (2000) 11(2) *Law and Critique* 219 at 232.

<sup>143</sup> Civil Union Act, s 6.

<sup>144</sup> Ibid s 8(6): ‘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 Customary Marriages Act.’

more inferior marriage, of civil union between heterosexual couples; and finally, the marriage of civil union between homosexual couples. Until this hierarchy is removed by the repeal of the Marriage Act, and the repeal of the relevant sections in the Civil Union Act that provide for this objection on grounds of conscience, the legislative message will remain that homosexual couples are somehow tainted and inferior. In this way, there is a concession to colonialism and at the same time a colonization and confinement of the homosexual couple as legal subject. That this confinement is without any rationale translates, of course, into the legal term 'unfair discrimination'.

A second aspect relates to the consequences of not marrying (whether in terms of the Marriage Act or in terms of the Civil Union Act) or entering into a civil partnership in South Africa today. One of the commendable aspects of the original draft of the Civil Union Bill was the fact that it provided legal recognition for what it called 'unregistered domestic partnerships'.<sup>145</sup> This species of civil union was defined as 'a relationship between two adult persons who live as a couple and who are not related by family'.<sup>146</sup> In terms of clause 38(1) of that Bill a partner to such an unregistered partnership would be able to apply to the court, upon the termination of the partnership, for a maintenance order, an intestate succession order or a property division order. The court, after taking into account all the relevant circumstances, could then make such an order as it deemed just and equitable.<sup>147</sup> These provisions were omitted from the Civil Union Act, with the promise that it would be tabled in a separate Bill this year.<sup>148</sup> But in the absence of such a Bill, this omission has interesting implications for informal cohabitation relationships between, on the one hand, heterosexual couples and, on the other, homosexual couples.

Normally, one would conclude that where a cohabitation relationship is not registered, there are no formal legal consequences that would ensue. But the situation is different as a result of the way that South Africa's equality jurisprudence on this topic has played out. In *Volks v Robinson*<sup>149</sup> the Constitutional Court held that Mrs Robinson could not receive maintenance from the deceased estate of the man whom she had lived with and cared for for 15 years. The court held that this was the case because she could not be regarded as a 'spouse' as contemplated by the Maintenance of Surviving Spouses Act.<sup>150</sup> This, the court held, was the case because she had not entered into a marriage where she had the choice to do so.<sup>151</sup>

<sup>145</sup> See Civil Union Bill supra note 18, clauses 38 to 45.

<sup>146</sup> Ibid, clause 1.

<sup>147</sup> Ibid, clauses 40(1), 44(2) and 44(3).

<sup>148</sup> See Beth Goldblatt 'Same-sex marriage: A difficult birth' (2006) (1) *Centre for Applied Legal Studies Newsletter* at 5.

<sup>149</sup> 2005 (5) BCLR 446 (CC).

<sup>150</sup> Act 27 of 1990.

<sup>151</sup> Contra the minority judgment of Mokgoro J and O'Regan J in *Volks v Robinson* supra note 148 para 108 ff.

This decision has been criticized by many, primarily for the fact that it does not recognize that cohabitation relationships have been stigmatized in the past and that the discriminatory Act leaves all survivors of cohabitation relationships without protection even where they had undertaken reciprocal duties of support during the relationship.<sup>152</sup> The judgment thus remains authority for the proposition that people (heterosexual and homosexual) who are de facto cohabiting have no claims of maintenance from a deceased estate of the person they were cohabiting with. And, if they do not have this claim against the *deceased* estate, they also do not have it in circumstances where the union comes to an end as a result of irreconcilable differences. The court placed great emphasis in this case on this latter aspect and held that a duty could not be imposed on Mr Volks in death which he did not have during his life.<sup>153</sup> The result is thus that heterosexual couples who live together now have to marry or register a civil union, in order to acquire rights in the estate of their partner.

