

THE RECOGNITION OF SAME-SEX UNIONS IN SOUTH AFRICA

by

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PREFACE

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LIST OF CONTENTS

	Page
<i>SUMMARY</i>	1
<i>KEY TERMS</i>	2
1 INTRODUCTION	3
1.1 Background	3
1.2 Research Problem and Purpose of Study	6
1.3 Outline of Chapters.....	6
1.4 Research Method	8
2 HISTORICAL BACKGROUND	10
2.1 Introduction.....	10
2.2 Same-Sex Unions and the Concept of Marriage that was received into South Africa	10
2.2.1 Canon Law and the Church-State/State-Church Relationship.....	11
2.2.2 Roman-Dutch Law and the Secularisation of Marriage Law.....	13
2.3 The Church-State/State-Church Relationship and Totalitarianism within the Apartheid Regime	15
2.4 Gay and Lesbian Movements and the Political Coalition Building that led to the Inclusion of Sexual Orientation in the Bill of Rights	17
2.5 Inclusion of Sexual Orientation in the Interim Constitution.....	20
2.5.1 Introduction	20
2.5.2 The Various Views on the Inclusion of Sexual Orientation	21
2.6 The Retention of the Sexual Orientation Clause in the Final Constitution	23
2.7 Post-Constitutional Developments	26
2.7.1 Legislative Developments.....	26
2.7.2 Judicial Developments.....	27
2.7.2.1 The So-Called 'Sodomy Judgement'	28
2.7.2.2 Extension of Rights to Same-Sex Life Partners who have Undertaken a Contractual Reciprocal Duty of Support	32
2.7.2.3 The Recognition of Same-Gendered Families.....	37
2.7.2.4 Acquiring Parental Authority in a Same-Sex Life Partnership	39
2.7.2.5 Affording Marriage Rights to Same-Sex Couples	43
2.8 Summary and Conclusion.....	46
3 THE CIVIL UNION ACT 17 OF 2006	48
3.1 Introduction.....	48
3.2 The Legislative Process that led to the Enactment of the Civil Union Act.....	48
3.2.1 The Recommendations made by the South African Law Reform Commission (SALRC) to Extend Marriage Rights to Same-Sex Couples	48
3.2.2 Draft Civil Union Bill.....	49
3.3 General Descriptions of the Civil Union Act.....	51
3.3.1 Definition and Formulation of a Civil Union	51
3.3.2 Requirements for the Solemnisation and Registration of a Civil Union.....	52
3.3.2.1 General	52

3.3.2.2	The Prescribed Formalities	53
3.3.2.3	Registration of a Civil Union	56
3.4	Legal Consequences of a Civil Union	57
3.4.1	Invariable Legal Consequences of a Civil Union	57
3.4.2	Variable Consequences of a Civil Union	58
3.4.2.1	Matrimonial Property Regime	58
3.4.2.2	The Dissolution of a Civil Union	60
3.5	Particular Problems Arising from the Civil Union Act	63
3.5.1	<i>Ex Officio</i> Marriage Officers not Compelled to Solemnise Same-Sex Civil Unions	63
3.5.1.1	Anomalies Between Marriage Officers created by the Marriage Act and Civil Union Act	63
3.5.1.2	Religious Accommodation versus Sexual Orientation	65
3.5.1.3	To Summarise	74
3.5.2	Marriageable Age	75
3.5.2.1	Is the Blanket Ban in Conflict with the Best Interests of Minor Children?	76
3.5.2.2	A Violation of Minors' Constitutional Rights to Equality and Dignity	78
3.5.2.3	Additional Arguments	80
3.5.2.4	To Summarise	81
3.5.3	The Patrimonial Consequences of a Same-Sex Civil Union	82
3.5.3.1	Proposals to Reform the <i>Lex Domicilii Matrimonii</i> Rule	83
3.5.3.2	To Summarise	87
3.6	The Acquisition of Parental Responsibilities and Rights by Same-Sex Civil Union Partners	87
3.6.1	Female Civil Unions	88
3.6.2	Male Civil Union Partners	90
3.7	Exclusion of Gay Identity in African Communities from the Ambit of the Civil Union Act	91
3.8	Conclusion	92

4 RECOGNITION AND LEGAL CONSEQUENCES OF SAME-SEX LIFE PARTNERSHIPS..... 94

4.1	Introduction	94
4.2	Protection of Life Partners by means of the Ordinary Rules of the Law	95
4.2.1	General	95
4.2.2	Life Partnership Contracts	96
4.2.3	Contracts of Universal Partnership	97
4.2.4	Financial Consequences of Same-Sex Life Partnerships	100
4.2.4.1	Property Acquired Prior to and During the Subsistence of the Same-Sex Life Partnership	100
4.2.4.2	The Common Home	101
4.2.4.3	Joint Bank Account	104
4.2.4.4	Maintenance	104
4.2.5	Agency	105
4.2.6	Will	105
4.3	The Legal Recognition which has been Afforded to Same-Sex Life Partnerships which have not been Solemnised and Registered under the Civil Union Act	106
4.3.1	General	106
4.3.2	Constitutional Jurisprudence	106
4.3.3	Statutory Recognition and Protection	110

4.3.4	Continued Protection and Recognition under Legislation and Judicial Developments after the Enactment of the Civil Union Act 2006	111
4.3.4.1	General	111
4.3.4.2	Children Born from a Permanent Same-Sex Life Partnership as a Result of Artificial Fertilisation.....	112
4.4	Essential Criteria for the Existence of a Same-Sex Life Partnership	116
4.4.1	<i>Consortium Omnis Vitae</i>	117
4.4.2	The Intention of Creating a <i>Permanent</i> Same-Sex Life Partnership	118
4.5	Draft Domestic Partnership Bill 2008	120
4.6	Summary and Conclusion.....	121
5	CONSTITUTIONAL ASPECTS PERTAINING TO SAME-SEX LIFE PARTNERSHIPS THAT FALL OUTSIDE THE AMBIT OF THE CIVIL UNION ACT OF 2006 AND THE CONSTITUTIONALITY OF THE CIVIL UNION ACT AS A SEPARATE MEASURE TO REGULATE SAME-SEX MARRIAGE.....	122
5.1	Introduction.....	122
5.2	The Constitutionality of the Continued Conferment of Spousal Benefits on Same-Sex Life Partners After the coming into Operation of the Civil Union Act	123
5.2.1	A Critical Analysis of <i>Volks NO v Robinson</i> and its Relevance for Same-Sex Life Partners.....	123
5.2.1.1	Decision of the Court <i>a quo</i>	123
5.2.1.2	The Majority Judgement of the Constitutional Court	124
5.2.1.3	The Minority Judgement of the Constitutional Court	126
5.2.1.4	Repercussions of the Constitutional Court's Model of Choice	128
5.2.2	Homophobia: A Social Reality	130
5.2.3	The Application of Substantive Equality to Eradicate Systemic Inequalities	132
5.2.4	To Summarise	136
5.3	The Constitutionality of the Civil Union Act 17 of 2006 as a Separate Measure to Govern Same-Sex Marriage.....	137
5.3.1	The Constitutional Court's Guiding Principles to the Legislature	137
5.3.2	The Constitutionality of a Civil Union Regime as an Alternative to Civil Marriage.....	138
5.3.3	Analysis and Summary	141
5.4	Conclusion	143
6	CONCLUSION: A CRITICAL ANALYSIS OF THE EMANCIPATION OF GAYS AND LESBIANS IN SOUTH AFRICA.....	145
7	BIBLIOGRAPHY	152
7.1	Books	152
7.2	Journal Articles	153
7.3	Other References	157
7.4	Table of Statutes.....	157
7.5	Table of Cases.....	159

SUMMARY

With the abolition of apartheid and the introduction of a new constitutional dispensation, the state's totalitarian exclusion of homosexuals from legal recognition was relegated to a past era. The constitutional commitment to human dignity and equality and the inclusion of sexual orientation as a prohibited ground of discrimination led to the recognition of same-sex life partnerships and, inevitably, same-sex marriage by means of a civil union regime. The object of this study is to investigate the scope of the legal consequences provided to same-sex couples by the Civil Union Act 17 of 2006 and to determine the legal standing of same-sex couples who fall outside the ambit of the Act. The study includes constitutional arguments pertaining to the continued recognition of same-sex life partnerships and a critical analysis of the constitutionality of the Civil Union Act as a separate measure to govern same-sex marriage. This investigation is conducted with reference to relevant legislation and case law.

