

THE 'INEVITABILITY' OF SAME-SEX MARRIAGE IN SOUTH AFRICA'S POST-APARTHEID STATE

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ABSTRACT

This article argues that the adoption of the Civil Union Act, extending marriage rights to same-sex couples, does not represent the inevitable and triumphant victory of a long legal and political struggle for the emancipation of gay men and lesbians in South Africa. A combination of luck, wise strategic leadership and fortitude eventually led to the adoption of full marriage rights for same-sex couples. The article traces the roots of this legal and political victory back to the debates about the inclusion of the sexual orientation clause in the South African Constitution and points to the importance of the distinct (conservative) legal strategy employed by the National Coalition for Gay and Lesbian Equality in achieving full partnership rights for all. The initial jurisprudence developed by the Constitutional Court created the basis for later legal victories and brought along judges who might have had some misgivings about the extension of marriage rights to same-sex couples had the issue arisen earlier on. The Constitutional Court's judgment in *Fourie* left very little room for Parliament to manoeuvre because it emphasised the symbolic value of marriage and confirmed that a 'separate but equal' partnership law for same-sex couples would not pass constitutional muster. However, this important legal victory will not have any direct and immediate bearing on the lives of many gay men and lesbians in South Africa as they face social, cultural and economic hardship in ways that cannot be easily addressed through the legal reform of partnership laws. The improvement of the lives of ordinary gay men and lesbians will go hand in hand with changes in societal attitudes towards minority sexualities, which to a large extent will be dependent on grassroots activism and organisation. Because the battle for full marriage rights was a well directed, elite-based legal battle, it failed to build a sustainable, vibrant, grassroots movement to take on this task but the symbolic space created by the same-sex marriage reform may well begin to allow for the fostering of such a movement and thus for true emancipation of gay men and lesbians.

I INTRODUCTION

The adoption of the Civil Union Act¹ by South Africa's Parliament in late 2006 could easily be seen as the inevitable culmination of a long, legal and political struggle for the emancipation of gay men and lesbians in South Africa. It might be tempting to assume that the inclusion of 'sexual orientation' in the non-discrimination clauses of the 1993² and 1996³ Constitutions created the conditions that logically and inevitably led to the Constitutional Court's

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1 Act 17 of 2006.

2 Constitution of the Republic of South Africa Act 200 of 1993 (the 1993 Constitution).

3 Constitution of the Republic of South Africa Act 108 of 1996 (the 1996 Constitution).

same-sex marriage judgment in *Fourie*⁴ and the adoption of the legislation that extended full marriage rights to same-sex couples. This achievement, in turn, could then also be viewed as confirming the final and triumphant emancipation of those individuals who experience same-sex sexual desire and are emotionally attracted to members of the same sex. However, a more critical look at the political and legal struggles that led to the adoption of this Act suggests that the process was far from inevitable. It is also not clear whether these struggles have led or will lead to the full emancipation of individuals whose sexual orientation does not conform to the existing heterosexual norm.

It is striking to note that when Edwin Cameron⁵ delivered his inaugural lecture at the University of the Witwatersrand in October 1992, arguing for the inclusion of sexual orientation 'as a specifically protected condition in a new Constitution', he explicitly conceded that the right to 'marry' might be confined to the traditional heterosexual institution generally associated with the procreation and parenting of children.⁶ Although he did contend that the 'genuine recognition of non-discrimination on the ground of sexual orientation would entail granting some recognition to permanent domestic partnerships', he argued that this 'need not take the form of extending heterosexual "marriage" which by both name and tradition may well be unnecessary and inappropriate'.⁷ Cameron was, of course, not the only activist or academic who argued for the explicit inclusion of a sexual orientation clause in the section on discrimination in the soon to be written Constitution, who chose to skirt the issue of marriage and adoption rights. In an attempt to highlight the injustice of the discrimination suffered by gay men and lesbians, the political and legal arguments put forward by gay and lesbian activists at the time focused on the criminalisation of same-sex sexual activity.⁸ Given the prevailing prejudice against homosexuality, it is not surprising that it was only obliquely, almost as an afterthought, that gay and lesbian activists acknowledged that the lifting of the criminal sanction against male sodomy alone would not be sufficient to fully protect gay men and lesbians from discrimination.⁹ At the same time, many mainstream legal commentators argued forcefully that the inclusion in the Constitution of the prohibition on discrimination based on sexual orienta-

4 *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (3) BCLR 355 (CC) (*Fourie*).

5 Now Judge of the Supreme Court of Appeal.

6 E Cameron 'Sexual Orientation And The Constitution: A Test Case For Human Rights' (1993) 110 *SALJ* 450, 467.

7 *ibid* 471. Discussing the need for the inclusion of sexual orientation as a ground in a non-discrimination provision he finally plays his hand by asking whether protection that does not, for example, allow a stable gay or lesbian couple, in every other way suitable, to be considered for adoptive parents, will extend any real protection at all (468).

8 *Ibid* 453-456. See also K Botha & E Cameron 'Sexual Privacy And The Law' in N Boister (ed) *Human Rights Yearbook 1993* (1994) 219.

9 Cameron (note 7 above) 471.

tion would not necessarily lead to the opening up of adoption and marriage rights for same-sex couples.¹⁰

Yet, in the discussions and in the arguments put forward by gay and lesbian activists and sympathetic academics during the debates surrounding the adoption of what came to be known as the Civil Union Act¹¹ by Parliament at the end of 2006, none of these put forward the proposition that it would be politically, emotionally or constitutionally acceptable for Parliament to pass a law that provided same-sex couples with the option to enter a civil partnership, without also providing the option of entering an institution that both in rights and duties would be equal with traditional marriage and would also be called marriage. Unlike many gay activists in the United Kingdom, for example, who in 2005 settled for legislation that provided same-sex couples with civil partnership rights,¹² all the oral submissions made to the Home Affairs Committee of Parliament in favour of extending marriage rights insisted on the adoption of a law that provided for same-sex *marriage*.¹³

It is important to remember that the eventual adoption of such legislation was not always as inevitable as it now seems. A combination of luck, wise strategic leadership and fortitude eventually made this achievement possible. But it could easily have been otherwise. In this article, I trace the roots of this legal and political victory back to the debates about the inclusion of the sexual orientation clause in the South African Constitution. I then analyse the distinct legal strategy employed by the National Coalition for Gay and Lesbian Equality (NCGLE)¹⁴ for achieving full partnership rights for those who are emotionally and physically attracted to members of the same sex. I argue that the early jurisprudence developed by the Constitutional Court set the stage for later victories because it brought on board judges who might have had some misgivings about the extension of marriage rights to same-sex couples. I then proceed to analyse the *Fourie* case and the battles that ensued around the proposed civil union legislation. Finally, I ask questions about the nature of this legal victory and the potential consequences for sexual freedom in South Africa.

10 As late as 1998, legal academics respected in some quarters were able to write:

It should be remembered that the prohibition on unfair discrimination against persons on account of their sexual orientation does not override the constitutional principle that 'the best interest of the child' are of paramount importance in every matter that concerns the child. And for as long as society does not see homosexuality and lesbianism as normal, it will frown upon any attempt to treat homosexual and lesbian parents as 'normal' for the purpose of access to young children. Moreover, the Constitution does not require that homosexuality (sic) must be actively promoted.

PJ Visser & JM Potgieter *Introduction to Family law* (2nd ed) (1988) 170 fn 108.

11 Act 17 of 2006.

12 See 'United Kingdom II: 1990 to Present' in *Encyclopedia Of Gay, Lesbian, Bisexual, Transgender And Queer Culture* <http://www.glbtc.com/social-sciences/united_kingdom_02,16.html>.

13 See Parliamentary Monitoring Group *Report on the Portfolio Committee of Home Affairs on Peoples' Public Hearings in Provinces on the Civil Union Bill, 20 September to 9 October 2006, and the Public Submissions* (24 October 2006) <<http://www.pmg.org.za/docs/2006/061031hearings.htm>>. See also, for example, Lesbian and Gay Equality Project *Submission on Civil Union Bill* (2006) <<http://www.equality.org.za/attachments/Civil%20Union%20Bill%20submission%20-%20final%20draft%20of%2020051006.pdf>>.

14 Later to become 'The Equality Project'.

II GETTING SEXUAL ORIENTATION INTO THE CONSTITUTION

An intriguing and difficult question is how South Africa became the first country in the world to include an explicit ban on sexual orientation discrimination in its Constitution. Prior to the 1980s there was little indication of a gay rights struggle in South Africa.¹⁵ However, the 1980's brought with it the politicisation of gay life, which was essential to the later success of the movement to get the sexual orientation clause included in the first democratic Constitution. The nascent gay and lesbian movement did not at first align itself with the anti-apartheid struggle. Thus, the Gay Association of South Africa (GASA), the first gay and lesbian organisation formed in South Africa in Johannesburg in 1982, functioned primarily as a social meeting place for white, middle-class gay men. Its mission statement explicitly confirmed that it was formed to provide a 'non-militant non-political answer to gay needs' in South Africa.¹⁶ But GASA soon ran into trouble when, as part of the attempts of the anti-apartheid movement to isolate groups sympathetic to the apartheid government, moves were made in the mid-1980's to expel GASA from the International Lesbian and Gay Alliance (ILGA). Despite an intervention by the National Secretary of GASA, Kevin Botha, at an international gathering in Copenhagen, the organisation was expelled the next year.¹⁷ It is during this time of heightened politicisation that the organisation Lesbians and Gays Against Oppression (LAGO) was formed in Cape Town in 1986. LAGO was the first gay and lesbian organisation with explicit links to the anti-apartheid groups. For the first time an organisation representing the interests of gay men and lesbians positioned itself in opposition to the government and endorsed the anti-apartheid struggle.¹⁸ This was followed by the creation of Gays and Lesbians of the Witwatersrand (GLOW) in 1988 under the leadership of Simon Nkoli.¹⁹ Nkoli had been a co-accused in the Delmas treason trial, along with the present Minister of Defence Mosiuoa ("Terror") Lekota.²⁰ GLOW which, like LAGO, linked the broader struggle for political rights with the struggle for gay rights was enormously influential.²¹ Around the same time

15 See however M Gevisser 'A Different Fight For Freedom: A History of South African Lesbian and Gay Organisation from the 1950s to the 1990s' in M Gevisser & E Cameron (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa* (1995) 14-86.

16 S Croucher 'South Africa's Democratisation and the Politics of Gay Liberation' (2002) 28 *Journal of South African Studies* 315, 318.

17 Botha later played an important role as a lawyer for the NCGLE.

18 E Christiansen 'Ending the Apartheid from the Closet: Sexual Orientation in the South African Constitutional Process' (1997) 32 *International Law and Politics* 997, 1023.

19 Christiansen *ibid*, 1024.

20 During the debate on the Civil Union Bill in the National Assembly, Minister Lekota, who is also the national chairman of the African National Congress, led a ringing defence of the Bill on behalf of the ANC and reminded MPs that many gays and lesbians had fought in the struggle, had gone into exile and some even faced the death penalty, along with their heterosexual comrades, to ensure democracy and equality in SA. This speech bears moving testimony to the lingering influence of the late Simon Nkoli. See A Quintel 'Civil Union Bill approved in historic vote' *IOL* <http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20061115043713495C702320>. See also M Massoud 'The Evolution of Gay Rights in South Africa' (2003) 15 *Peace Review* 301, 302.