The position is, however, quite different when it comes to same-sex cohabiting couples. Before the enactment of the Civil Union Act, a number of decisions established rights for same-sex cohabiting couples that would not automatically ensue for heterosexual cohabiting partners. In the recently decided case of *Gory v Kolver*,<sup>154</sup> for instance, the Constitutional Court held that a same-sex partner in a permanent life partnership is entitled to inherit under the law of intestate succession just as a spouse to a marriage would.<sup>155</sup> The court also confirmed that where it has granted this kind of remedy in the past it is up to Parliament to remove it.<sup>156</sup> The result of this judgment (and similar ones preceding it) is paradoxical in that same-sex couples who cohabit and do not enter into a marriage or civil partnership under the Civil Union Act are now entitled to a myriad rights to which their heterosexual counterparts are not.

All of this goes back to the interpretation of the word ‘spouse’ in the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,<sup>157</sup> a decision we believe to be itself a concession to colonialism in that it uncritically accepted the common-law definition of a marriage. In this, one of the first cases dealing with equality for same-sex couples, the court held that the context did not indicate that the word spouse included a partner in a same-sex life partnership.<sup>158</sup> This meant that the court had to remedy the unconstitutionality of the various provisions by ‘reading in’ words into the Act<sup>159</sup> and not by expanding the discriminatory concept (‘spouse’ in this

<sup>152</sup> See Schäfer op cit note 54 at 630ff.

<sup>153</sup> *Volks* supra note 149 para 58.

<sup>154</sup> 2007 (4) SA 97 (CC).

<sup>155</sup> *Ibid* para 19.

<sup>156</sup> *Ibid* para 30.

<sup>157</sup> *Supra* note 4.

<sup>158</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* supra note 4 at 20D–21C/D.

<sup>159</sup> *Ibid* at 39D–F/G.

case) from within. This decision created the precedent for the challenges of various pieces of legislation that followed. The court only changed the concept of a spouse in the *Fourie* decision to include same-sex couples. The concept, however, still excludes parties in heterosexual cohabiting relationships. This situation again occasions a reconsideration of the argument for a functionalist definition of marriage.<sup>160</sup> Although this argument remains cogent it currently seems improbable that such a definition of marriage will follow. In the future heterosexual cohabitations not registered as marriages or civil unions will hopefully be dealt with by some form of domestic partnership legislation.

It seems to us that an extraordinary turn has taken place here as a result of the Constitutional Court's initial concession to colonialism and a certain modernity in the *National Coalition* judgment.<sup>161</sup> At the time of the judgment the court certainly did not (and could not) foresee that the jurisprudence would develop in such a way that it would grant homosexual cohabiting partners more rights than it does heterosexual cohabiting partners. This remains an inequality still to be addressed by Parliament. It is an important inequality to be addressed especially because South Africa remains a patriarchal society in which many women lack the power to insist on marriage when their male partner does not wish to conclude a marriage or civil union.<sup>162</sup>

## CONCLUSION

The eradication of the stains of apartheid from the social fabric of South Africa is a fragile, ongoing and often painful process. Nowhere was this more vividly highlighted than in the experience of South Africa's civil union saga. The opposition (in all its forms) generated by the debate over same-sex marriage has exposed to us both how far we have come and how far we still have to go.

<sup>160</sup> Angelo Pantazis 'An argument for the legal recognition of gay and lesbian marriage' (1997) 114 *SALJ* 556. Also see Schäfer op cit note 54 at 644ff for a slightly different argument.

<sup>161</sup> This turn was anticipated by Beth Goldblatt op cit note 22 at 266.

<sup>162</sup> See Brigitte Clark 'Families and domestic partnerships' (2002) 119 *SALJ* 634–48, Beth Goldblatt 'Regulating domestic partnerships — A necessary step in the development of South African family law' (2003) 120(3) *SALJ* 610–29, Goldblatt op cit note 22. Also see Centre for Applied Legal Studies *Submission to Parliamentary Portfolio Committee on Home Affairs: The Civil Unions Bill 2006* (2006): 'Women are often unable to convince the man with whom they live to marry them. Yet these women operate in many ways as 'wives' — they cook and clean for their male partner and often bear and raise his children. They may also assist him in his business and contribute financially towards the household. This may continue for many years but if the relationship breaks down, it is usually the man who owns the house and most of the other property built up during the relationship. In terms of current common law, the women in these partnerships have little hope of sharing in any of this property and are generally left without a home, no financial support from the man, and responsibility for the children.'