KEY TERMS

sexual orientation

human dignity

equality

permanent same-sex life partnership

same-sex marriage

Civil Union Act 17 of 2006

Constitution

totalitarianism

gay men

lesbian women

'With the introduction of a constitutional democracy in 1994, South Africa entered a new era characterised by values, such as respect for the dignity and privacy of all its citizens, a principled commitment to equality, recognition of diversity of different groups in our heterogenous society and, last but not least, a particular emphasis on bringing the most vulnerable groups in society within the ambit of constitutional protection'.¹

1 INTRODUCTION

1.1 BACKGROUND

Sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of homosexuals to members of the same sex.² The notion of sexual orientation includes both personal and individual identity and also social and emotional relations.³

The social and legal system of apartheid did not protect sexual minorities who expressed an erotic attraction to members of the same sex. Because their sexual orientation differed from the majority norm which was based on Christian beliefs, homosexual conduct was condemned and punished by law.⁴ The political and legal systems of pre-1994 South Africa were specifically noted for the totalitarian invasion of the state in the private sphere of people's day-to-day lives.⁵

With the abolition of apartheid and the introduction of a new constitutional dispensation, a democratic, legal and intellectual framework was created that allowed historically marginalised groups, for example, gays and lesbians, to challenge the religious and ideological hegemony that dominated South

¹ Sloth-Nielsen and Van Heerden 'The constitutional family: Developments in South African family law jurisprudence under the 1996 Constitution' (2003) *International Journal of Law, Politics and the Family* 121.

² Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450 at 452.

³ Botha and Cameron 'Sexual orientation' (1994) *South African Human Rights Yearbook* 281 at 283.

⁴ Jivan 'From individual protection to recognition of relationships: Same-sex couples and the experience of sexual orientation reform' (2007) 11 *Law, Democracy and Development* 19 at 21.

⁵ Van der Vyver 'Constitutional perspective of Church-State relations in South Africa' (1999) 2 *Brigham Young University Law Review* 635 at 636.

African politics.⁶ The constitutional commitment to human dignity and equality and the inclusion of sexual orientation as a prohibited ground of discrimination in terms of section 9(3) of the Constitution, 1996, created ample opportunity for gay men and lesbian women to question the validity and constitutionality of the common law and certain provisions of legislation that excluded them from recognition and protection during apartheid. These constitutional provisions have formed the *Grundnorm* of several court cases⁷ in which recognition and protection of same-sex relationships have been at issue.⁸ In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,⁹ the constitutional court emphasised that these provisions propose that everyone has rights to equal concern and respect across difference¹⁰ and that the Constitution dictates an adjustment of the way in which intimate relationships are legally regulated and acknowledged in South Africa.¹¹

The common-law definition of marriage did not make provision for same-sex marriage and consequently deprived same-sex couples of certain benefits that accrue to married couples. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*¹² the constitutional court restructured the conformist social order of intimate monogamous relationships and acknowledged the existence of 'another form of life partnership which is different from marriage as recognised by law. This form of life partnership is represented by a conjugal relationship between two people of the same

⁶ Mosikatsana 'The definitional exclusion of gays and lesbians from family status' (1996) 11 *South African Journal on Human Rights* 549 at 554.

⁷ *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Farr v Mutual & Federal Insurance Co Ltd* 2000 3 SA 684 (C); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *J v Director General, Department of Home Affairs* 2003 5 SA 621 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA); *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 1 SA 524 (CC); *Gory v Kolver* 2007 4 SA 97 (CC). All these cases will be discussed in Chapter 2 of this study.

⁸ Van Aardt and Robinson 'The biology of homosexuality and its implications for human rights in South Africa' (2008) 71 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 179 at 180.

⁹ 1999 1 SA 6 (CC).

¹⁰ *National Coalition* at par 132.

¹¹ De Vos 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *South African Journal on Human Rights* 179 at 181.

¹² 2000 2 SA 1 (CC).

sex'.¹³ This judgement introduced the concept of a 'same-sex life partnership' into our legal vocabulary. In this case the court held that the constitutional rights to equality and dignity demanded the recognition and extension of spousal benefits (in this case, immigration rights) to gay and lesbian partners in a permanent same-sex life partnership.¹⁴ In subsequent cases, the constitutional court and supreme court of appeal have further extended pension benefits;¹⁵ the right to inherit on intestacy;¹⁶ the common-law action for damages for loss of support¹⁷ and the acquisition of parental responsibilities and rights¹⁸ to partners in a permanent same-sex life partnership.

In order to determine whether a same-sex life partnership is in existence the court takes into account the totality of facts presented by the partners and the intention of the same-sex life partners to form a permanent same-sex relationship.¹⁹ In essence, a same-sex life partnership confers a sense of status upon gay and lesbian relationships if their relationships mimics the characteristics associated with an ideal heterosexual marriage.

The legal recognition of permanent same-sex life partnerships inevitably led to the recognition and extension of marriage rights to same-sex couples.²⁰ The Civil Union Act 17 of 2006 came into operation on 30 November 2006 and provides same-sex couples who are above the ages of 18 years with the option to conclude either a marriage or civil partnership; collectively known as a civil union.²¹ Section 13(1) of the Act equates a civil union with a civil marriage. In other words, the Act provides for the application of the required changes to contextualise the reference to marriage in any other law including

¹³ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) at par 36.

¹⁴ *Home Affairs* at par 97.

¹⁵ *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC), 2003 4 SA 266 (CC).

¹⁶ *Gory v Kolver* 2007 4 SA 97 (CC).

¹⁷ *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA).

¹⁸ *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *J v Director-General, Department of Home Affairs* 2003 5 SA 621 (CC).

¹⁹ *Home Affairs* at par 88.

²⁰ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 1 SA 524 (CC).

²¹ See the definition of 'civil union' in s 1 of the Act.

the common law so that they can apply in respect of a civil union.²² The Act further dictates that, with the exception of the Marriage Act 25 of 1961 and Recognition of Customary Marriages Act 120 of 1998, any reference to husband, wife or spouse in any other law, including the common law, includes a civil union partner.²³ Although the Civil Union Act formally affords same-sex couples the same rights and responsibilities the Marriage Act affords heterosexual couples some inequalities and differentiations still exist.

1.2 RESEARCH PROBLEM AND PURPOSE OF STUDY

Two questions arise from the recognition of same-sex unions by way of the Civil Union Act. The first question relates to the scope of the legal consequences and protection provided to same-sex couples by the Civil Union Act. The second question relates to the legal consequences of same-sex life partners who fall outside the ambit of the Civil Union Act. This study is therefore undertaken with a view to answering the aforementioned questions.

1.3 OUTLINE OF CHAPTERS

Roman-Dutch law as influenced by Canon law is the common law of the Republic of South Africa. The principles of the Roman-Dutch law of marriage characterised by monogamy, heterosexuality and values affirmed by Christian theology formed the foundation of marriage law in South Africa in the pre-constitutional era. These principles will be discussed in Chapter 2 of this study. Chapter 2 will also provide a discussion on how lesbian and gay movements created alliances with certain political movements that fought against apartheid and it will be indicated how these alliances eventually led to recognition of same-sex unions in South Africa and of their full protection under the new constitutional dispensation.

In order to answer the first question mentioned above, namely the scope of the legal consequences and protection that is provided to same-sex couples

²² S 13(2)(a).
²³ S 13(2)(b).

by the Civil Union Act, it is necessary to give a general description of the Act. The purpose of the description is to determine who has the capacity to enter into a civil union and to set out the requirements for the solemnisation and registration of a civil union and, importantly, to identify any shortcomings which may render the Act unconstitutional. This investigation is undertaken in Chapter 3.

In order to answer the second question mentioned above, namely the legal consequences of same-sex life partners who fall outside the ambit of the Civil Union Act, it is necessary to indicate the regulation of these relationships by means of the ordinary rules of the law. It is also necessary to discuss the legal recognition that has been conferred on same-sex life partnerships prior to the coming into operation of the Civil Union Act. In order to confer certain spousal benefits upon same-sex life partners it is essential to determine whether a life partnership is in existence. The concept of a same-sex life partnership was judicially developed in an inconsistent manner, with the courts employing a diverse range of definitions and criteria. The most telling example of inconsistency is created by the required presence of a reciprocal duty of support or the voluntary assumption of a contractual duty of support between same-sex life partners in some cases. In order to create some certainty, Chapter 4 of this study will provide essential criteria for the existence of same-sex life partnerships.

Chapter 5 of this study will provide a comprehensive discussion of the continued protection and recognition of same-sex life partnerships that fall outside the ambit of the Civil Union Act. This study will be conducted within a social and historical context and with the focus fully on the notion of substantive equality. In *Volks NO v Robinson*²⁴ the constitutional court reassessed the objective model of choice which demands that the law should not intervene or attach consequences to relationships where the parties chose not to enter into a legally valid marriage. This approach assesses the availability of 'choice' by merely focusing on the presence or absence of legal

²⁴ 2005 5 BCLR 446 (CC).

impediments to marriage. The Civil Union Act makes provision for same-sex marriage and thus eradicated the legal impediments that the law imposed upon same-sex marriage. Based on the view of the judgement in *Volks* together with the enactment of the Civil Union Act the continued extension of spousal benefits to same-sex couples who do not enter into a civil union may no longer be justified and may amount to differential treatment of homosexual and heterosexual couples. This issue will be discussed with reference to the mentioned case law. Based on the findings, certain recommendations will be made.