21 Gevisser (note 15 above) 63-69.

the Organisation of Lesbian and Gay Activists (OLGA) was formed in Cape Town to replace LAGO. OLGA was affiliated to the United Democratic Front (UDF), a broad-based political alliance aligned with the ANC, and in the late 1980's OLGA activists flew to London to argue the case for gay rights with the ANC.²² The activists met with, amongst others Albie Sachs, then a member of the ANC constitutional committee, and impressed on him and others the need to put the rights of gay men and lesbians on the ANC agenda. Other contacts between members of the ANC and gay and lesbian activists also opened the door for the ANC to consider taking on the issue of gay rights.

Personal contacts between individuals in and of itself would probably not have been decisive to convince the ANC — a broad church organisation with different ideological factions, containing both progressive strands as well as more traditionalist and nationalist positions — to take on board the issue of sexual orientation discrimination. I contend that the gay and lesbian 'movement' was ultimately successful because its leaders were fortunate and wise enough to be able to present their struggle as forming part of a broader struggle against the oppression of the apartheid state. In order to tap into the powerful anti-apartheid political current, it was necessary for the gay and lesbian movement to propound a worldview that would both legitimate and motivate protest action. Some political scientists argue that in order for a minority group to be successful in their struggle for acceptance and/or rights, its activists must 'tap highly resonant ideational strains in mainstream society' and, often, their ability to do so would be influenced by the availability of 'master frames'²³ or what I would call master narratives.²⁴ In South Africa, the most powerful master frame available was that of the anti-apartheid struggle. Gay men and lesbians could refer to this struggle and show that their struggle fitted the same frame, was part, in fact, of the same larger struggle for human rights and the emancipation of the oppressed. It is striking that in 1990, the year in which the ANC was unbanned and Nelson Mandela was released from prison, a representative of GLOW wrote:

In South Africa, gay liberation is charged with distracting from the struggle for a democratic non-racial future. The same charge used to be levelled at the women's movement. Both have subsequently proved that our struggle against oppression can enhance, not divide the offensive. GLOW, like the women's movement, believes that 'None Will Be Free Until All Are Free'.²⁵

- 22 This information was provided to me by Derek Fine, one of the founding members and leaders of OLGA, who also told me that their delegation met with, amongst others, Albie Sachs, who was later to become a judge on the Constitutional Court and wrote the majority judgment in the *Fourie* case.
- 23 D McAdam 'Culture and Social Movements' in E Laraña, H. Johnston, and J. Gusfield (eds) *New Social Movements: from Ideology to Identity* (1994) 36, 36-57. See also Croucher (note 16 above) at 324.
- 24 See also P de Vos 'A Bridge Too Far?: History as Context in the Interpretation of the South African Constitution' (2001) 17 *SAJHR* 1, 9-16, and more generally J Lyotard *The Post-Modern Condition* (1984) xxiv.
- 25 P Noomé 'The Gay Left' (1990) 43 *Exit* 3.

I thus contend that the skilful way in which individuals and organisations exploited this association with the broader anti-apartheid struggle was instrumental in the early success of the gay and lesbian 'movement'. The importance of this move becomes more apparent when one takes into account that by the early 1990's the South African gay and lesbian 'movement' had little genuine political power. The various gay and lesbian communities²⁶ were poorly organised, racially divided and mostly without sympathy from the general public.²⁷ Gays and lesbians were 'notoriously uncohesive politically' and it must not be forgotten that at that stage there were still substantial inhibitions on gays and lesbians forming open organisations.²⁸

As the ANC was arguably the most important player in the negotiating process that led to the adoption of the 1993 Constitution, it was hugely significant that when South African political parties began drafting the 1993 Constitution, the ANC had already formally recognised gay and lesbian rights and had agreed to include in its proposed Bill of Rights a prohibition against discrimination on the basis of sexual orientation.²⁹ When the Technical Committees which assisted with the drafting of the 1993 Constitution, set out to draft an equality clause, some tension emerged about whether the fundamental rights enshrined in the Bill of Rights would be protected by a general guarantee of equality before the law or would be enumerated in order to specify the precise grounds upon which discrimination would be rendered unconstitutional.³⁰ The first draft of the clause expressed a statement of principle that the Bill of Rights should include 'the right to equal protection and benefit of the law' but the protected conditions — including sexual orientation — were relegated to an explanatory note.³¹ The decision was eventually taken to provide an enumerated list, a decision that stemmed from the political

26 Given South Africa's history of marginalization and oppression, it is not surprising that one could hardly talk of one monolithic gay and lesbian community in South Africa. See generally O Phillips 'Constituting the Global Gay' in C Stychin & D Herman (eds) *Sexuality in the Legal Arena* (2000) 17.

27 Christiansen (note 18 above) 999. Christiansen quotes from a study done in 1987 in Cape Town which found that 71% of respondents believed homosexuality to be morally wrong. The study was published in G Isaacs & B McKendrick *Male Homosexuality in South Africa: Identity Formation, Culture and Crisis* (1992) 141.

28 Cameron (note 6 above) 451.

29 C Stychin 'Constituting Sexuality: The Struggle for Sexual Orientation in the South African Bill of Rights' 23 (1996) *Journal of Law and Society* 455, 459. See Constitutional Committee, African National Congress *Draft Bill of Rights: A Preliminary Text* (1992) reprinted in A Sachs *Advancing Human Rights in South Africa* (1992) Appendix 1, 215. See also Croucher (note 16 above) 320; E Cameron "'Unapprehended Felons": Gays and lesbians and the law in South Africa' in M Gevisser & E Cameron (note 15 above) 89, 96.

30 For a detailed discussion of the drafting of the 1993 Constitution and the inclusion of the sexual orientation clause, see Christiansen (note 16 above). Christiansen points out that a 'two-stage' constitutional drafting process was settled upon which would allow the drafting of a preliminary constitution in 1993 during the first stage and the drafting of a final constitution after democratic elections during a second stage (1004). See also A Sparks *Tomorrow Is Another Country: The Inside Story Of South Africa's Road To Change* (1995) 129; and P Waldheimer *Anatomy Of A Miracle: The End Of Apartheid And The Birth Of A New South Africa* (1997) 194-95.

31 Botha & Cameron (note 8 above) at 282. See also Technical Committee on Fundamental Rights During the Transition *Second Progress Report* 21 May 1993 par 2.1.1.4.

imperative to mention race and gender specifically. This enumeration then provided a crucial opening for arguments regarding the inclusion of other grounds, including the ground of sexual orientation.³² Personal contact and interventions by the Equality Foundation, a non-profit organisation set up to lobby for the inclusion of the sexual orientation clause in the Constitution, was of particular importance in this regard.³³ When members of the National Party later expressed anxiety about the implications of the enumeration of sexual orientation (especially because of its perceived potential to protect 'deviant' sexual practices such as paedophilia and bestiality) individual interventions by gay rights activists were once again decisive.³⁴

For present purposes, it is important to note that during the negotiation process politicians also expressed concern about the legal implications of the inclusion of the sexual orientation clause for adoption and marriage rights for same-sex couples.³⁵ The response of the members of the Technical Committee, lawyers roped in to assist with the drafting of the Constitution, closely followed the submission made in this regard by gay and lesbian activists and stated that rights were necessarily limited, and that it was for the courts to interpret the proper reach of the clause.³⁶ At no stage were the politicians told that adoption by same-sex couples and same-sex marriage was the *sine-qua-non* for sexual equality.³⁷ Instead, for strategic reasons the implications of inclusion of the clause were minimised. It would have been foolish to present the inclusion of the sexual orientation clause as a dramatic break with the past and to admit that it might assist in effecting a radical transformation of society — especially not in relation to family law.³⁸ Instead, activists were able to present the oppression and discrimination of gay men and lesbians — as epitomised by the criminalisation of male same-sex sodomy — as being sufficiently similar to other forms of oppression and discrimination associated

32 Croucher (note 16 above) 320; Christiansen (note 18 above) 1031; and Stychin (note 29 above) 458.

33 L du Plessis and H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 142. See also Stychin (note 29 above) 458. Edwin Cameron and Kevan Botha were central figures in this process.

34 The intervention by Kevan Botha and Edwin Cameron is significant here. They present a summary of their arguments in Botha and Cameron (note 8 above) 289-290.

35 Stychin (note 29 above) 458.

36 Stychin (note 29 above) 459, quoting Hugh Corder who was a member of the Technical Committee dealing with the drafting of the Bill of Rights.

37 Interestingly, this fact was used by the Constitutional Marriage Amendment Campaign, a coalition formed to get Parliament to amend the Constitution in order to reserve marriage as between one man and one woman, to argue that it was never intended to extend marriage to same-sex couples. The organization refers to the Draft Lesbian and Gay Rights Charter drawn up under the auspices of OLGA in 1992 and points out that even this Charter which represented the views of the more progressive forces in the gay and lesbian community, did not envisage the recognition of same-sex marriage. The Charter was published in D Fine *Lesbian and Gay Rights Developing Justice Series* (1992) 8, Social Justice Resource Project and Legal Education Action Project, Institute of Criminology, University of Cape Town. <<http://defendmarriage.blogspot.com/search?updated-max=2006-08-28T11%3A45%3A00-07%3A00&max-results=50>>.

38 Stychin (note 29 above) 559. As Stychin points out, this was rather ironic as 'the entire constitutional process was understood as precisely the means by which radical social change was being implemented'.

with the struggle against apartheid. When the apartheid Parliament voted to adopt the 1993 Constitution and South Africa became the first country in the world to include an explicit non-discrimination provision based on sexual orientation in its Constitution, it was in its own way a radical move. Yet, those who took part in the process that led to this historic step did not necessarily envisage (or reveal) that it would lead to the acceptance of adoption and marriage rights for same-sex couples.

III RETAINING THE SEXUAL ORIENTATION CLAUSE IN THE 1996 CONSTITUTION

The inclusion of the sexual orientation clause in the 1993 Constitution was strategically a great victory for the gay and lesbian 'movement' in South Africa. However, because of the two-stage approach to constitution-making adopted as part of the transition in South Africa, this victory was not secure. It was open to the members of the Constitutional Assembly tasked with drafting a 'final' Constitution to leave out the sexual orientation clause in this second document. It was therefore not surprising that some members of the gay and lesbian community were galvanised into forming an organisation that would ensure the retention of the clause in the 1996 Constitution and would also manage the litigation strategy that would ensure — in the long term — the full and equal enjoyment of legal rights and benefits by all gay men and lesbians in South Africa.