It is indeed revolutionary that we have managed to enact legislation that affords same-sex couples the same rights, obligations and benefits previously only possible through marriage under the Marriage Act. It is indeed remarkable that we have achieved this as the first country in Africa and that, in doing so, we have joined only a small number of countries in the international community. It is indeed astonishing that we have achieved this so soon after our emergence from the dark past of apartheid.

Considering the structural divisions of our apartheid legacy, it was specifically important from an integrative point of view that same-sex and heterosexual couples be brought together under one common institution. This integration would allow the marginalized same-sex couple a new means of accessing the mainstream, where they choose to do so. It meant that there is, for the first time, a common language in which to describe both homosexual and heterosexual ways of living.<sup>163</sup> And this form of integration is indispensable as part of the normalization of post-apartheid South African society as a whole and in conformity with the constitutional ideal of openness.<sup>164</sup>

In this contribution we have attempted to trace the emergence of gay people from the dark days of a totalitarian past. We have shown that the course for the eventual enactment of same-sex marriage laws was set shortly after the enactment of our Constitution, and that this development was facilitated primarily by the unique inclusion of sexual orientation as a ground in s 9(3) of the Constitution. We have argued for the legal and ethical significance of equal marriage and indicated why the initial draft of the civil union legislation was not in accordance with the Constitutional Court's judgment in the *Fourie* decision, in that it did not afford equal marriage to homosexual people. In addition, we have attempted to show why, in the uniquely South African context, an exclusive 'civil partnership' regime was doomed right from the outset. Finally, we have expressed our discomfort with the new legislation while celebrating the enormous progressive step South Africa has taken.

By way of conclusion we would raise the question we find most pertinent in coming to terms with this chapter in the legal history of South Africa. This is also the question that we would propose to take us forward in what is undoubtedly an ongoing local and international debate. The question is this: Given the public displays of vitriol, give the public display of vitriol, the hurtful insults and the sheer violence that accompanied the enactment of same-sex marriage legislation in South Africa, how much have we really contributed to the furtherance of democratic tolerance for all who belong to South Africa? If democracy depends on a public realm in which plurality must thrive,<sup>165</sup> then we contend that the unquestionable intolerance for difference

<sup>163</sup> Joseph Landau 'Marriage as integration' in *Reader op cit* note 1 at 319.

<sup>164</sup> See s 36(1) of the Constitution.

<sup>165</sup> The literature on plurality is vast but most significantly has its roots in Hannah Arendt & Margaret Canovan (ed) *The Human Condition* (1998). For a South African perspective on (and support of) Arendtian politics and plurality see Karin van Marle

characteristic of this process indicates that the journey has only begun. Laroque writes that equalization of the marriage rights of same-sex and heterosexual people is only one step along the path to eradication of homophobia. 'Until we can change the bent of the human heart which seems to instinctively fear what it cannot — or will not — identify in itself, the eradication of homophobia will remain a Utopian goal.'<sup>166</sup>

Nevertheless, South Africa has always been the locus of unique occasions. It was astonishing to see how many people exerted their democratic right to engage in public dialogue, whether in the press, at public meetings or parliamentary hearings. It was indeed inspiring to see how many people came out of the comfort of their houses to protest — rightly or wrongly. Furthermore, it was encouraging to see the nurturing of these public spaces to ensure the ongoing debate. The creative way in which communities formed in an almost organic fashion, for or against this legislation, indicated one thing: that people care deeply. While this concern might often be misplaced, irrational and based on sheer ignorance, it does indicate a motivation amongst the people of South Africa to be involved in the democratic process. And once the South African people have come to understand that the question whether a person is 'good' or 'bad' is not determined by that person's preference for this or that sex, our democracy will have progressed and South Africa will belong more truly to all who live in it.

'Public landscape in a transforming society' (1998) 13 *South African Public Law* 135 and Johan W G van der Walt *Law and Sacrifice* (2005).

<sup>166</sup> Quoted in Leslie Thatcher 'Derrida's utopia' available at <http://forum.truthout.org/blog/story/2006/8/4/141532/9388> (last accessed on 5 October 2006).