Chapter 5 of this study will also address the constitutionality of the Civil Union Act as a separate measure to regulate same-sex marriage. It is, therefore, essential to determine whether the Civil Union Act complies with the guiding principles provided by the constitutional court in *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amicus Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs*²⁵ which required the legislature to provide same-sex couples with a public and private status equal to heterosexual couples.²⁶ This chapter will include an analysis of the implication of the constitutional court's deference to the legislature in *Fourie*. Based on the findings, certain recommendations will be made.

After the assessment of the aforementioned questions the study will conclude with a critical analysis of the emancipation of gays and lesbians in South Africa.

1.4 RESEARCH METHOD

In the past, research in South Africa took place within a structure of parliamentary sovereignty but now in the post-apartheid era research is conducted within a constitutional paradigm. An applied research study will be done within a framework of subjective rights inclusive of a micro-comparison study to indicate the promotion and enhancement of human rights of same-

²⁵ 2006 1 SA 524 (CC).
²⁶ *Fourie*, at par 82.

sex couples in South Africa. The envisaged research is not of an empirical nature but involves a literature study of books, journal articles, legislation and case law.

'People make their own history (runs a celebrated phrase), but not in circumstances of their own choice; they act in an arena shaped by the past. Accordingly, to understand the present conjuncture in South Africa it is essential to have a sense of its history, to reflect on constraints and the possibilities created by that history.'¹

2 HISTORICAL BACKGROUND

2.1 INTRODUCTION

This chapter consists of a historical overview of the legal and social position regarding same-sex unions before and after the new constitutional dispensation but prior to the coming into operation of the Civil Union Act 17 of 2006. For purposes of the historical overview it is necessary to discuss the concept of marriage and to indicate the grounds on which exclusion of same-sex partners from marriage was justified. Below it is explained that religion, and specifically the Christian doctrine, was the main reason for the exclusion and alienation of those who dared to be different from what was regarded as the normal standard of behaviour. This explanation is followed by a discussion on how lesbian and gay movements created alliances with certain political movements that fought against the apartheid regime and it will be indicated how these alliances eventually led to recognition of same-sex unions in South Africa and of their full protection under the new constitutional dispensation. Finally, post-constitutional legislative and judicial developments prior to the enactment of the Civil Union Act are discussed.

2.2 SAME-SEX UNIONS AND THE CONCEPT OF MARRIAGE THAT WAS RECEIVED INTO SOUTH AFRICA

In the period before 1994 the Westminster system of government applied in South Africa.² During this period the courts of law did not have the competence to question the legality of parliamentary legislation.³ The concept

¹ Bundy (1993) 49 as quoted in Terreblanche *A history of inequality in South Africa, 1652-2002* (2002) 3.

² Robinson 'The evolution of the concept of marriage in South Africa: The influence of the Bill of Rights in 1994' (2005) *Obiter* 488 at 489.

³ *Ibid.*

of marriage as it existed during this period essentially reflected the position in Canon and Roman-Dutch law.⁴

2.2.1 CANON LAW AND THE CHURCH-STATE/STATE-CHURCH RELATIONSHIP

Canon law was basically Roman law as modified to meet the needs of the medieval church.⁵ The Catholic Church of the Middle Ages was not only a spiritual institution but a State with its own legislature and courts of law which exercised supra-national jurisdiction.⁶ The jurisdiction of the Church not only included matters pertaining to the organisation and property of the Church, but also matters relating to faith, sacraments and sins.⁷

The sources of Canon law were primarily the Bible, the writings of Church fathers, Justinian's codification of the *Corpus Juris*, the canons of Church councils and the decretals of the popes.⁸ According to the Church, Christ elevated marriage between baptised persons to a sacrament.⁹ The institution of marriage, therefore, was the creation of God and not the creation of the State or even of the Church.¹⁰ Accordingly, the status created by marriage as a sacrament was instituted by God; it was a natural relationship whose ends and essential properties were determined by natural law and these ends and properties could not be varied by human legislation or by the consent of the parties.¹¹

The primary purpose of marriage as it was elevated by God was the procreation and rearing of children and the early church fathers were

⁴ *Ibid.*

⁵ Hahlo and Kahn *The South African legal system and its background* (1968) 511.

⁶ *Idem*, at 512.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Snee 'Canon law of marriage: An outline' (1957-1958) 35 *Detroit Law Journal* 309 at 311.

¹⁰ *Idem*, at 310.

¹¹ *Idem*, at 312.

intolerant of sexual pleasures not directed towards procreation.¹² Any sexual acts that were not directed towards procreation were seen as contrary to the order of nature and were variously termed by the old authorities as *sodomie*, *venus monstrosa* or *onkuysheyd tegens de Natuur* and were therefore considered crimes and punishable by death.¹³

When Constantine became the first Christian Roman Emperor the Christian Church and political decree became inseparably involved — consubstantial.¹⁴ The emperor became the chosen representative and instrument of God and was there to guarantee political and spiritual peace by bringing people to the service of God.¹⁵ Both religious belief and state policy became embodied in the head of state. Thus, the church became the state and the state became the church.¹⁶

The state's attitude toward same-sex unions was extremely hostile. Same-sex intimacy was outlawed by the Justinian Code of AD 533 and in the seventh century in the Western Empire the Visigoth State in Spain criminalised sodomy.¹⁷ Particularly from the 13th century onwards the Church took a stronger stand against same-sex intercourse as evidenced, for example, in the writings of St. Thomas Aquinas.¹⁸

There is no doubt that the Christian doctrine was in future to determine what the standard for normal behaviour should be.

¹² Snee 'Canon law of marriage: An outline' (1957-1958) 35 *Detroit Law Journal* 309 at 313; Church 'Same-sex unions — Different voices' (2003) 9 *Fundamina* 44 at 49.

¹³ *R v Gough and Narroway* 1926 CPD 159 at 161; Church 'Same-sex unions — Different voices' (2003) 9 *Fundamina* 44 at 49.

¹⁴ Barnard 'Totalitarianism, (same-sex) marriage and democratic politics in post-apartheid South Africa' (2007) 23 *South African Journal on Human Rights* 500 at 501.

¹⁵ Knowles 'Church and state in Christian history' (1967) 2 *Journal of Contemporary History, Church and Politics* 3 at 5.

¹⁶ Barnard 'Totalitarianism, (same-sex) marriage and democratic politics in post apartheid South Africa' (2007) 23 *South African Journal on Human Rights* 500 at 501.

¹⁷ Church 'Same-sex unions — Different voices' (2003) 9 *Fundamina* 44 at 48.

¹⁸ *Idem*, at 49.

2.2.2 ROMAN-DUTCH LAW AND THE SECULARISATION OF MARRIAGE LAW

Canon law was received into Roman-Dutch law. Roman-Dutch law can be seen as the offspring of the union between the law of Holland and Roman law.¹⁹

In Roman-Dutch law the philosophies of Montesquieu's doctrine of *trias politica*, namely that the powers of legislation, administration and adjudication should be separated, were embraced.²⁰ The old ecclesiastical courts were abolished and the Reformed Church became the State Church of the Netherlands.²¹ By virtue of the *jus majestatis circa sacra* the Church was subject to control by the Government.²² All matters relating to the position of the Church in the community, the administration of its property, and the legal consequences of acts performed in church, including marriage, were from this day forward the concern of the State.²³ Accordingly, after the Reformation, the marriage law of Holland became secularised and the sacramental nature of marriage was disclaimed.²⁴

However, it was still accepted that marriage was a relationship between one man and one woman. The comparison of the relationship between husband and wife with that of Christ and his congregation provided for the view of marriage as a relationship solely between one man and one woman.²⁵

These were the principles of the Roman-Dutch law of marriage that were brought to South Africa when Jan van Riebeeck established the first European Settlement at the Cape of Good Hope, and they remained largely unchallenged in the pre-constitutional era.

¹⁹ Hahlo and Khan *The South African legal system and its background* (1968) 511 and 514.

²⁰ *Idem*, at 528.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ Sinclair assisted by Heaton *The law of marriage* (1996) 191.

²⁵ Ephesians 5:23-33.

The biblical justification for marriage as an exclusive relationship between one man and one woman, fundamentally monogamous, was reflected *holus bolus* by the moral and legal climate predating the transitional Constitution.²⁶ South African courts often referred to the well-known English decision in *Hyde v Hyde and Woodmansee*²⁷ where it is stated that '[m]arriage in Christendom, may...be defined as the voluntary union for life of one man and one woman to the exclusion of all others...'

Based on the concept of marriage as it was defined within Christendom, any kind of recognition of same-sex unions in South Africa was forbidden, and sexual relations between persons of the same-sex were characterised as abnormal and criminal behaviour. The legal notion of marriage as defined by the common law and statutes was based on principles of monogamy and heterosexuality, principles affirmed by Christian theology.²⁸

Polygyny and same-sex unions were regarded as contrary to public policy and destructive of society.²⁹ Ironically, while divorce is inevitably destructive of the family and consequently of society it was not regarded as contrary to public policy in South African law although it was forbidden in terms of Christian beliefs.³⁰ It might therefore be argued that the real issue was not destruction of society, but rather upholding a state policy that represented the views of a white Christian community on what was acceptable conduct.³¹

²⁶ Dlamini 'The role of customary law in meeting social needs' (1991) *Acta Juridica* 71 at 75.