Thus in late 1994, 43 gay and lesbian organisations came together to form the National Coalition for Gay and Lesbian Equality (NCLGE) at the First National Gay and Lesbian Legal and Human Rights Conference held in South Africa.³⁹ The conference was presented as a gathering of gay activists and other groups from across a broad political and cultural spectrum and was specifically designed to be inclusive in terms of race, gender, and social class. Delegates agreed that the Coalition had to pursue four interrelated objectives:⁴⁰ retaining the sexual orientation clause in the Constitution; decriminalising (male) same-sex conduct; constitutional litigation challenging discrimination in same-sex relationships; and training of representatives and effective leaders within the lesbian and gay organisations. Thus, the broad goals included the challenging of discrimination against same-sex couples, but deliberately did not include more radical demands for the achievement of same-sex adoption of marriage rights. These relatively modest goals (or so they now seem) formed part of a deliberate strategy to work towards important but achievable goals focused broadly on the Constitution and more specifically on law reform. It is therefore unsurprising that the Coalition's first task was to ensure

39 Croucher (note 16 above) 320; R Louw 'A Decade of Gay and Lesbian Equality Litigation' in M du Plessis & S Pete (eds) *Constitutional Democracy in South Africa 1994-2004* 65, 66; Stychin (note 29 above) 461. The conference was held on 3 December 1994 at the Centre for Applied Legal Studies, University of the Witwatersrand.

40 P Mtetwa 'Defend the Equality Clause' (1995) 1 *Equality: News and Views of the National Coalition for Gay and Lesbian Equality* 1.

that the sexual orientation clause be retained in the final Constitution. It is also unsurprising that the Coalition achieved this goal without much trouble. The retention of sexual orientation in the 1996 Constitution is widely acknowledged to have much to do with the efforts of the NCGLE.⁴¹ A critical analysis of these efforts makes it clear that for obvious strategic reasons the Coalition focused on the discrimination based in criminal law and deliberately did not draw attention to the possibility that the retention of the clause could lead to the legalisation of same-sex marriage.

The NCGLE embarked on an extensive lobbying campaign to ensure the retention of this clause in the 1996 Constitution.⁴² With the assistance of an employed lobbyist it successfully lobbied members of the Constitutional Assembly for the retention of the clause.

However, in evaluating the Coalition's lobbying effort it now seems to have adopted a relatively conservative kind of activism. There were four distinct aspects that would characterise the campaign.

First, the campaign to retain the sexual orientation clause in the 1996 Constitution was essentially driven by a small elite leadership who formulated a strategic plan they thought would achieve the stated goal and made sure that the plan was executed by the members. As Stychin points out, the strategy of the Coalition could 'best be characterised as orchestrated, managed, and insider'.⁴³ The campaign was also tightly controlled with dictates arriving from central office as to what was acceptable and what was not.⁴⁴ There was an overwhelming view among the leadership that a strong and unified message had to be delivered consistently so as not to create any unnecessary controversy and to prevent a backlash of any kind. To retain control of the process and to ensure that the 'right' message was sent to those who could decide the fate of the sexual orientation clause, a top-down management style had to be followed. Thus some criticized the campaign as elitist, undemocratic, and unrepresentative of South Africa's gay and lesbian community.⁴⁵

Second, the campaign was not aimed at changing the hearts and minds of the South African population or to confront homophobic attitudes and assumptions. It was felt it would be too risky to try to confront societal homophobia because of the strong possibility of a disastrous backlash. Every care was thus taken to be uncontroversial and to show that gay men and lesbians were also 'normal' human beings. Lobbyists were also briefed to approach members of Parliament in a non-confrontational manner and to try to find

41 N Oswin 'Producing Homonormativity in Neoliberal South Africa: Recognition, Redistribution, and the Equality Project' (2007) 37 *Signs: Journal of Women and Culture in Society* 649, 652. See also Christiansen (note 18 above) 1037.

42 Louw (note 39 above) 66.

43 Stychin (note 29 above) 463.

44 Ibid 463. Stychin mentions the fact that some activists wanted to advocate a letter-writing campaign to the Constitutional Assembly but that this was shot down by 'head office'.

45 Ibid 463; Croucher (note 16 above) 325.

common ground with the elected representatives.⁴⁶ The strong and unified message sent out by the Coalition during the lobbying effort was that homosexuals had been marginalised and oppressed by the apartheid regime, but were non-threatening individuals who wanted to be left alone to live their lives in peace and harmony with others. As part of this strategy the Coalition also consciously decided to engage the powerful role players with 'conservative' arguments around the immutability of sexual orientation (arguing that sexual orientation was just as immutable as race) and by trying to show that homosexuals were just as 'normal' and 'harmless' as most heterosexuals.⁴⁷ It effectively deployed a universalised version of homosexual identity and constructed a powerful argument in favour of non-threatening 'acceptance' within the predominant liberal legal discourse of the time.⁴⁸ However, in the process it 'avoided tackling its opponents within the terms of Afrocentrism'⁴⁹ — thus avoiding discussing arguments about the 'un-Africanness' of homosexuality — because it was part of the strategy to de-politicise the issue of the inclusion of sexual orientation in the Constitution. The strategy followed by the NCGLE to ensure the retention of the sexual orientation clause thus drew upon and replicated the model of the anti-apartheid movement which brought together a coalition of interests that was held together by the overwhelming centrality of its shared objective.⁵⁰ For the purposes of this article it is of particular importance to note that the leadership of the Coalition rather chose not to 'rattle potential adversaries in South African society by making specific demands' around controversial issues such as the re-definition of the family, adoption, and, of course, same-sex marriage.⁵¹

Third, it is also important to note that this 'strategy of persuasion rather than confrontation' was based on a conscious choice not to rely on, and thereby foster, a grassroots movement. Thus the executive committee of the Coalition decreed 'direct political action, civil disobedience, picketing, demonstrations and protest

46 I was one of 35 volunteers who assisted with the lobbying. It was decided that since I was a white, Afrikaans-speaking man I should go and speak with conservative, white, Afrikaner MPs because I would be able to 'speak their language'. I was instructed to remain friendly at all times no matter what was said to me and to try to keep the discussion focused on the need for equality for all human beings.

47 Oswin (note 41 above) 652. As Christiansen points out, there were good reasons to make this kind of argument, because opposition to the retention of the sexual orientation clause in the Constitution was based on strongly held feelings about the 'abnormality' of homosexuality and the Biblical injunctions against acceptance of gay men and lesbians (note 18 above) 1041-42.

48 As Stychin and others have pointed out, homosexual identity — as opposed to same-sex sexual acts — is an historically and culturally specific construct. Michel Foucault explains that such an identity was the product of nineteenth century medical discourse in Europe. See generally M Foucault *The History of Sexuality Volume One: An Introduction* (translated by R Hurley) (1990).

49 Stychin (note 29 above) 455.

50 Stychin (note 29 above) 461. He notes that at the founding conference of the NCGLE four objectives were agreed upon: (i) retaining the sexual orientation clause in the Constitution; (ii) decriminalizing (male)same-sex sexual conduct ; (iii) constitutional litigation challenging discrimination against same-sex relationships; and (iv) training of representative and effective leadership within the lesbian and gay organizations. See P Mtetwa (note 40 above).

51 Oswin (note 41 above) 652.

type actions' to be "inappropriate".⁵² According to Ronald Louw, this decision not to embark on a mass campaign but to lobby Parliamentarians 'was informed by the disorganised nature of gay and lesbian politics, the relatively small attendances at pride parades, and the lack of racial and gender representation in the more visible lesbian and gay movement'.⁵³ It was a deliberate strategy aimed at showing a strong united front while placating and reassuring the constitutional insiders with the real power.⁵⁴ There was a fear that mass mobilisation would create strong reaction from the religious right who may have mobilised in opposition and in much larger numbers than the gay and lesbian community.⁵⁵ In retrospect this fear seems to have been unfounded. The Constitutional Assembly (CA) received more than 22 000 submissions regarding the content of the Constitution. At the end of the process the CA had received 7 032 responses in support of including sexual orientation in the final text and 564 opposed to its inclusion, which suggests that grassroots gay and lesbian activists were far more energised than their religious opponents.⁵⁶

Lastly, it must be noted that the conservative lobbying strategy did not mean that the Coalition did not embrace a progressive discourse of human rights and political emancipation as espoused by the new ANC government. The leaders of the NCGLE, which included Edwin Cameron, Zackie Achmat,⁵⁷ and the erstwhile leader of GASA Kevan Botha, were obviously aware of the need for the Coalition to present an image of gender, class and racial diversity within its ranks to ensure that its struggle was positioned within the 'master frame' mentioned in the previous section. The Coalition worked hard to show that it was representative and also framed its issues in a language that tapped into the larger discourse of anti-apartheid oppression. They did this, both as a matter of principle and, I would contend, in the interests of strategy because the prevailing political climate prohibited mainstream constitutional players from opposing the granting of rights to historically marginalised groups.⁵⁸ In an environment where the political discourse was strongly in favour of equality rights, it was not very difficult to make the case for the retention of the sexual orientation clause in the 1996 constitution.⁵⁹ Moreover, in South Africa at a time when racial concern seemed to overwhelm all other political considerations, the issue of the inclusion of the sexual orientation clause was not a make or break issue for any political party, bar the African Christian Democratic Party (ACDP), and the statements by this party were so over the top that it alienated other political actors who might have had doubts about the retention of this clause.

52 NCGLE *Equality* newsletter of the NCGLE (March 1995) as quoted by Oswin (note 41 above) 652.

53 Louw (note 39 above) 66.

54 Stychin (note 29 above) 463.

55 Louw (note 39 above) 66.

56 M Palmberg 'Emerging Visibility of Gays and Lesbians in Southern Africa' in B Adam, J Duyvendak & A Krouwel (eds) *The Global Emergence of Gay and Lesbian Politics* (1999) 273.

57 Later to become leader of the Treatment Action Campaign.

58 The only political party represented in Parliament which actively opposed the retention of the sexual orientation clause was the African Christian Democratic Party (ACDP).

59 Stychin (note 29 above) 461.

Ultimately this strategy — although much criticised — was highly successful in achieving the stated goal of retaining the sexual orientation clause in the final Constitution. Only the ACDP openly declared its opposition to the retention of the clause,⁶⁰ a remarkable achievement given the weakness of the gay and lesbian movement and the overwhelming opposition to homosexuality in society. At the same time, the victory came at a price. The campaign had failed to foster a grassroots political movement that could build on the legal victories later achieved in the courts to truly begin to challenge the deeply ingrained prejudices in society. It also failed to begin preparing public opinion for the radical legal changes to come, although this does not seem particularly problematic because the Constitutional Court emerged as a champion of the rights of the homosexual minority, regardless or maybe because of the overwhelming homophobia in the South African society.

IV THE NCGLE AND ITS 'CONSERVATIVE' LITIGATION STRATEGY

(a) The strategic approach

Following the successful battle for the retention of the sexual orientation clause, the NCGLE set its sights on the other goals agreed upon at its founding conference. Although the broader challenge for the gay and lesbian movement was clearly to try to change public perceptions, empower gay men and lesbians to exercise the newly acquired rights, and safeguard the democratic principles that allow freedom and equality to flourish,⁶¹ the Coalition, at its first national conference in December 1995, determined a narrow strategic agenda dominated by legal interventions.⁶² The Coalition thus decided to embark on a carefully crafted and controlled programme of litigation as it felt that the lobbying process had ensured that the Coalition was in a strong position to take this fight forward.⁶³ According to the late Ronald Louw, who was intimately involved in the work of the NCGLE, the Coalition aimed to bring together a range of organisations under its umbrella to work together and — very importantly — *not to embark on court action on their own* outside the strategic vision of the Coalition. The Coalition would then control the process of deciding when and in what order to bring constitutional challenges regarding the various aspects of discrimination against gay men and lesbians. As Louw points out, this was a difficult task given the fact that gay and lesbian politics in South Africa up to that point had been fractious, with a fissure along racial lines.⁶⁴ Yet, in retrospect the Coalition (and its successor the Equality Project), managed to hold a remarkably tight grip on which sexual orientation

60 T Schweltnus 'Sexual Orientation and the Equality Clause' (1996) *Obiter* 319.

61 Oswin (note 41 above) 654.

62 Minutes of the NCGLE National Conference, Cape Town, 17 December 1995. NCGLE Collection, AM 2615, Gay and Lesbian Archives of South Africa.

63 Z Achmat *National Coalition for Gay and Lesbian Equality Draft Review 1994 — July 1998* (unpublished). See also Louw (note 39 above) 66.

64 Louw (note 39 above) 66. Also see N Lumphondwana 'Race Relations in the Lesbian Movement' (1996) 29 *Agenda* 72; and E Cameron 'Constitutional Protection of Sexual Orientation and African Conceptions of Humanity' (2001) 118 *SALJ* 642.

litigation was conducted in South Africa. It is therefore not surprising that the Constitutional Court was only required to consider the question of adoption rights for same-sex couples in 2002 and marriage rights in 2004.

As part of this tightly controlled litigation strategy, the Coalition decided that the first Constitutional challenge should be focused on the criminal provisions — including the prohibition on male sodomy — which essentially criminalised homosexuality in South Africa at that time.⁶⁵ As the arguments put forward by Edwin Cameron for the inclusion of sexual orientation showed, the criminalisation of gay sex was the most obviously obnoxious aspect of discrimination suffered by gay men and (and indirectly) lesbians. Unlike a challenge for the legal protection of same-sex couples, a criminal law challenge seemed ‘safe’ and winnable. In particular, two decisions by the Cape High Court — one delivered even before the advent of the new Constitution — indicated that judicial attitudes had changed and that the judiciary was ready to reconsider the wisdom of criminalising same-sex sodomy.⁶⁶ The thinking within the NCGLE was that a successful sodomy challenge would establish a strong jurisprudential foundation that could later be used as precedent to challenge more ‘difficult’ types of discrimination such as discrimination regarding adoption and marriage rights for same sex couples.⁶⁷ The Coalition was also still concerned that a public backlash might occur if the Constitutional Court were to make a decision on a more controversial topic such as on same-sex marriage or adoption by same-sex couples. As Louw pointed out, ‘a same-sex marriage application would be so out of tune with public sentiment’ that the leadership of the Coalition thought that ‘it would be unwise to bring such an application before establishing a gay and lesbian jurisprudence’.⁶⁸

65 This first application also challenged other provisions of the criminal law, but the main focus of the application was a challenge to the common law crime of sodomy. In South Africa the common law prohibited male sodomy and ‘unnatural acts’ (see J Burchell & J Milton *Principles of Criminal Law* (2nd ed) (1997)). The Sexual Offences Act 23 of 1957 also contained section 20A, which prohibited acts ‘calculated to stimulate sexual passion or to give sexual gratification’ between two men at a party. A party was defined as any occasion where more than two people were present. Lesbian sexual relationships were criminalized only to the extent that they fell foul of the age of consent provisions of the Sexual Offences Act (section 14), which required a lower age of consent for male and female same-sex sexual activity than for different sex sexual activity.

66 *S v H* 1993 (2) SACR 545 (C) and *S v Kampher* 1997 (2) SACR 418 (C).

67 Louw (note 39 above) 66.

68 Ibid 67. Despite the attempts by the Coalition to control the sexual orientation litigation, one of the first cases brought to court was by a lesbian couple who challenged the Regulations and Rules of the Police Medical Aid Scheme which excluded same-sex partners from the benefits of the scheme because it defined dependents as ‘the legal spouse or widow or widower or a dependent child’. The High Court, in *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (T), found that a legal duty to support each other existed between the two applicants without specifically invoking the Constitution (316A-B). It is clear that the Coalition was not happy with the fact that Ms Langemaat and her partner turned to the courts. Ronald Louw, who was involved with the Coalition, commented that ‘[t]his was a problematic application as it could have potentially raised various divisive issues such as adoption and same-sex marriage...’ (note 39 above) 67.

The conservative and careful attitude of the Coalition is evident in the fact that although in its first case it chose to challenge the common law and statutory provisions criminalizing same-sex sexual behaviour, it deliberately did not target those sections of the Sexual Offences Act that provided for a lower age of consent for same-sex sexual activity than for different sex sexual activity.⁶⁹ Because of the wide-ranging stereotype in society of gay men as sexual predators on the young, it was felt that attacking the age of consent would send the 'wrong signal' and would unnecessarily provoke those opposed to equal rights for gay men and lesbians. This strategy was at least partly successful because, as I will demonstrate below, it led to a long list of very important legal victories which ultimately paved the way for the *Fourie* decision.

However, the success achieved by the Coalition through litigation can only be viewed as a partial victory, since, in principle, it aimed to achieve far more than attack legally sanctioned discrimination against gay men and lesbians. Given the 'master frame' within which it situated its struggle, the Coalition was acutely aware of the social realities facing its constituents. At the 1995 national conference the Coalition declared that the litigation strategy would go hand in hand with building a strong gay and lesbian movement. It acknowledged that the majority of the Coalition's members were poor, had been racially discriminated against and did not have access to equal resources.⁷⁰ This meant that the Coalition had to provide support to people to empower them to build a strong political movement over and above its litigation strategy.⁷¹ What was required to safeguard the legal gains was to build a 'representative' lesbian and gay movement in South Africa which in turn would ensure that legal victories were translated into broader social transformation regarding sexual orientation issues.⁷² As Oswin points out, the Coalition constantly reiterated the importance of achieving this goal. He points to utterances by the NCGLE's national director, Mazibuko Jara who stated that:

69 The Sexual Offences Act prohibits 'immoral or indecent act(s)' committed by a man older than 19 with a man younger than 19 (Section 14(1)(b)). Soliciting or enticement by a man older than 19 of a man younger than 19 to commit 'immoral or indecent' acts is also criminalised by the Act. (In 1988 the tri-cameral Parliament extended the existing prohibition on 'immoral or indecent' acts between men and boys under 19 to those between women and girls under 19 in the Immorality Amendment Act 2 of 1988.) The Act does not only prohibit same-sex sexual acts between younger and older men — it also prohibits different-sex sexual acts between older men and younger women, referring to such acts not as 'immoral or indecent' but as 'unlawful carnal intercourse'. The age of consent for different-sex sexual acts differs from same-sex sexual acts and is pegged at 16 (Section 14(1)(a)). The word 'indecenty', in this context, has come to acquire a specific meaning, that includes any sexual acts between men that do not involve sodomy. In essence an 'indecent' act therefore refers to those acts which used to be punishable under the common law as 'unnatural' acts (Burchell & Milton *Principles of Criminal Law* (2nd ed) (1997) 635). In 1988 female same-sex sexual conduct was for the first time acknowledged by the legislator when the tri-cameral Parliament extended the existing prohibition on 'immoral or indecent' acts between men and boys under 19 to those between women and girls under 19 (Immorality Amendment Act 2 of 1988).

70 Oswin (note 41 above) 654, quoting from minutes of the NCGLE national conference in 1995.

71 Oswin (note 41 above) 659.

72 M Jara & S Lapinsky 'Forging a Representative Gay Liberation Movement in South Africa' *Development Update: Quarterly Journal of the South African National NGO Coalition and Interfund* 2 (1998) 2, 32.

[T]he origins of the NCGLE is firmly rooted in the struggle for human rights in South Africa and as a result our movement is far more focused on legal and constitutional issues than on the concept of “gay liberation”. In this process there is the risk of the grassroots of the community to be left behind. The Coalition acknowledges this and is eager to rectify it.⁷³

Given the twin goals of the Coalition, it is not possible to say that it was wholly successful. While it chalked up a long list of legal victories which culminated in the adoption of the Civil Union Act,⁷⁴ it never managed to build a grassroots gay and lesbian movement.⁷⁵ There were many reasons for this latter failure. As pointed out above, there was a high degree of orchestration and control and an often expressed need for discipline from members of the movement. Because of the essentially elitist nature of litigation, most members of the Coalition were willing to accept this. This willingness might also, at least partially, have been motivated by a relatively high degree of faith on the part of Coalition members in law and legal strategizing to achieve social change (and perhaps trust in the Constitution as a vehicle for transformation).⁷⁶ But because so much emphasis was placed on litigation, the core activists never really did the hard work needed to build a grassroots movement, placing a strong emphasis on ‘product, to the almost total exclusion of process’.⁷⁷ Although it was hoped at the time that the strategic victories in court would later allow a grassroots movement to flourish, this was far too optimistic and never happened. This is not atypical. Legal victories for social movements do not always translate into *political* gains for the movement. Thus Cicchino argues that:

[R]ights victories, of their nature, tend to have an ambivalent effect on the social movements that achieve them. While such victories can infuse a movement with vitality and confidence, they can also increase conservative tendencies, since each victory invariably means that there is now more for the oppressed group to lose’.⁷⁸

In South Africa this conservative tendency was further enforced by the conservative litigation strategy followed by the Coalition, which attempted to dampen expectations from grassroots members, which, in turn, dampened enthusiasm for political action. Thus, while one of the most pressing issues on the agenda of many gay men and lesbians at that time was their desire to enforce their right to get married or have their relationships otherwise legally protected, such expectations were ‘being consciously lowered by lawyers

73 Oswin (note 41 above) 660, quoting from M Jara ‘Mazibuko’s World’ *Gay SA* 16.

74 The NCGLE thus met three of the four initial organisational objectives. These objectives were: to ensure the retention of the sexual orientation clause in the new constitution; to decriminalize same-sex conduct; to prepare constitutional litigation to challenge sexual discrimination; and to train a strong and effective gay and lesbian leadership. See Jara & Lapinsky (note 72 above) and Oswin (note 41 above) 659.

75 Oswin (note 41 above) 660. See also M Nell & J Shapiro ‘Taking the Struggle Forward: An Evaluation of the National Coalition for Gay and Lesbian Equality’ (1998) 2. Report commissioned by the NCGLE, NCGLE Collection, AM 2615, Gay and Lesbian Archives of South Africa, Johannesburg, as quoted in Oswin (note 41 above) 661.

76 Stychin (note 29 above) at 464.

77 Nell & Shapiro (note 75 above) 3.

78 P Cicchino, B Deming and K Nicholson ‘Sex, Lies, and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill’ in D Herman & C Stychin (eds) *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (1995) 141, 156.

so as to comport with the incremental approach to law reform' which was planned and executed by the leadership.⁷⁹

Moreover, the focus on the attainment of *legal rights* and access to benefits did not necessarily improve the lives of those individuals who were supposed to be the target beneficiaries of the work of the Coalition. As one of the activists who worked for the Coalition remarked:

[T]hose benefits if you look at them don't really improve the lives of lesbian and gay people unless you're employed in a fairly well-off job and you travel internationally to meet some foreigner to come and marry you and all those kinds of things. Which is fine, well, it's great that they did that work, but it doesn't really incorporate the lives of most lesbians and gay people.⁸⁰

Despite these failings, the litigation strategy was important in establishing firm principle and precedent in the build up to the same-sex marriage judgment of the Constitutional Court. The strategy must therefore also be evaluated with reference to the attainment of same-sex marriage. I shall return to this issue in the last section of this paper.