²⁷ (1866) LR 1 P&D. For example, in *Seedat's Executors v The Master* 1917 AD 302 at 309 and *Ismail v Ismail* 1983 1 SA 1006 (A) at 1019 a 'marriage' was defined as the legally recognised life-long voluntary union between one man and one woman to the exclusion of all others.

²⁸ Church 'Same-sex unions — Different voices' (2003) 9 *Fundamina* 44 at 52.

²⁹ Dlamini 'The role of customary law in meeting social needs' (1991) *Acta Juridica* 71 at 75.

³⁰ *Ibid.*

³¹ *Ibid.*

2.3 THE CHURCH-STATE/STATE-CHURCH RELATIONSHIP AND TOTALITARIANISM WITHIN THE APARTHEID REGIME

Roman-Dutch law as influenced by Canon law is the common law of the Republic of South Africa. It is evident that these common-law principles formed the foundation of the pre-constitutional government where all conduct was supposed to uphold Christian beliefs.

When considering the constitutional history of South Africa two aspects of its legal arrangements come to mind: the systematic institutionalisation by the state of racist structures; and, in the context of religious matters, a distinct bias for a certain brand of Christianity.³² These two characteristics of the South African social, economic, political and legal structures denote the fabric of a totalitarian regime both in the state's interference in the private lives of individuals and the state's regulation of the internal affairs of non-state social institutions.³³

A 'distinct bias for Christianity' was one of the aspects that denoted the fabric of the apartheid regime.³⁴ The church-state consubstantiality provided a religious foundation for the 'political perpetration of isolation and loneliness (for example of gays and lesbians) that is required for terror to thrive'.³⁵ It is evident that this religious bias was an indispensable component of the apartheid government's totalitarian recipe.³⁶ This particular brand of a totalitarian regime in terms of which the church and the state are consubstantial can be described as 'totalitarianism par excellence'.³⁷ Hannah Arendt emphasises that totalitarian domination as a form of government distinguishes it from all others. According to her view, totalitarianism is never

³² Van der Vyver 'Constitutional perspective of Church-State relations in South Africa' (1999) 2 *Brigham Young University Law Review* 635.

³³ *Ibid.*

³⁴ *Idem*, at 638.

³⁵ Barnard 'Totalitarianism, (same-sex) marriage and democratic politics in post apartheid South Africa' (2007) 23 *South African Journal on Human Rights* 500 at 504.

³⁶ *Ibid.*

³⁷ *Idem*, at 505.

content with the destruction of political life; it seeks the destruction of private life above and beyond all else.³⁸

The political and legal systems of pre-1994 South Africa were particularly noted for the totalitarian interference of the state in the private sphere of people's day-to-day lives.³⁹ In 1948, D F Malan, who was a Dutch Reformed Minister, became the first prime minister of the apartheid era.⁴⁰ Soon after Malan's election the Dutch Reformed Church propagated the 'purist' concept of apartheid, which required total separation between white and black South Africans as a necessity for the survival of white 'civilization' in South Africa. From a political point of view this concept of apartheid was essential for the continuation of white rule.⁴¹ At the insistence of the Dutch Reformed Church⁴² Parliament passed the Prohibition of Mixed Marriages Act 55 of 1949, which prohibited marriage and any form of co-habitation between white and black.

Sexual intimacy between males was prohibited by the common-law offence of sodomy and unnatural sexual acts were prohibited in terms of the Immorality Act 5 of 1927. Under apartheid, the Immorality Act was repealed and substituted with the Sexual Offences Act 23 of 1957. Section 20A of the Sexual Offences Act criminalised any act between males at a party⁴³ if such an act was calculated to stimulate sexual passion or to give sexual gratification.⁴⁴ The penalty prescribed for such an act was a maximum fine of R4000 or two years' imprisonment or both.⁴⁵ The Act further prohibited 'immoral or indecent' acts between men and boys under 19 years.⁴⁶ In 1988 Parliament extended the prohibition on 'immoral or indecent' acts to acts

³⁸ Arendt *The origins of totalitarianism* (1967) 474.

³⁹ Van der Vyver 'Constitutional perspective of Church-State relations in South Africa (1999) 2 *Brigham Young University Law Review* 635 at 636.

⁴⁰ Ross 'The Fundamentalisation of Afrikaner Calvinism' in Diederiks & Quispel (eds) *Onderscheid en minderheid: Sociaal-Historische opstellen over discriminatie en vooroordeel* (1987) 201.

⁴¹ Terreblanche *A history of inequality in South Africa, 1652-2002* (2002) 314.

⁴² Barnard 'Totalitarianism, (same-sex) marriage and democratic politics in post apartheid South Africa' (2007) 23 *South African Journal on Human Rights* 500 at 503.

⁴³ S 20A(2) defined a party as 'any occasion where more than two persons are present'.

⁴⁴ S 20A(1).

⁴⁵ S 22(g).

⁴⁶ S 14(1)(b).

between woman and girls under 19 years.⁴⁷ Discrimination was evident as this prohibition differed from the heterosexual age of consent, which was 16 years and not 19 years as in the case of the homosexual age of consent.⁴⁸

It can therefore be concluded that during the apartheid regime gay men and lesbian women and other sexual minorities suffered a ruthless fate, having been categorised as criminals and rejected by society as outcasts and perverts.⁴⁹ This exclusion and marginalisation was experienced more intensely by those South Africans already suffering under the yoke of apartheid because of their race, sex and economic status.⁵⁰

2.4 GAY AND LESBIAN MOVEMENTS AND THE POLITICAL COALITION BUILDING THAT LED TO THE INCLUSION OF SEXUAL ORIENTATION IN THE BILL OF RIGHTS

During the late 1980s the apartheid regime was criticised and sanctioned worldwide for the abuse and discrimination directed towards black people, and it was during this period that gay and lesbian movements were established to place gay issues on the agenda of the anti-apartheid struggle both in South Africa and abroad.⁵¹

Prior to the 1980s there was little sign of a gay rights struggle in South Africa. However, the 1980s brought with it the politicisation of gay life.⁵² The Gay Association of South Africa (GASA) was the first gay and lesbian organisation established in Johannesburg in 1982.⁵³ The principal function of this

⁴⁷ S 14(3)(b).

⁴⁸ This discriminatory differentiation was declared inconsistent with the Constitution and will be discussed in par 2.7.1 below.

⁴⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) at pars 27 and 28; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) at pars 31 and 32.

⁵⁰ De Vos and Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' (2007) 124 *South African Law Journal* 795 at 797.

⁵¹ Cock 'Engendering gay and lesbian rights: The equality clause in the South African Constitution' (2002) 26 *Woman's Studies International Forum* 35 at 36.

⁵² De Vos 'The "inevitability" of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *South African Journal on Human Rights* 432 at 435.

⁵³ *Ibid.*

organisation was to serve as a social meeting place for white, middle-class gay men.⁵⁴ At first, the nascent gay and lesbian movement did not align itself with the anti-apartheid struggle. This position changed drastically when GASA got involved in the isolation of groups sympathetic to the apartheid movement.⁵⁵ This was fatal for GASA and subsequently led to its expulsion from the International Lesbian and Gay Alliance (ILGA).⁵⁶

Due to heightened politicisation, Lesbian and Gays Against Oppression (LAGO) was formed in Cape Town in 1986 — the first gay and lesbian organisation with explicit links to anti-apartheid groups.⁵⁷ Also in the 1980s, gay anti-apartheid activist Simon Nkoli established the first mass-based black gay and lesbian organisation, the Gay and Lesbian Organisation of the Witwatersrand (GLOW).⁵⁸ This organisation committed itself to a 'Non-Racist, Non-Sexist, and Non-Discriminatory Democratic Future'.⁵⁹ Nkoli emphasised that the battles against homophobia and racism were inseparable.⁶⁰ He stated:

'I'm fighting for the abolition of apartheid, and I fight for the right of freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as a black man if I am not free as a gay man'.⁶¹

Then followed the affiliation of the Western Cape Organisation of Lesbian and Gay Activist (OLGA), which eventually replaced LAGO. Although the majority of the members OLGA were white, the organisation located itself within the liberation struggle and was led by anti-apartheid activists.⁶² OLGA was affiliated with the leading organisation in the struggle for democracy, namely

⁵⁴ *Ibid.* GASA was therefore viewed and characterised as 'apartheid-friendly' and patriarchal.

⁵⁵ De Vos 'The "inevitability" of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *South African Journal on Human Rights* 432 at 435.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* Christiansen 'Ending the Apartheid from the closet: Sexual orientation in the South African constitutional process' (1997) 32 *International Law and Politics* 997 at 1023.

⁵⁸ Louw 'Sexual orientation' (1997) 8 *South African Human Rights Yearbook* 245 at 260.