(b) The jurisprudence on sexual orientation

Reading the Constitutional Court's judgment in the *Fourie* case, it is striking to note that it contains six pages of discussion on the Court's precedent regarding sexual orientation discrimination.⁸¹ It reads as if Sachs J was saying to the public, to lawyers and to his fellow judges that the outcome of the case had indeed become inevitable, given the nature of the jurisprudence on sexual orientation discrimination developed by the Court in previous cases. In this sense the cautious litigation strategy employed by the NCGLE paid off. By the time the Constitutional Court was called upon to decide on the same-sex marriage question, it had given such a ringing endorsement of the rights of gay men and lesbians, that it seems that even judges who might have wished to provide same-sex couples with partnership rights that fell short of full marriage, were bound by the long list of precedent and were therefore forced to go along with the decision by Sachs.⁸² To illustrate this point, I shall now turn to the relevant case law.

In the first case to reach the Constitutional Court — dealing with the criminalisation of (male) sexual activity — the Coalition got what it had hoped for (and more) in the line of precedent. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,⁸³ Ackermann J declared invalid the common law crime of sodomy as well as several legislative provisions dealing with

79 Stychin (note 29 above) at 464.

80 Interview with former director of the Equality Project in Johannesburg August 2003 as reported by Oswin (note 41 above) 662-663

81 *Fourie* (note 4 above) paras 46-58.

82 There is no way of knowing whether some of the Constitutional Court judges who took part in the *Fourie* case harboured doubts about the full extension of marriage rights to same-sex couples. I think it likely that at least some of them might have felt this way. However, it is my contention that if there were such judges they would have been boxed in by previous precedent.

83 1998(12) BCLR 1517 (CC) (*NCGLE v Justice*).

male same-sex sexual activity.⁸⁴ The Court gave a very broad interpretation of sexual orientation, stating that it was:

[d]efined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.⁸⁵

This seemed to suggest that the constitutional protection would safeguard the rights of not only those individuals who have embraced a homosexual identity, but everyone who found themselves subject to discrimination because of their emotional and erotic attraction to a member of the same sex.

Even more significantly, the Constitutional Court associated respect for the rights of gay men and lesbians with the acceptance of the significance of difference in society. The court linked the equality guarantee in the Constitution to the anti-subordination principle, arguing that the 'desire for equality is not a hope for the elimination of all differences', but, indeed, a rejection of subordination. Quoting from a Canadian Supreme Court decision, Ackermann J continued:

It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.⁸⁶

The court thus argued that any justification for treating individuals, who are viewed as 'different' from the norm differently, would produce or perpetuate the subordination of that group and it is exactly this subordination of groups which the right to equality is aimed at eradicating. In our constitutional order, equality and uniformity are far from synonymous but, instead mean 'equal concern and respect across difference'.⁸⁷ In his concurring opinion, Sachs J went even further, arguing that the acceptance of difference is particularly important in South Africa where group membership has been the basis of express advantage and disadvantage in the past. The development of an active

84 This included section 20A of the Sexual Offences Act of 1957; the inclusion of sodomy in the Schedule 1 of the Criminal Procedure Act of 1977; and the inclusion of sodomy in the schedule to the Security Officers Act of 1987.

85 Ibid para 20.

86 *NCGLE v Justice* (note 83 above) para 22. The court quoted Cory J, delivering part of the joint judgment of the Canadian Supreme Court in *Vriend v Alberta* (1998) SCR 493 para 69.

87 Ibid para 130. According to Sachs J, the success of the whole constitutional endeavour in South Africa will depend in large measure on how effectively 'sameness' and 'difference' are reconciled. As the judge so eloquently stated:

[Equality] does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society. (para 132 (footnotes omitted)).

rather than a purely formal enjoyment of a common citizenship depends on recognising and accepting people as they are. In the context of sexual orientation this means that:

[T]he concept of sexual deviance needs to be reviewed. A heterosexual norm was established, gays were labelled deviant from the norm and difference was located in them. What the constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.⁸⁸

One could therefore interpret the judgement as a rejection of discourse of normality around sexuality. What seems to be rejected is the very notion of heteronormativity that has been deeply entrenched in South Africa's legal culture and society. This is a society that assumes that heterosexual culture is the elemental form of human association, the very model of inter-gender relations, the indivisible basis of all community and the means of reproduction without which society would not exist.⁸⁹ It is a society in which heterosexuality has sneaked into dialectical thought (that is, thought of differences) as its main category⁹⁰ while homosexuality has come to be understood as a hierarchical inferior deviation from this category. At first glance, this profoundly progressive moment in the judgment embodies a rejection of conformity and an embrace of diversity. It suggests that we are all different from each other, heterosexuals just as different as homosexuals. In this view then, homosexuals stop being 'failed heterosexuals' and become human beings with the same right to self-realisation as all other groups in society. The fact that the state may not impose orthodoxies of belief systems on the whole of society has two consequences. The first is that gay men, lesbians and bisexuals cannot be forced to conform to heterosexual norms. They can now break out of their invisibility and live as full and free citizens of South Africa. The second is that those persons who for reasons of religious or other beliefs disagree with or condemn homosexual conduct, are free to hold and articulate such beliefs. Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to endorse such beliefs in any way.⁹¹

It is difficult to overstate the power of the rhetoric in the first National Coalition case. In a way no other court in the world had ever done, the Constitutional Court rejected the very basis of different treatment of gay men and lesbians by rejecting the notion of normal and abnormal sexuality

88 Ibid para 134.

89 M Warner 'Introduction' in M Warner (ed) *Fear of a Queer Planet: Queer Politics and Social Theory* (1993) xxi.

90 M Wittig *The Straight Mind* (1992) 40, 43.

91 *NCGL v Justice* (note 83 above) para 137.

as aligned with hetero- and homosexuality. When the Constitutional Court handed down their judgment dealing with the rights of same-sex couples in the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* — the second National Coalition case — there was much hope that it would build on the jurisprudence of the first case. And at first blush, the soaring rhetoric once again deployed by the Court seemed to suggest that the judgment provided a firm basis for further litigation that would eventually lead to the achievement of full equality rights for same-sex couples and for individuals who experience an emotional and erotic attraction to members of their own sex.

In this case the Constitutional Court endorsed the view that in the absence of same-sex marriage, the state has a duty to protect same-sex couples who live in same-sex life partnerships.⁹² In the process it created a new legal entity, namely the ‘same-sex life partnership’, which is ‘a conjugal relationship between two people of the same sex’.⁹³ It is clear from the decision that not all relationships of same-sex couples would be considered constitutionally worthy of protection. To determine which relationships would be protected the starting point is to enquire what the nature of family life is that is usually protected by legislation that protects heterosexual marriage. Such an enquiry reveals that under South African common law a marriage ‘creates a physical, moral and spiritual community of life, a *consortium omnis vitae*’.⁹⁴ A *consortium omnis vitae* embraces intangibles such as loyalty and affection as well as more material needs of life such as physical care, financial support and the running of a common household.⁹⁵ The duties of cohabitation and fidelity flow from such a relationship. Lastly, this reciprocal duty of support also means that the partners have a joint responsibility for supporting and raising children born of the marriage.⁹⁶ The formation of such a relationship is a matter of profound importance to everyone concerned ‘and is of great social value and significance’. Relationships which create similar obligations and have similar social value to heterosexual marriage should therefore be legally protected as well.⁹⁷

Looking at the lofty wording deployed by the judges in *NCGLE v Home Affairs*,⁹⁸ it may be easy to conclude that this judgment made the eventual achievement of same-sex marriage inevitable. However, there were at least three aspects of the decision that troubled commentators. First, it was noted that the Constitutional Court declined to give the word ‘spouse’ as used in the

92 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39 (CC) (*NCGLE v Home Affairs*) para 57.

93 *Ibid* para 36.

94 *Ibid* para 46, quoting from JD Sinclair assisted by J Heaton *The Law of Marriage* Vol 1 (1996) 422.

95 *Ibid*. See *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) at 9G.

96 See for example *Dawood & Another; Shalabi & Another; Thomas & Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC) para 31; *Satchwell v President of the Republic of South Africa and Another* 2002 (9) BCLR 986 (CC) (*Satchwell*).

97 *Satchwell* (*ibid*) para 22.

98 Note 92 above.

Act a broad meaning to include same-sex life partnerships. The question thus arose whether this would not prove an obstacle for future litigation specifically aimed at achieving same-sex marriage.⁹⁹ Those sections of the judgment which recognised 'permanent same-sex life partnerships' alongside 'spouse' was said to be especially worrying. The argument was put forward that this has laid the legal foundation for the recognition of separate but equal institutions to regulate intimate relationships.¹⁰⁰ It is clear that the Court declined to say to what extent, if at all, 'the law ought to give formal institutional recognition to same-sex life partners'.¹⁰¹ In response to arguments by the Minister of Home Affairs that it was of considerable public importance to 'protect the traditional and conventional institution of marriage', the court said that 'even if this proposition were to be accepted', the protection 'may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership'.¹⁰² When fashioning a remedy in this case the Court furthermore stated that '[t]he family unit of a same-sex life partnership is different from the family unit of spouses and to treat them identically might in fact, in certain circumstances, result in discrimination.'¹⁰³ These dicta have been interpreted as creating the legal space for the 'statutory recognition for what have been variously termed domestic partnerships or civil unions'.¹⁰⁴

Second, concern was expressed about the way in which the Court dealt with this newly created legal entity called the same-sex life partnership.¹⁰⁵ The Court said that one should be able to determine whether such a partnership has legally come into existence by looking at the totality of all relevant facts and determining whether the same-sex partnership is sufficiently similar to that of the (idealized) heterosexual marriage. It provided an open ended list of factors that might be relevant. These factors focused on the permanence of relationship and the public nature of the commitment and included: the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share respon-

99 See R Louw 'Gay and Lesbian Partner Immigration and the Redefining of Family' (2000) *SAJHR* 313, 315, where Louw stated:

It is not that we are bound by this narrow definition [of the word spouse] (in fact the Court's avoidance of the issue might be a reason why it will require future constitutional analysis), but there are dicta in the judgment which, if followed, could lead to an institution alternative to marriage being used to recognize gay and lesbian relationships.

Louw did not, however, indicate which dicta exactly would be problematic.

100 Ibid 320.

101 *Fourie* (note 4 above) para 60.

102 Ibid para 55.

103 Ibid para 84. But the Court the continued by stating '[s]ame-sex life partners are *as of yet* not recognized or protected in a comparable manner by the law'.