⁵⁹ *Ibid.*

⁶⁰ Cock 'Engendering gay and lesbian rights: The equality clause in the South African Constitution' (2002) 26 *Woman's Studies International Forum* 35 at 36.

⁶¹ *Ibid.* This statement was made at the first public parade in 1990 organised by GLOW.

⁶² *Ibid.*

the United Democratic Front (UDF), a broad-based political alliance aligned with the African National Congress (ANC).

Until the late 1980s the ANC had no policy on sexual orientation and some senior officials within the party even dismissed gay issues as irrelevant.⁶³ In the late 1980s gay political activists flew to London to argue the case for gay rights with the ANC.⁶⁴ These activists met with, amongst others, Albie Sachs,⁶⁵ then a member of the ANC constitutional committee, and impressed on him and others the need to put the rights of gay men and lesbian women on the ANC agenda.⁶⁶ By the time the South African political parties began the drafting process of the Interim Constitution, the ANC had formally recognised gay and lesbian rights and had agreed to include a prohibition against discrimination on the basis of sexual orientation in its proposed Bill of Rights.⁶⁷

According to Pierre de Vos the gay and lesbian movement was ultimately successful because its leaders were fortunate and wise enough to present their struggle as forming part of a broader struggle against oppression by the apartheid state. He further states that some political scientists, for example, Doug McAdam, argue that in order for any minority group to be successful in their struggle for acceptance and/or rights, its activists must 'tap highly resonant ideational strains in mainstream society'.⁶⁸ Often their ability to do so

⁶³ *Ibid.* For example, Ruth Mompati, a member of the National Executive Committee of the ANC made the following dismissive statement in 1987: 'I cannot even begin to understand why people want lesbian and gay rights. The gays have no problems. They have nice homes and plenty to eat. I don't see them suffering. No one is prosecuting them...We haven't heard about this problem in South Africa until recently. It seems to be fashionable in the West'. She saw the gay issue as a 'red herring' which detracted attention from the main struggle against apartheid, and justified the ANC's lack of policy on gay and lesbian rights by stating, 'We don't have a policy on flower sellers either'. According to her lesbians and gays are 'not normal. If everyone was like that, the human race would come to an end'.

⁶⁴ De Vos 'The "inevitability" of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *South African Journal on Human Rights* 432 at 436.

⁶⁵ Now Constitutional Court Judge.

⁶⁶ De Vos 'The "inevitability" of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *South African Journal on Human Rights* 432 at 435.

⁶⁷ *Idem*, at 437.

⁶⁸ *Idem*, at 436.

is influenced by the availability of 'master frames'⁶⁹ or what De Vos describes as 'master narratives'.⁷⁰ In South Africa the most powerful master frame or master narrative available was that of the anti-apartheid struggle.⁷¹ Gay men and lesbian women could refer to this struggle and were able to argue that their struggle fitted the same frame, namely the larger struggle for human rights and the emancipation of the oppressed.⁷²

2.5 INCLUSION OF SEXUAL ORIENTATION IN THE INTERIM CONSTITUTION

2.5.1 INTRODUCTION

It is difficult to identify a clear beginning and end to the political and social transformations of South Africa. The process of adopting a new Constitution for South Africa was a complicated, intentionally reflective process set against the dramatic historical backdrop of the end of apartheid and the fundamental reformulation of the political and societal structure of the entire nation.⁷³

Talks between the National Party (NP) and the ANC officially started in February 1990 when the liberation movements were unbanned.⁷⁴ The constitutional negotiations commenced at a forum called the Convention for a Democratic South Africa (CODESA) in December 1991 where delegates of the various political parties gathered at Kempton Park's World Trade Centre.⁷⁵ These negotiations ended in controversy, deadlock and violence. In November 1993 negotiations were resumed at the Multi-Party Negotiation Process (MPNP).⁷⁶ During these negotiations an agreement was finalised.⁷⁷

⁶⁹ Croucher 'South Africa's democratisation and the politics of gay liberation' (2002) 28 *Journal of South African Studies* 315 at 324.

⁷⁰ De Vos 'The "inevitability" of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *South African Journal on Human Rights* 432 at 436.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Christiansen 'Ending the Apartheid from the closet: Sexual orientation in the South African constitutional process' (1997) 32 *International Law and Politics* 997 at 998.

⁷⁴ *Idem*, at 1003.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

Despite the finalisation of the agreement, conflict with regard to the writing process continued between the dominant parties, being the ANC and NP. The negotiated solution to the conflict was a two-stage constitutional drafting process.⁷⁸ The first stage involved drafting an interim constitution, planning elections, and setting up a new Parliament that would elect a new president. During the second stage the newly elected Parliament in its role as the Constitutional Assembly would draft a 'final constitution'.⁷⁹

2.5.2 THE VARIOUS VIEWS ON THE INCLUSION OF SEXUAL ORIENTATION

In the draft Bill of Rights of the South African Law Commission that was appointed by the Government and the draft Bill of Rights of the ANC the following were accepted:

1. the centrality of individual rights of equality;
2. that limitations must be placed on governmental power; and
3. that the exercising of governmental power must be subject to oversight by the judiciary.⁸⁰

Although all the parties that participated in the drafting process agreed that an equality clause must be enshrined in the Constitution, that all persons are equal before the law and that discrimination is unconstitutional, they differed in their view on how this agreement was to be embodied.⁸¹ In its first paper on Group and Human Rights the South African Law Commission suggested that, along with being a woman, a child or a disabled person, gays and lesbians constitute a 'natural group'.⁸² The common characteristic of these groups is

⁷⁸ Christiansen 'Ending the Apartheid from the closet: Sexual orientation in the South African constitutional process' (1997) 32 *International Law and Politics* 997 at 1004.

⁷⁹ *Ibid.*

⁸⁰ Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450 at 451.

⁸¹ *Idem*, at 465.

⁸² *Ibid.*

that 'they have not chosen to have a particular status in a particular group, but have been assigned to that status by nature'.⁸³

When the NP published its constitutional proposals on 2 February 1993 the party adopted the Law Commission's formulation, in that it indicated that protection against discrimination must be awarded to gays and lesbians but under the so-called 'natural characteristics'.⁸⁴ According to Cameron this indicated that although the Government wanted to extend protection to gays and lesbians it only wanted to do so obliquely and that the protection that it wanted to afford was limited to protection from discrimination.⁸⁵ He further states that the protection that was envisaged would be insufficient and would not outlaw many of the pervasive forms of discrimination that homosexual persons encountered. The NP's draft further created a problem in that it implied that 'natural characteristics' were 'disabilities' and that only 'disabilities' which were 'natural characteristics' would be protected.⁸⁶

That most parties agreed on including either explicit or implicit anti-discrimination protections for gays and lesbians was a remarkable achievement. However, it did not ensure the inclusion of an express reference to sexual orientation in the Interim Constitution.⁸⁷ By the time of the MPNP, it remained unclear within the Technical Committee of Theme Committee Four of the Constitutional Assembly⁸⁸ whether the equality clause would be a provision prohibiting discrimination against specific, enumerated classes or a

⁸³ South African Law Commission Working Paper 25 Project 58 *Group and Human Rights* (1989) 398 as cited by Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450 at 466.

⁸⁴ Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450 at 466.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Christiansen 'Ending the Apartheid from the closet: Sexual orientation in the South African constitutional process' (1997) 32 *International Law and Politics* 997 at 1031.

⁸⁸ Technical Committee of Theme Committee Four dealt with fundamental rights. The mandate and work of this Committee was guided by Constitutional Principle II, which states: 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter Three of the Constitution'.

generic non-discrimination provision.⁸⁹ Ultimately, party negotiators chose to accept an equality clause that prohibited discrimination on specific grounds, including sexual orientation. Thus, section 8(2) of the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution) prohibited unfair discrimination, directly or indirectly, on the ground of sexual orientation.

2.6 THE RETENTION OF THE SEXUAL ORIENTATION CLAUSE IN THE FINAL CONSTITUTION

As late as October 1995, the inclusion of sexual orientation as a protected ground in the final Constitution (hereinafter Constitution) remained an outstanding issue. The Technical Committee of Theme Committee Four of the Constitutional Assembly clearly supported the inclusion of sexual orientation in the Explanatory Memorandum on the Draft Bill of Rights of 9 October 1995 that was prepared for the Constitutional Committee. The Committee recommended that sexual orientation be included as a prohibited ground of discrimination in the equality clause.⁹⁰ The Technical Committee demonstrated the similarities between sexual orientation and other forms of forbidden discrimination in various human rights documents and emphasised that the enumerated grounds of discrimination in international law related to characteristics and choices which all formed an integral part of human personality and identity. The forbidden discrimination specifically related to groups that were particularly vulnerable to discrimination, exclusion and subordination, for example, gays and lesbians.⁹¹

Due to the absence of national precedents and human rights documents within South Africa, the Technical Committee based their arguments and recommendations on various international human rights documents. Within the international arena no formal international human rights document explicitly afforded gays and lesbians equal rights and protection from unfair

⁸⁹ Christiansen 'Ending the Apartheid from the closet: Sexual orientation in the South African constitutional process' (1997) 32 *International Law and Politics* 997 at 1032.

⁹⁰ Explanatory Memorandum on the Draft Bill of Rights of 9 October 1995 par 4.2.3.

⁹¹ *Idem*, at par 4.2.2.

discrimination based on sexual orientation.⁹² International human rights bodies therefore had to interpret certain rights to extend them to gays and lesbians. Thus, for example, the United Nations Rights Committee (hereinafter UNHRC) interpreted sex as a prohibited ground of discrimination in articles 2(1) and 26 of the Covenant on Civil and Political Rights (hereinafter ICCPR) to include sexual orientation.⁹³ The UNHRC therefore ruled that legislation criminalising all forms of sexual intercourse between consenting homosexual men violated the right to privacy protected in article 17 of the ICCPR read with the right to non-discrimination in the enjoyment of the rights protected in the ICCPR.⁹⁴ This interpretation is consistent with the case law of the European Court of Human Rights.⁹⁵

The Technical Committee further referred to the Canadian case of *Haig v Birch*⁹⁶ where it was held that sexual orientation should be treated as an analogous ground of discrimination and should therefore be included within the scope of section 3(1) of the Canadian Human Rights Act which prohibits discrimination on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.⁹⁷

Not all the members of the Constitutional Assembly were convinced by the arguments that were based on international human rights precedents mainly due to the fact that equal rights for gays and lesbians lacked universal

⁹² Christiansen 'Ending the Apartheid from the closet: Sexual orientation in the South African constitutional process' (1997) 32 *International Law and Politics* 997 at 1035.

⁹³ Explanatory Memorandum on the Draft Bill of Rights of 9 October 1995 par 4.2.3.

⁹⁴ *Ibid.* In *Toonen v Australia* U.N. Human Rights Commission No. 488, Nicholas Toonen asserted that the protection from unfair discrimination based on sex in the International Covenant on Civil and Political Rights, article 26, was to be interpreted as including sexual orientation.

⁹⁵ *Ibid.* The Technical Committee cited three cases (*Dudgeon v United Kingdom*, judgement of 22 October 1981, Series A, vol 45; *Norris v Ireland*, judgement of 30 November 1987, Series A, vol 142; *Modinos v Cyprus*, judgement of 22 April 1993, Series A, vol 259) from the European Court for Human Rights in which it was decided that sodomy laws that criminalised homosexual acts violated article 8 of the European Convention for Human Rights and Fundamental Freedoms which guarantees 'everyone the right to respect for private and family life, his home and his correspondence'.

⁹⁶ *Ibid.* *Haig v Birch* (1992) 10 CRR (2d) 287.

⁹⁷ *Ibid.*

acceptance.⁹⁸ Advocates for the inclusion of sexual orientation 'responded that universal acceptance only defined the minimum platform that had to be provided. It did not stop the constitution-making body from including other kinds of protection, even if not universally accepted'.⁹⁹ Despite the debate that was occurring in the Constitutional Assembly, the Technical Committee was unequivocal in its final endorsement:

'[I]t is our strongest recommendation that sexual orientation be included as a prohibited ground of discrimination in the equality clause'.¹⁰⁰

During the final drafting period the gay and lesbian community's endeavour to influence the final Constitution was supported by a coalition of activists under the name National Coalition for Gay and Lesbian Equality (hereinafter NCGLE).¹⁰¹ The NCGLE was formed in December 1994 in anticipation of the struggle to keep sexual orientation in the final Constitution's equality clause.¹⁰² The Coalition's work included coordinating coalition member actions, organising lobbying efforts that reflected the racial and linguistic diversity of gay and lesbian South Africans, preparing submissions to the Constitutional Assembly, and orchestrating very successful letter-writing, petition and postcard campaigns.¹⁰³ The preservation of protection for sexual orientation in the final Constitution can be viewed as the result of the successful campaign by the NCGLE.¹⁰⁴

On 10 October 1995 the Constitutional Committee agreed to follow the recommendations made by the Technical Committee to retain sexual orientation as a ground for protection from discrimination despite public opposition, limited legal precedent, fragmented organisations, and

⁹⁸ Christiansen 'Ending the Apartheid from the closet: Sexual orientation in the South African constitutional process' (1997) 32 *International Law and Politics* 997 at 1036.

⁹⁹ *Idem*, at 1037.

¹⁰⁰ Explanatory Memorandum on the Draft Bill of Rights of 9 October 1995 par 6.1.

¹⁰¹ Christiansen 'Ending the Apartheid from the closet: Sexual orientation in the South African constitutional process' (1997) 32 *International Law and Politics* 997 at 1037.

¹⁰² *Ibid.*

¹⁰³ *Idem*, at 1038.

¹⁰⁴ *Idem*, at 1037.

conservative cultural elements.¹⁰⁵ South Africa thus became the first country in the world explicitly to recognise in its Constitution¹⁰⁶ sexual orientation as a ground on which discrimination would automatically be unfair until proven otherwise.¹⁰⁷

2.7 POST-CONSTITUTIONAL DEVELOPMENTS

The inclusion of sexual orientation as a prohibited ground of discrimination in terms of section 9(3) of the Constitution created an opportunity for gay men and lesbian women to question the validity and constitutionality of the common law and certain provisions of legislation that excluded them from recognition and protection during apartheid.

2.7.1 LEGISLATIVE DEVELOPMENTS

None of the legal consequences of marriage automatically applies if a same-sex couple concludes a life partnership. However, some Acts extend the same protection and benefits to same-sex life partners that they afford to married couples and heterosexual life partners.

For example, the Maintenance Act 99 of 1998 places a legal duty on any person to maintain any other person irrespective of the nature of the relationship between those persons.¹⁰⁸ The Act therefore extends recognition to a contractual duty of support by same-sex life partners who have agreed on a duty to support each other.¹⁰⁹ The Domestic Violence Act 116 of 1998 affords protection to persons who live or lived together in a relationship in the nature of a marriage and therefore includes same-sex life partners in its ambit.¹¹⁰ In terms of the Medical Schemes Act 131 of 1998, a medical scheme

¹⁰⁵ *Idem*, at 1042.

¹⁰⁶ Act 108 of 1996. The Citation of Constitutional Law Act 5 of 2005 subsequently removed the reference to 'Act' and changed the title of the Constitution to Constitution of the Republic of South Africa, 1996.

¹⁰⁷ S 8(2) of the Interim Constitution; s 9(3) of the Constitution, 1996.

¹⁰⁸ S 2(1).

¹⁰⁹ See also Cronjé and Heaton *South African family law* (2004) 2nd ed 58.

¹¹⁰ S1.

will not be allowed to be registered if the rules discriminate against anyone on the ground of sexual orientation.¹¹¹ A medical scheme may therefore not deny membership to a person because of his or her sexual orientation.¹¹² The Rental Housing Act 50 of 1999 protects same-sex life partners from unequal treatment and prohibits unfair discrimination on the grounds of marital status and sexual orientation.¹¹³

Changes to legislation that have been the result of post-constitutional court decisions will be discussed under the next heading below.

2.7.2 JUDICIAL DEVELOPMENTS

The Constitution contains an explicit prohibition against unfair discrimination on the ground of sexual orientation and marital status,¹¹⁴ and guarantees everyone the right to privacy,¹¹⁵ human dignity¹¹⁶ and equality before the law and equal protection and benefit of the law.¹¹⁷ These constitutional provisions have been raised in several cases¹¹⁸ in which protection and recognition of same-sex relationships have been at issue. The constitutional court has emphasised that these provisions suggest that every one has rights to equal concern and respect across difference¹¹⁹ and that the Constitution demands

¹¹¹ S 24(2)(e).

¹¹² Cronjé and Heaton *South African family law* (2004) 2nd ed 231.

¹¹³ S 4(1).

¹¹⁴ S 9(3) of the Constitution, 1996.

¹¹⁵ S 14 of the Constitution, 1996.

¹¹⁶ S 10 of the Constitution, 1996.

¹¹⁷ S 9(1) of the Constitution, 1996.

¹¹⁸ *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Farr v Mutual & Federal Insurance Co Ltd* 2000 3 SA 684 (C); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *J v Director General, Department of Home Affairs* 2003 5 SA 621 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA); *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 1 SA 524 (CC); *Gory v Kolver* 2007 4 SA 97 (CC).

¹¹⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) at par 132 (per Sachs J).

an adjustment of the way in which intimate relations are legally regulated and acknowledged in South Africa.¹²⁰

The promise of equality for all has been fulfilled in several court cases after 1994. These cases can be viewed as signifying a move away from the idea that heteronormativity forms the basis of policy formulation in our society. The cases will be discussed in detail under the following headings: The so-called 'Sodomy Judgement'; Extension of rights to same-sex life partners where a contractual reciprocal duty of support has been undertaken; Acquiring parental authority in a same-sex life partnership; Affording marriage rights to same-sex couples.