104 Louw (note 99 above) 321.

105 See generally P de Vos 'Same-sex sexual desire and the re-imagining of the South African Family' (2004) *SAJHR* 179.

sibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another.¹⁰⁶

Given the forceful rhetoric of the Court in *NCGLE v Justice* regarding the right to be different, the focus on the above factors suggests that only idealized heterosexual marriage-like relationships would be legally protected. Although the Court was at pains to point out that none of these requirements is indispensable for establishing a relationship worthy of legal protection,¹⁰⁷ the cumulative effect of this set of factors and the way in which the Court has dealt with questions about the legal protection of same-sex relationships in other cases, suggests that relationships that do not closely map that of an idealized heterosexual marriage, will not be worthy of equal concern and respect. The judgment seems to support a rather narrow conception of family, even while it professes to endorse a more open-ended view of the legal regulation of intimate relationships. It is silent, say, on a relationship in which a gay man and a lesbian make arrangements to have a child and to act as co-parents of that child but do not engage in a conjugal relationship traditionally associated with the joint parents of a child.¹⁰⁸ While this judgment thus placed the legal recognition of same-sex relationships on the table, it failed to engage with the possible consequences of an equality right to be different. This trend continued in other cases on adoption rights¹⁰⁹ and pension rights.¹¹⁰

Third, it has been argued that the Court's approach to same-sex life partnerships seems to reflect a deeply problematic view of what constitutes worthy same-sex relationships and thus also about who qualifies as 'good homosexuals'. Those factors, which according to the court would be relevant for determining whether to legally recognise such relationships — for example couples sharing a common home, joint pension rights, joint wills — seem to mirror neo-liberal assumptions about the role of relationships in the capitalist system. Ideal homosexual relationships, it seems, will be relationships that help to facilitate the privatisation of care responsibilities and will thus shift

106 *NCGLE v Justice* (note 83 above) para 88. See also *Du Toit and Another v Minister for Welfare and Population Development and Others* 2002 (10) BCLR 1006 (CC) (*Du Toit*), where the Court, in determining that the applicants' relationship was worthy of protection, described their relationship in the following terms:

The applicants have lived together as life partners since 1989. They formalized their relationship with a commitment ceremony, performed by a lay preacher in September 1990. To all intents and purposes they live as a couple married in community of property; immovable property is registered jointly in both their names; they pool their financial resources; they have a joint will in terms of which the surviving partner of the relationship will inherit the other's share in the joint community; they are beneficiaries of each other's insurance policies; and they take all major life decisions jointly and on a consensual basis. (Para 4).

107 *Fourie* (note 4 above) para 88.

108 De Vos (note 105 above) 197.

109 *Du Toit* (note 106 above).

110 *Satchwell* (note 96 above).

the burden of care from the state onto individuals. This means perhaps that the 'good homosexual' envisaged by the Constitutional Court will be a middle-class man or woman and will perhaps be white.¹¹¹ After all, many poor and/or black South Africans still do not have the financial resources to fully carry the burden envisaged by this neo-liberal relationship model, and may continue to rely on the state to provide access to housing and old age pensions. As Stychin points out, implicit in the Court's imagining of the good homosexual 'may be an understanding of homosexuality as a white, middle-class phenomenon and, as a consequence, a wide array of ways of living come to be erased'.¹¹² Perhaps inevitably, the relationships considered worthy of protection as 'same-sex life partnerships' are relationships that 'dare speak their name'. Only those couples prepared to and capable of disclosing the nature of their relationships and who are willing to open up their lives to the surveillance by the Courts or officials of the Department of Home Affairs, stand a chance of protection.

This is a potentially important insight because if true, it may well suggest that the ultimate achievement of full marriage rights for same-sex couples would not necessarily be a victory that would lead to the emancipation of all (or even the majority) of gay men and lesbians in South Africa, and that its benefits would be more pronounced for middle class (and perhaps white) couples whose relationships mirror the imagined characteristics of an ideal marriage. What happens to those gay men and lesbians whose lives do not allow for the opening of joint bank accounts, the sharing of homes, the making of joint wills and the sharing in pension fund benefits? What happens to those homosexuals whose sexual identities do not facilitate the formation of permanent life partnerships or whose social and economic circumstances or cultural and familial bonds and demands make it impossible to 'come out' of the closet to claim the legal rights aimed at protecting them?

V THE 'MARRIAGE' JUDGMENT

In the *Fourie* decision the Constitutional Court declared, first, that the common law definition of marriage is 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, second, that the Marriage Act — in terms of which marriages are concluded in South Africa — is invalid because it refers only to marriage between a 'husband' and 'wife', and not between 'spouses'.¹¹³ In doing so the Court again endorsed the notion that at the heart of the prohibition on discrimination based on sexual orientation

111 I am not contending that this is a conscious choice on the part of the judges on the Constitutional Court or that, when pushed, the judges would not readily agree that individuals of all races and all classes can and do experience emotional and sexual desire for members of the same sex. My contention is that the Court may have made assumptions about what constitutes a legally valid same-sex relationship based on their own experience of relationships, which would be mediated by race and class.

112 C Stychin "A Stranger to its Laws": Sovereign Bodies, Global Sexualities, and Transnational Citizens' (2000) 27 *Journal of Law and Society* 601, 621-622.

113 *Fourie* (note 4 above) para 415.

is an acceptance of the right to be different.¹¹⁴ It also confirmed its previously expressed view that individuals in same-sex relationships should not be defined exclusively in terms of their sexual desire,¹¹⁵ and that same-sex couples are equally as capable of forming intimate, lasting relationships and raising children as heterosexual couples.¹¹⁶

The Court situated its analysis of the case within the broader perspective of South Africa's oppressive and discriminatory past, within the 'master frame' also adopted many years before by the NCGLE. This was not a new development as South Africa's Constitutional Court has often emphasised that one can only grasp the far-reaching, progressive effect of the constitutional protections if one remains aware of the apartheid past and understands that the Constitution was drafted in large part to prevent a recurrence of the dehumanising oppression and marginalization that characterised the apartheid state.¹¹⁷ The apartheid legislation that contributed to this oppression included the Immorality Act,¹¹⁸ which criminalized sexual intercourse between white and black people and the Prohibition of Mixed Marriages¹¹⁹ Act which prohibited marriage between white and black people in South Africa. There has therefore been a long history in South Africa of interference with the all-important life enhancing choices people make about their intimate actions and relationships, interference that was based on a disregard for the human dignity of black citizens.

The Constitutional Court further noted that during the apartheid era, gay men and lesbians suffered a particularly harsh fate, having been branded as criminals and rejected by society as outcasts and perverts. It also pointed out that this exclusion and marginalisation, 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.

It is within this historical context that the reasoning of the Constitutional Court in the *Fourie* case should be understood. The Court's reasoning follows a logical route which suggests that at least some of the fears expressed about the creation of a second class recognition for same-sex couples, through the recognition of same-sex life partnerships, were unfounded. The Court said that marriage is an important and unique institution and constitutes 'much more than a piece of paper'.¹²⁰ On the one hand, it pointed out that marriage until recently was the only source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims and the like. On the other hand, the Court noted that marriage also bestows a myriad of *intangible* benefits on those who choose to enter into

114 Ibid para 59-62.

115 Ibid para 52.

116 Ibid para 53.

117 *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) para 19.

118 Act 21 of 1950.

119 Act 55 of 1949.

120 *Fourie* (note 4 above) para 70.

it. As such, marriage entitles a couple to celebrate their commitment to each other at a public event so celebrated in our culture. Couples who marry are showered with presents and throughout their lives are able to commemorate this event at anniversaries while pictures of the day can be displayed in their house and in the houses of their families. Given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this regard 'would be to negate their right to self-definition in a most profound way'.¹²¹ Thus, the Court argued that where the law fails to recognise the relationships of same-sex couples 'the message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected'. It serves, in addition, to perpetuate and reinforce existing prejudice and stereotypes. 'The impact constitutes a crass, blunt, cruel and serious invasion of their dignity'.¹²² The Constitutional Court continued:

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.¹²³

The important conclusion is therefore that the exclusion of same-sex couples from marriage has both a *practical* and *symbolic* impact, which means that the problem cannot be rectified through the recognition of same-sex unions outside the law of marriage. According to the Court, in responding to the unconstitutionality of the existing marriage regime, *both* the practical and the symbolic aspects have to be responded to.

Thus, it would not be sufficient merely to deal with all the practical consequences of exclusion from marriage. It would also have to accord to same-sex couples a *public and private status* equal to that which heterosexual couples achieve from being married.¹²⁴

Because of the fact that marriage has a symbolic power, a 'separate but equal' regime for same-sex couples would therefore not be sufficient.¹²⁵ The judgment refers per illustration to the apartheid-era case of *R v Pitje*, in which the appellant (a candidate attorney with the law firm of Nelson Mandela) occupied a place at a table in court that was reserved for 'European practitioners'. The

121 Ibid para 72.

122 Ibid para 54.

123 Ibid para 71.

124 Ibid para 81.

125 It is intriguing to note that the judgment never uses the term 'marriage' itself when speaking of the need for the legal recognition of same-sex relationships. However, the fact that the court emphasizes that marriage provides not only tangible legal rights, but also intangible benefits and status implies that extending anything less than marriage rights to same-sex couples would constitute disregard for the human dignity of same-sex couples and would thus be discriminatory.

Appeal Court at the time upheld the appellant's conviction for contempt of court as it was '...clear 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 be hampered in the slightest in the conduct of his case by having to use a particular table'. This approach, Justice Sachs remarked 'is unthinkable in our constitutional democracy' today.¹²⁶

The Court then proceeded to consider (and then to reject) some of the arguments put forward by religious groups against the recognition of same-sex marriage. Because these arguments were put forward in order to try to convince the Court of the need to recognise same-sex relationships in a way not associated with marriage, it is important to highlight some of the reasoning here. First, the Constitutional Court confirmed its rejection of the age-old argument that the constitutive and definitional characteristic of marriage is its procreative potential and can therefore never include same-sex couples.¹²⁷ This argument, it said, was deeply demeaning to heterosexual married couples who, for whatever reason, either choose not to procreate or are incapable of procreating when they enter a relationship or become so at any time thereafter.¹²⁸ It is also demeaning for couples who start a relationship at a stage when they no longer have the capacity to conceive or for adoptive parents. Although this view might have some 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.¹²⁹

Second, it rejected the other familiar argument 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. Although the Court recognised that religious bodies play a large and important part in public life and are part of the fabric of our society,¹³⁰ it endorsed the view that 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 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.¹³¹

This means that 'the religious beliefs of some cannot be used to determine the constitutional rights of others'. In an open and democratic society there should be a capacity to accommodate and manage difference and not to enforce the view of the (religious) majority on marginalised minorities in ways that would

126 *Fourie* (note 4 above) para 151.

127 *Ibid* para 51.

128 *Ibid* para 86.

129 *Ibid* para 90.

130 *Ibid* para 90-93.

131 *Ibid* para 98.

reinforce unfair discrimination against a minority.¹³² A contrary view smacks unpleasantly of the authoritarian/totalitarian tactics so characteristic of the National Party government during the apartheid era.

The judgement provided Parliament with the opportunity to remedy the unconstitutionality within one year. Parliament was required to adopt new legislation that would accord same-sex couples the same rights and status as enjoyed by heterosexual married couples. If Parliament failed to do so within a year, the existing Marriage Act would automatically be amended to include same-sex couples and would extend all the rights associated with marriage to such couples.