2.7.2.1 THE SO-CALLED 'SODOMY JUDGEMENT'

*National Coalition for Gay and Lesbian Equality v Minister of Justice*¹²¹ was the first case in which the constitutional court had to give judgement on alleged discrimination based on sexual orientation. The case dealt with the confirmation of an order made by the Witwatersrand local division. The Witwatersrand local division had granted an order declaring unconstitutional and invalid the common-law offence of sodomy and certain statutory provisions which prohibited and criminalised sexual conduct between consenting male adults.

Although the constitutional court did not need to confirm the invalidity of the common-law offence of sodomy,¹²² Ackermann J, who delivered the majority judgement, indicated that the constitutional court was obliged to consider the correctness of the high court's order with regard to sodomy to enable it to consider the correctness of that court's order declaring unconstitutional and invalid the statutory provisions that criminalised any conduct between men

¹²⁰ De Vos 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *South African Journal on Human Rights* 179 at 181.

¹²¹ 1999 1 SA 6 (CC).

¹²² An order declaring an Act of Parliament unconstitutional must be confirmed by the constitutional court: section 172(2)(a) of the Constitution, 1996.

which is 'calculated to stimulate sexual passion or to give sexual gratification'.¹²³

Ackermann J held that the sole purpose and existence of the offence of sodomy was to criminalise a particular form of gay expression which failed to conform to the moral or religious views of a section of society.¹²⁴ The objective of the common-law offence of sodomy was not dictated by the punishing of 'male rape'. The fact that the ambit of the offence was wide enough to include 'male rape' was mere coincidental. The core of the offence was to punish sexual expression between gay men.¹²⁵

Ackermann J further held that gay men were a permanent minority in society and had in the past suffered from patterns of disadvantage, and that the consequences of the disadvantage were severe, affecting the dignity, personhood and identity of gay men at a deep level.¹²⁶ Although the right to equality was the primary basis on which the case was argued, Ackermann J held that the criminalisation of sodomy also infringed the right to dignity enshrined in section 10 of the Constitution. He stated that the common-law prohibition on sodomy criminalised all sexual intercourse between men regardless of the circumstances surrounding the relationship, thus punishing a form of sexual conduct the broader society identified with homosexuality.¹²⁷ The existence of a law which criminalises a form of sexual expression for gay men degraded and devalued gay men in our broader society and constituted an invasion of their dignity and thus infringed section 10 of the Constitution.¹²⁸

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

'Privacy recognises that we all have the right to a sphere of private intimacy and autonomy which allows us to establish and nurture human

¹²³ At pars 9 and 73.

¹²⁴ At par 69.

¹²⁵ At par 69.

¹²⁶ At par 26.

¹²⁷ At par 28.

¹²⁸ At par 28.

relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy'.¹²⁹

It was therefore concluded that the common-law offence of sodomy was unconstitutional because it breached the rights to equality, dignity and privacy.¹³⁰ The limitations on these rights were not justifiable in terms of section 36 of the Constitution. It was held that the 'enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose'.¹³¹

The concept of equality as emphasised in this case laid down a solid foundation for future recognition of same-sex unions. It endorsed the view that the 'desire for equality is not a hope for the elimination of all differences' because 'to understand "the other" one must try, as far as humanly possible, to place oneself in the position of "the other" '.¹³² According to Ackermann J:

'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 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'.¹³³

¹²⁹ At par 32.

¹³⁰ At par 30.

¹³¹ At par 37.

¹³² At par 22.

¹³³ At par 22.

In his concurring judgement Sachs J held that 'equality means equal concern and respect across difference' and that equality 'does not imply a levelling or homogenisation of behaviour', but instead indicates that we must acknowledge and accept the differences in our society.¹³⁴ Sachs J further held:

'At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At the best, it celebrates the vitality that a difference brings to any society'.

Therefore, the right to equality is conceptualised as the right to be different from stated or unstated norms without suffering unfavourable consequences because of such difference.¹³⁵ According to Sachs J the decision of the court should be seen as 'part of a growing acceptance of difference in an increasingly open and pluralistic South Africa'. He further expressed the hope that 'the emancipatory effects of the elimination of institutionalised prejudice against gays and lesbians will encourage amongst the heterosexual population a greater sensitivity to the variability of the human kind'.¹³⁶

The constitutional court confirmed the order of the Witwatersrand local division declaring invalid and unconstitutional the common-law offence of sodomy and certain statutory provisions which criminalised and prohibited consensual sexual male intercourse.

Another aspect of inequality on the ground of sexual orientation was subsequently declared inconsistent with the Constitution. In *Geldenhuys v The National Director of Public Prosecutions and Others*¹³⁷ the constitutional court confirmed an order made by the supreme court of appeal declaring that sections 14(1)(b) and 14(3)(b) of the Sexual Offences Act unfairly differentiated and discriminated between heterosexual and same-sex sexual

¹³⁴ At par 132.

¹³⁵ De Vos 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *South African Journal on Human Rights* 179 at 185.

¹³⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) at par 138.

¹³⁷ CCT26/08.

activities. This unfair discrimination was found to be unjustifiable and was declared unconstitutional. The Criminal Law (Sexual Offences) Amendment Act 32 of 2007 subsequently repealed section 14 of the Sexual Offences Act of 1957. Sections 15 and 16 of the 2007 Act set a uniform age of consent, namely 16 years, for all consensual sexual activities.

2.7.2.2 EXTENSION OF RIGHTS TO SAME-SEX LIFE PARTNERS WHO HAVE UNDERTAKEN A CONTRACTUAL RECIPROCAL DUTY OF SUPPORT

The common-law definition of marriage does not make provision for same-sex marriage and consequently deprives same-sex life partners of certain benefits that accrue to married couples. In the following cases the courts used the test of a reciprocal duty of support to extend certain benefits that are usually afforded to married couples to the parties to same-sex life partnerships.

In *Langemaat v Minister of Safety and Security*¹³⁸ the constitutionality of the rules and regulations of the police medical aid scheme, Polmed, was questioned. The scheme afforded benefits to a legal spouse, widow or widower and the children of a member of the police force. These persons alone could be registered as a member's dependants. It was argued that the definition of 'dependant' in Polmed's rules was inconsistent with section 9(3) of the Constitution.

The applicant had been a member of the South African Police Service for 15 years. She had been living with her same-sex life partner since 1986. Since that date they owned a house and operated joint finances, were financially co-dependant, made joint decisions and named each other as beneficiaries in their respective insurance policies. Their relationship was described as an abiding and serious one. The applicant applied to register her partner as her dependant under the Polmed scheme, but the respondent rejected the

¹³⁸ 1998 2 All SA 259 (T), 1998 3 SA 312 (T).

application on the basis that the definition of 'dependant' did not include a same-sex life partner.

The court held that a 'dependant' is someone who relies upon another for maintenance and that this includes a same-sex partner. The court further held that where a same-sex union has existed for many years in a common home the parties to that union must owe each other a duty of support. Roux J concluded that the rules and regulations of Polmed led to the exclusion of many *de facto* dependants of members of the police force and that this exclusion amounted to discrimination.¹³⁹ Roux J did not indicate the specific ground of discrimination but declared the discrimination to be unconstitutional and ordered the chairman of the police medical scheme to review his decision and register the lesbian partner as the dependant of the police officer.¹⁴⁰

In *Satchwell v President of the Republic of South Africa*¹⁴¹ sections 8 and 9 of the Judge's Remuneration and Conditions of Employment Act 88 of 1989 were found to be inconsistent with the equality provisions of section 9 of the Constitution.¹⁴² Sections 8 and 9 provided that two-thirds of the salary that would have been payable to a judge had to be paid to his or her 'surviving spouse' until the death of such spouse. The 'surviving spouse' was also entitled to a gratuity and certain allowances. These benefits were reserved for 'spouses' of judges and were not payable to a 'partner in a permanent same-sex partnership'.

The applicant, a female judge, launched an application in the Transvaal provincial division. She alleged that the said provisions violated her right to equality as entrenched in section 9 of the Constitution because they denied her and her same-sex life partner benefits that were afforded to judges and their spouses. The applicant and her same-sex life partner had been involved in an intimate, committed, exclusive and permanent relationship since 1986.

¹³⁹ 1998 2 All SA 259 (T) at 264B, 1998 3 SA 312 (T) at 316A-C.

¹⁴⁰ 1998 2 All SA 259 (T) at 265E, 1998 3 SA 312 (T) at 317G.

¹⁴¹ 2002 9 BCLR 1220 (SCA), 2002 6 SA 1 (CC).

¹⁴² At par 21.

They lived like a married couple and were acknowledged as such by their respective families.

The Transvaal provincial division declared sections 8 and 9 of the Act inconsistent with the Constitution and ordered that the defect be rectified by the reading in after the word 'spouse' of the words 'or partner, in a permanent same-sex life partnership'. This order had to be confirmed by the constitutional court.