The judgment contains ringing language affirming the right of gay men and lesbians to form intimate life partnerships and to 'be different'. But there seems to be a contradiction at the heart of the rhetoric employed by the Court. It is striking to note the degree to which this judgment valorises the institution of marriage and endorses the view that legal marriage remains the only comprehensive and valid way in which two people can (and perhaps should) bestow full legal and societal recognition on their relationship. At the heart of the decision is an acceptance of the fundamental importance of marriage for our society. In order to show that the exclusion of same-sex couples from marriage fundamentally affects their human dignity, the Court emphasises both the legal and symbolic nature of marriage and approvingly notes that marriage provides those who enter into it with a specific, somewhat exalted, status in our society. Although this valorisation of the institution of marriage by the Constitutional Court is not new,¹³³ it is particularly striking and somewhat jarring in this case, given the rhetoric of the Constitutional Court in both the *NCGLE v Home Affairs* judgment and earlier in the *Fourie* judgment about 'the right to be different'. If the test for the full recognition of equality is about the recognition of and respect for difference, then why, one might wonder, is it appropriate for the law to bestow special rights and a special status on those hetero- or homosexual couples who choose to enter into traditional marriage? The judgment thus hints at the limits of a political and legal strategy for the emancipation of gay men and lesbians based on a model of assimilation and acceptance. It seems to suggest that acceptance, true acceptance, only comes to those who wish to make or have the power to make a choice in favour of 'normality' — even though, given the economic, social or cultural position of individuals, this 'choice' might not be open to all. The 'right to be different' then runs the risk of becoming an empty slogan. One might even argue that it becomes merely the right not to be a heterosexual — as long as one conforms to the image of the idealised imaginary heterosexual. I shall return to this point in the last section of this paper.

132 Ibid para 94.

133 See for example *Dawood* (note 96 above); and *Volks v Robinson* 2005 (5) BCLR 446 (CC).

VI THE FIRST DRAFT OF THE CIVIL UNION BILL

Many activists and ordinary gay men and lesbians were deeply upset by the remedy offered by the majority of the Court in the *Fourie* judgment,¹³⁴ arguing that it was not an effective remedy and condemned same-sex couples who wished to get married to another year in legal limbo.¹³⁵ Because the judgment never used the word ‘marriage’, there was also some anxiety that Parliament would try to avoid its responsibilities by providing a separate but equal regime of legal protection that would not comply with the letter and spirit of the majority judgment. It was therefore with some trepidation that activists approached the original version of the Civil Union Bill¹³⁶ when it was tabled in Parliament at the end of August 2006. The Bill proposed the creation of a separate institution for same-sex couples — called a ‘civil partnership’ — which purported to bestow exactly the same legal rights on same-sex civil partners as on heterosexual married couples.¹³⁷ There were, however, three pivotal ways in which the proposed civil partnership differed from traditional marriage: it would not be called a marriage (except at the ceremony if the partners so chose),¹³⁸ marriage officers — even those who are not related to a religious institution — would have a right to refuse to solemnise a civil partnership,¹³⁹ and it would only be open to same-sex couples, not to heterosexual couples.¹⁴⁰ It was therefore argued that this Bill represented an attempt to create a ‘separate but equal’ marriage regime that would ‘protect’ ‘real marriage’ from ‘contamination’ and ‘defilement’ by same-sex couples, while pretending to provide such couples with equal partnership rights. This move was deeply upsetting to many in the gay and lesbian community, not only because it failed to respect the human dignity of gay men and lesbians which is protected in the Constitution, but also because, so it was argued, it obviously contradicted the very clear instructions set out by the Constitutional Court.

This view was based on the fundamental assumption at the heart of the *Fourie* judgment that the institution of marriage indeed had a special *status* in our society and that access to the institution of ‘marriage’ would be the only way to truly give effect to the Constitutional promise of equality. The Bill, it was argued, created a separate and inferior regime and failed to recognise — as the Constitutional Court did — that both tangible legal consequences and

134 O’Regan J wrote a dissenting judgment on the issue of remedy only.

135 Many had criticized the majority for not adhering to its own precedent on remedies which would have required the court to provide a remedy that would have vindicated the rights of the litigants. Many also expressed doubt about the wisdom of allowing a public participation process, given the deeply entrenched homophobia in society. On the latter point, many of us changed our minds. Although the public participation process that accompanied discussions about the adoption of the Civil Union Act was deeply flawed, it did open up a conversation about sexual orientation and provided an unprecedented platform in the media for those arguing in favour of respect of gay men and lesbians.

136 Draft Civil Union Bill, GG 29169 (31 August 2006).

137 Ibid section 13.

138 Ibid section 11.

139 Ibid section 6.

140 Ibid section 1.

intangible benefits flow from the act of entering into a marriage. The problem, it was said, was clearly that a Bill that did not allow same-sex couples the right to get married and call their union a marriage, would not provide for an institution of equal *status*. It seemed to propose a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation. This was problematic, given the fact that the Constitutional Court made clear that 'separate but equal' partnership rights would not be good enough because it would serve as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to discrimination.

Gay and lesbian activists, assisted by the language deployed by the Constitutional Court, launched a sustained attack on the draft legislation.¹⁴¹ Tapping into the 'master frame' mentioned before, arguments were put forward about the inherent unfairness of a 'separate but equal' marriage regime. By pointing out that the concept of marriage has a profound symbolic, emotional and political power in our culture that gives it a special status, it became easier for activists and academics to show that by refusing same-sex couples the right to enter into an institution called 'marriage', the Bill would deprive same-sex couples of the right to access the status associated with the term 'marriage'. It was also easier to show how deeply problematic it was that civil partnerships were envisaged as being exclusively for same-sex couples who would still be prohibited from accessing the institution of marriage reserved for heterosexuals.¹⁴² The arguments that it is extremely insulting and humiliating towards those of us who might want to marry a member of our own sex, resonated with some members of the ANC, exactly because it powerfully reminded them of the similarities with apartheid.¹⁴³ After political intervention, the ANC members of the Home Affairs Portfolio Committee decided at the last possible moment that it would be necessary to amend the draft Bill. Activists furthermore could point to the Constitutional Court warning that creating a special institution for same-sex couples would invariably be based on prejudice against or hatred of homosexuals. And prejudice, the Court has said on many occasions, can never justify discrimination in our constitutional dispensation.

It was furthermore argued that the effects of the Bill were potentially more severe because so many gay men and lesbians still experience tremendous oppression, marginalisation and vilification in our society. Some men and women are still raped, assaulted or even killed because they are lesbians or gay. In this context, the creation of an apartheid-style separate civil partnership for same-sex couples, it was argued, would merely confirm that the law did not consider our relationships equal in status and worthy of equal concern

141 See for example P de Vos 'Gays and Lesbians Now "Separate But Equal"' Mail & Guardian 17 September 2006, <http://www.mg.co.za/articlePage.aspx?articleid=284218&area=/insight/insight__comment_and_analysis/>.

142 See Parliamentary Monitoring Group (note 13 above).

143 I was told this personally by a member of the ANC caucus in Parliament who took part in the debate in the caucus on the Civil Union Bill on the condition that I would not mention his name. Similar sentiments were expressed to me by an advisor to the Minister of Home Affairs.

and respect. In short, a doctrine of ‘separate but equal’ was deeply humiliating and insulting when applied to black South Africans. It remains humiliating and insulting (and now also unconstitutional) when applied to homosexuals.

Completely absent from the discussion by representatives of the LGBTI¹⁴⁴ community in this debate, was any critique of the institution of marriage as a patriarchal or otherwise outdated institution, or any arguments in favour of civil partnership as an alternative to marriage. Nor was there any public discussion about the potential ‘normalising’ power of marriage or problems of access to the institution by especially poor and black gay men and lesbians or by individuals who do not identify as gay or lesbian at all but who experience emotional and sexual attraction towards members of their own sex. Although South African legal academics have raised critical questions about the problematic role of marriage in the regulation of relationships and the inevitable legal exclusion of those who do not conform to the idealized heterosexual norm,¹⁴⁵ these critical voices were almost completely absent from the debate around the Civil Union Bill.

One possible explanation for this is that the LGBTI movement has been so successful in framing the struggle for sexual freedom within the master frame of the anti-apartheid struggle that this approach has come to dominate the discourse completely. The rhetoric of ‘separate is never equal’, echoing pre-democracy era slogans used in the anti-apartheid struggle, may have been so deeply entrenched and rhetorically powerful that it may have inhibited critical voices from emerging. Those of us who have expressed some criticism of the valorisation of marriage in our legal system and in our society, may have felt it would be churlish and counter-productive to criticise marriage when its achievement was posited by the Constitutional Court and most other LGBTI activists as the final barrier to full and equal acceptance of gay men and lesbians by the law and ultimately by society.

Another, perhaps more decisive, reason for this silence was the uncritical acceptance by the mostly middle-class, mostly white, LGBTI activists, lawyers and academics¹⁴⁶ involved in the process that the Constitutional Court’s view of the legal and symbolic centrality of marriage in our society accurately described the lived reality of most people in the country. In this view, marriage may not be perfect, may well be a patriarchal institution, may well not provide adequate legal or emotional protection to many people who are married and may well facilitate and perpetuate gender oppression, but because of its symbolic position in our society, it remains the only prize worth having. By gaining access to the institution of marriage, so the argument goes, gay men and lesbians gain access to an institution of extremely powerful symbolic value that would help to pave the way towards societal acceptance

144 Lesbian, Gay, Bisexual, Transgender and Intersex.

145 B Goldblatt ‘Regulating Domestic Partnerships — a Necessary Step in the Development of South African Family Law’ (2003) 120 *SALJ* 610, 612; P de Vos ‘Same-sex marriage, the right to equality and the South African Constitution’ (1996) 11 *SA Public Law* 356.

146 I include myself in this group as I was also involved in the lobbying process and did not raise a critical voice during the discussions.

of homosexuality. Access to marriage by same-sex couples may thus help to change the way society views homosexuality and may help to take the edge off the hatred and prejudice that is still so prevalent in South African life. I will return to the wisdom of this view in the last section of this paper.

VII THE AMENDED CIVIL UNION ACT

Ultimately, arguments put forward by activists and academics were at least partly successful and early in November the National Assembly adopted a substantially amended Bill which provided for same-sex couples to enter into 'marriage' or a 'civil partnership'¹⁴⁷ that would accord to those who enter it all the rights associated with traditional heterosexual marriage.¹⁴⁸ The Civil Union Act thus amends all existing legislation and common law in which references are made to 'marriage', 'husband', 'wife' or 'spouse', so that it will apply equally to those couples who register a marriage or a civil partnership in accordance with the Civil Union Act. The Act now provides for the recognition of same-sex relationships in a way that extends to same-sex couples the same rights and duties and the same status as that traditionally enjoyed by different-sex couples. The new Act provides for both same-sex and different-sex couples to enter into a marriage or a civil partnership¹⁴⁹ and prescribes the formal requirements for entering into such a civil union marriage. This means that the Act allows both same-sex and different-sex couples to register their relationship in terms of this legislation. It also means that it provides such couples with a choice, either to register a 'marriage' or a 'civil partnership'. Whether one chooses to register a marriage or a civil partnership, the legal consequences would be exactly the same. At first blush, it seems somewhat perplexing that this choice was provided at all. Most couples would probably not choose to register 'civil partnerships' if they have the choice of registering

147 Civil Union Act 17 of 2006, section 1 which defines a civil union as follows:

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

148 Ibid section 13, which states:

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

149 It has been suggested that section 8(6) of the Act muddies the waters in this regard and may be interpreted as restricting marriage under the new act to same-sex couples. Section 8(6) states that:

A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or the Customary Marriages Act.

I contend that it is clear from the context that this section does not prohibit different sex-couples from entering a marriage in terms of the Civil Union Act. It merely states that such different sex-couples would only be able to enter into a Civil Union marriage if they would also have been allowed to enter into a marriage in terms of one of the two other laws regulating marriage in South Africa.

a 'marriage', given the symbolic power of 'marriage' in our society and given the absence in the public discourse of a critique of the institution of marriage. This choice was ironically, most probably retained as a compromise to placate more conservative critics. Ironic, because given the contested nature of heterosexual marriage and feminist critiques regarding the alleged patriarchal nature of the institution,¹⁵⁰ the inclusion of this option seems like a net gain for progressives. It allows those couples who do not wish to be associated with an institution specifically called 'marriage' to enter into a union that will provide them with the full range of legal rights and duties that arise from such institution. Some more conservative same-sex couples who view marriage as an institution exclusively associated with heterosexual relationships, may well also choose to enter into a civil partnership instead of a 'marriage'.

It is also ironic that with the adoption of the Civil Union Act, same-sex couples will, in effect now have more legal rights than different-sex couples. Over the past ten years the Constitutional Court extended many of the rights enjoyed by married heterosexual couples to (obviously unmarried) same-sex couples in life partnerships.¹⁵¹ These rights include the right of same-sex couples to adopt children, to enjoy immigration rights, pension benefits and the right to inherit from a same-sex life partner. Limiting these rights to heterosexual married couples was found to be discriminatory precisely because same-sex couples could not get married and were thus automatically excluded from enjoying these rights. This raised the question as to whether same-sex couples who did not marry would automatically lose these rights where the court had read in words into existing legislation to include same-sex life partners. In a recent judgment the Constitutional Court, in the case of *Gory v Kolver and Others*, confirmed that these hard-won rights would not *automatically* be amended merely because same-sex couples are now allowed to get married. Even if same-sex couples do not get married they will have, for example, the right to inherit from their life partner — even where no will was left. But, as the Court pointed out, Parliament will have the right to amend this kind of legislation to take away the rights of non-married same-sex couples so that they are treated the same as heterosexual couples.¹⁵²

However, apart from broader concerns about the true emancipatory effect of the Civil Union Act, it remains problematic in at least one important technical sense. As with the original Marriage Act, the Civil Union Act allows for the designation of ministers of religion as marriage officers, but also allows such marriage officers to refuse to solemnise a marriage if it does not conform to the requirements of that particular religion. However, unlike the original Marriage Act, the Civil Union Act allows non-religious marriage officers appointed by the State to refuse 'on the ground of conscience, religion and

150 See P Ettelbrick 'Since When is Marriage a Path to Liberation?' in R Baird & S Rosenbaum (eds) *Same Sex Marriage: the Moral and Legal Debate* (1997) 164.

151 *NCGLE v Justice* (note 83 above); *NCGLE v Home Affairs* (note 92 above); *Satchwell* (note 96 above); *Du Toit* (note 106 above); *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC); *Gory v Kolver NO and Others* 2007 (3) BCLR 249 (CC).

152 *Gory v Kolver* *ibid* para 28.

belief to solemnise a civil union between two persons of the same-sex'.¹⁵³ Marriage Officers are designated by the state in terms of section 2 of the Marriage Act and as such are state officials. This provision clearly endorses sexual orientation discrimination by state officials and will most probably be struck down by the Constitutional Court if challenged. It may make it more difficult for less wealthy and educated same-sex couples who live in small towns in South Africa to get married. Such a couple would typically go to the local magistrate's court where the local magistrate would act as the state's designated marriage officer. When such a magistrate then refuses to marry a couple, they might not pursue the matter out of ignorance or a lack of resources. This clause has therefore been strongly criticised by LGBTI activists.

VIII CONCLUSION

The adoption of the Civil Union Act represents a victory of sorts for the gay and lesbian 'movement' in South Africa. Although the new Act is problematic in some respects, it provides full marriage rights along with the full *status* associated with marriage to those same-sex couples who choose to enter into a civil union. The question is, however, whether the attainment of this important legal right represents a profoundly important step forward for the full emancipation of ordinary gay men and lesbians. Statistics released by the Department of Home Affairs suggests that it might not. In the seven months ending in June 2007 only 707 same-sex marriages were concluded in South Africa. Almost half of these marriages were conducted in the metropolitan province of Gauteng while rural provinces such as Mpumalanga (13 same-sex marriages), Limpopo (5 same-sex marriages) and North West (4 same-sex marriages), lagged far behind.¹⁵⁴ Most gay men and lesbians — especially in more rural provinces — have therefore not rushed out to tie the knot. This suggests that marriage is not the Holy Grail for the emancipation of gay men and lesbians in South Africa.

The reasons for this lack of enthusiasm for marriage in the LGBTI community are varied and complex, but for the purposes of this article, were recognised by the NCGLE from the outset: Most gay men and lesbians in South Africa face social and economic hardship in a way that cannot be easily addressed through legal reform — even if that reform ultimately leads to the legal recognition of same-sex marriage. Many individuals who experience an emotional and erotic attraction to members of their own sex, face hardships of the most extraordinary kind and 'coming out' of the closet and getting married — surely the ultimate act of coming out — would therefore not be open to many gay men and lesbians. The murder in Soweto in July 2007 of gay and lesbian activists, Sizakele Sigasa and Salome Masooa, serves as a stark reminder of the lived realities faced in this regard by a majority of gay and les-

153 Civil Union Act section 6.

154 S Mabena 'Gauteng leads in gay marriages' *Behind the Mask* <<http://www.mask.org.za/article.php?cat=southafrica&id=1627>>.

bian South Africans.¹⁵⁵ Apart from fears for one's physical safety, being gay or lesbian in an open manner can be hazardous in many other ways. Individuals face rejection from friends and family, are often ejected from parental homes and become homeless or are vilified and harassed by members of the community in which they grew up and live. Facing life in such circumstances might be such a constant and all-encompassing struggle that the idea of entering into a marriage may seem far-fetched and remote from a person's world.

There is of course a possibility that the recognition of same-sex marriage may help to start changing the deeply entrenched prejudices which lead to the kinds of abuse mentioned above. The law — particularly human rights law — can be viewed as an important site of struggle because the law helps to produce the reality within which we live.¹⁵⁶ I have for example, argued elsewhere that the mere fact that the Constitution prohibits discrimination on the basis of sexual orientation has opened up a space for some in the community to embrace their sexual identity and to begin to resist oppression.¹⁵⁷ That is why the Civil Union Act might potentially have an effect on the deep-seated homophobia and prejudice in society. Given the powerful symbolic nature of 'marriage' in South Africa, the increased access to marriage by gay men and lesbians who are in a position to do so, may well open up new 'spaces of freedom' for some gay men and lesbians in communities that previously may have been completely hostile and antagonistic towards them.¹⁵⁸

It is, however, unclear what influence the adoption of the Civil Union Act will have in the long term on the so-called 'right to be different'. I have argued earlier in this paper that the Constitutional Court's conception of 'good' same-sex relationships worthy of legal protection seems to mirror that of an idealised middle class, heterosexual and perhaps even a white couple. I have also pointed out that the Court's decisions have a tendency to valorise the institution of 'marriage', and that this jurisprudence inevitably contributes to the de-legitimisation of less traditional relationship arrangements. The adoption of the Civil Union Act may well speed up this process and may further limit the possibility for the legal recognition and protection of non-marital relationships — especially to protect the more marginalised and vulnerable member of that relationship. The Civil Union Act may therefore contribute to the disciplining of individuals, forcing them to conform and get married if

155 Author unknown 'Group vows to seek justice for brutal gay murders' *Behind the Mask* <<http://www.mask.org.za/article.php?cat=southafrica&id=1626>>.

156 See A Hunt & G Wickham *Foucault and Law: Towards a Sociology of Law as Governance* (1994) 60-1. Foucault sees law as an instrument of power. But power is productive: it produces reality; it produces domains of objects and rituals of truth; it produces the individual and the knowledge that may be gained of her.

157 See P de Vos 'The Constitution Made us Queer: The Sexual Orientation Clause in the South African Constitution and the Emergence of Gay and Lesbian Identity' in C Stychin & D Herman (note 26 above) 194, 196-198

158 See revised PhD thesis of A Tucker 'Male Homosexuality in Cape Town, SA: Visibility and the Appropriation of Space' University of Cambridge (2006) where he argues that the same-sex marriage debate has led to more openness and acceptance of gay men by members of the community in townships around Cape Town.

they do not want to live outside the legal protection and recognition afforded by the law. But because of the social, economic or cultural circumstances in which many, predominantly black, South Africans live, they will not have a choice in the matter at all. For some, 'coming out' of the closet and getting married will have disastrous or even deadly consequences. This in itself does not mean the adoption of the Civil Union Act should be criticised: just because all cannot immediately gain access to a benefit with a potential radiating effect, does not mean all should be deprived of such a benefit. However, there is a real danger that given the fact that the LGBTI community achieved this recognition through a very specific, legally-based, elitist, non-grassroots political strategy described in the first part of this article, those who do not or cannot conform adequately to take up the legal protection afforded by marriage or civil partnership, will now be forgotten and will become a new underclass. If the adoption of the Civil Union Act is presented as the culmination of a long struggle that finally restores full citizenship to all gay men and lesbians in South Africa, it may well lull the middle class gay and lesbian activists and academics into a false sense of emancipation and will further weaken the political role of those organisations active in the LGBTI community. Moreover, if marriage is taken up most often and most visibly by middle-class, white, gay and lesbian couples it will help to maintain the fiction of homosexuality as a white, middle-class phenomenon in the popular imagination.

The adoption of the Civil Union Act should therefore be seen not as the inevitable culmination of a long struggle for gay and lesbian emancipation, but merely as a small victory in the ongoing struggle for recognition of the full citizenship of all individuals who experience emotional and sexual attraction towards members of the same sex — regardless of their race, class, or sex. What is really required is for a thriving and confident grassroots gay and lesbian movement to make use of the space provided by this Act, to make new inroads into the prejudice and ignorance about homosexuality so prevalent in our communities. Such a movement could have used the space created during the debates about the adoption of the Civil Union Act, to contest deeply entrenched patriarchal and heterosexist discourse. As such, the Civil Union Act would have been a powerful legal tool reaching beyond its immediate effect of providing legal protection for mostly middle-class, gay men and lesbians who feel comfortable enough and have the resources to enter into a marriage. In this regard the (perhaps inevitable) failure of the NCGLE to build such a grassroots movement is an opportunity lost.