Delivering the constitutional court's judgement, Madala J stated that the benefits afforded to spouses of judges were afforded to them because of the importance of marriage in our society and because judges owed a legal duty of support to their spouses. Historically our law only recognised marriages between heterosexual spouses. This narrowness of focus excluded many relationships which create similar obligations and have a similar social value.¹⁴³ The constitutional court held that the fact that the provisions afforded benefits to spouses and omitted same-sex partners who established a permanent long-term relationship similar to that of a marriage, including undertaking a reciprocal duty of support, constituted unfair discrimination on the grounds of sexual orientation and marital status.¹⁴⁴ The court emphasised that section 9 of the Constitution does not require that spousal benefits be extended to same-sex partners who had not undertaken a reciprocal duty of support.¹⁴⁵ The court ordered sections 8 and 9 of the Act, as well as the ancillary regulations, to be read as including the words 'or partner in a same-sex partnership in which partners have undertaken reciprocal duties of support' after the word 'spouse'.

After the judgement of the constitutional court the Judge's Remuneration and Conditions of Employment Act 88 of 1989 was replaced by the Judge's Remuneration and Conditions of Employment Act 47 of 2001. Like its predecessor, this Act and its regulations did not afford benefits to a judge's

¹⁴³ At par 22.

¹⁴⁴ At par 23.

¹⁴⁵ At par 24.

same-sex life partner. Judge Satchwell was granted direct access to the constitutional court to challenge the constitutionality of this omission.¹⁴⁶ The constitutional court declared the provisions and regulations unconstitutional and corrected the defect with a reading-in order similar to the order it made during the first *Satchwell* decision.

In *Du Plessis v Road Accident Fund*¹⁴⁷ the appellant and the deceased were partners in a same-sex union when the deceased was killed in a motor vehicle accident. The appellant and the deceased had lived together since 1988. Their relationship was stable and they were acknowledged by family and friends as a couple. They even concluded a ceremony that was similar to a marriage ceremony. They would have legally married had they been permitted to do so.

The primary question was whether the plaintiff was entitled to institute a claim for loss of support against the respondent (the Road Accident Fund) in terms of the provisions of the Road Accident Fund Act 56 of 1996. The claim was dismissed by the court *a quo*. In terms of section 17 of the Road Accident Fund Act the defendant is obliged to compensate any person for loss or damage which that person has suffered as a result of the death of any other person that was caused by or arose from the driving of a motor vehicle if the death was caused by the negligence of the driver or owner of the motor vehicle. However, section 19(a) of the Act exempts the defendant from liability in instances where neither the driver nor the owner who caused the death would have been liable at common law.¹⁴⁸

The appellant requested the court to develop the common-law action for damages for loss of support and to bring the common law in conformity with the right to equality and dignity as enshrined in the Constitution. Although at that stage only marriage gave rise to an automatic reciprocal duty of support, Cloete JA emphasised that there is another form of life partnership which is

¹⁴⁶ *Satchwell v President of the Republic of South Africa* 2004 1 BCLR 1 (CC), 2003 4 SA 266 (CC).

¹⁴⁷ 2003 11 BCLR 1220 (SCA), 2004 1 SA 359 (SCA).

¹⁴⁸ At par 6.

different from marriage where a similar duty of support existed between the parties to that relationship namely, a conjugal relationship between people of the same sex.¹⁴⁹ Cloete JA held that the appellant had proved a legally enforceable duty of support on the part of the deceased. This finding was based on the fact that the appellant and the deceased had lived together as if they were legally married in a stable and permanent relationship until the deceased was killed; they had been accepted by family and friends as partners; they had pooled their income and had shared family responsibilities; each of them had made a will in which the other party was appointed sole heir; and when the plaintiff was medically boarded, the deceased had expressly stated that he would support the appellant financially and in fact did so until he died.¹⁵⁰ Based on these facts the appellant had a valid claim for loss of support against the Road Accident Fund. The supreme court of appeal accordingly extended the common-law action for damages for loss of support to a surviving same-sex life partner whose deceased same-sex life partner had undertaken a contractual duty to support him.

In *Gory v Kolver and Others*¹⁵¹ section 1(1) of the Intestate Succession Act 81 of 1987 was declared invalid and unconstitutional. Section 1(1) afforded rights of intestate succession to heterosexual spouses but not to permanent same-sex life partners. Van Heerden AJ held that the failure of section 1(1) of the Act to include a surviving same-sex life partner in which the partners have undertaken reciprocal duties of support was inconsistent with the applicants' rights to equality and dignity and that the limitation on these rights could not be justified.¹⁵² The defect was corrected by the reading in of the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' after the word 'spouse'.

In the above cases benefits and rights were extended to same-sex life partners but only in instances where they had undertaken a contractual duty to support each other. In each case where same-sex life partners seek to

¹⁴⁹ At pars 12 and 13.

¹⁵⁰ At pars 15 and 16.

¹⁵¹ 2007 4 SA 97 (CC).

¹⁵² At par 19.

apply one of these decisions to their situation one would therefore have to determine whether the life partners have undertaken a reciprocal duty to support.

2.7.2.3 THE RECOGNITION OF SAME-GENDERED FAMILIES

The traditional nuclear family has been the norm in society for as long as one can remember. Any discourse in heteronormativity was regarded as contrary to public policy or intended to be a destruction of society and religious beliefs. The constitutional recognition of sexual orientation as a prohibited ground for discrimination created ample opportunity for a new approach and the development of family law and family life.

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others*¹⁵³ the applicants brought an application in the high court for an order, *inter alia*, declaring section 25 of the Aliens Control Act 96 of 1991 to be inconsistent with the Constitution on the basis that the Act discriminated against partners in permanent same-sex life partnerships. Section 25(5) made provision for the issuing of immigration permits to the 'spouse' of a person who is permanently and lawfully resident in the Republic. It therefore denied the exemption to partners in permanent same-sex life partnerships.

Ackermann J held that 'spouse' as used in section 25(5) was not reasonably capable of a broad construction to include partners in permanent same-sex life partnerships.¹⁵⁴ The word 'spouse' was not defined in the Act, but the ordinary meaning implied that it referred to a 'married person; a wife, a husband'.¹⁵⁵ Furthermore, the context in which 'spouse' was used in section 25(5) did not suggest a wider meaning.¹⁵⁶ Section 25(5) accordingly only afforded protection to conjugal relationships between heterosexuals and denied protection and exemption to a life partnership, which was the only form

¹⁵³ 2000 1 BCLR 39 (CC), 2000 2 SA 1 (CC).

¹⁵⁴ At par 25.

¹⁵⁵ At par 25.

¹⁵⁶ At par 25.

of conjugal relationship available to same-sex life partners.¹⁵⁷ The court held that the impact of section 25(5) was to reinforce harmful and hurtful stereotypes of homosexuals¹⁵⁸ and that it constituted a crass, blunt, cruel and serious invasion of their dignity.¹⁵⁹

Ackermann J emphasised that over the past decades an accelerating process of transformation had taken place in family relationships, as well as in societal and legal concepts regarding the family and what it comprised.¹⁶⁰ He concluded that:

‘gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, eros and charity; they are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household; they are individually able to adopt children and in the case of lesbians to bear them; in short they have the same ability to establish a *consortium omnis vitae*; finally...they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.’¹⁶¹

The court held that the invasion of the right to equality and dignity was not justifiable and ordered that the constitutional defect in section 25(5) be corrected by the reading in, after the word ‘spouse’, of the following words: ‘or partner in a permanent same-sex life partnership’.¹⁶²

¹⁵⁷ At par 36.

¹⁵⁸ At par 49.

¹⁵⁹ At par 54.

¹⁶⁰ At par 47.

¹⁶¹ At par 53.

¹⁶² At par 97.

In *Farr v Mutual & Federal Insurance Co Ltd* ¹⁶³ the applicant had been insured by the respondents since 1987 against loss or damage to the applicant's motor vehicle and liability to third parties. The insurance policy excluded liability for death or bodily injury to a member of the policy holder's family normally resident with him. The applicant and his same-sex life partner collided with another motor vehicle. The applicant's same-sex life partner sustained injuries and claimed damages arising from his injuries from the applicant. The respondent repudiated the claim on the ground that the claimant was a member of the applicant's family normally resident with him.

The court held that the phrase 'a member of the policy holder's family' in an insurance policy clause included the long-term same-sex partner of the policy holder. The consequences of the inclusion of the policy holder's same-sex life partner in the phrase was that the respondent was not obliged to indemnify the applicant against claims by his same-sex life partner which arose out of injuries he sustained in a motor vehicle collision where the motor vehicle was driven by the applicant.

2.7.2.4 ACQUIRING PARENTAL AUTHORITY IN A SAME-SEX LIFE PARTNERSHIP

Parental authority refers to the rights, duties, powers and responsibilities parents have in respect of their children and those children's property.¹⁶⁴ In the past, the acquisition of parental authority by same-sex life partners seemed impossible but with the enactment of the Constitution, the achievement of human rights and the development of reproductive technology it all became a reality.

In *Du Toit and Another v Minister of Welfare and Population Development and Others*¹⁶⁵ the applicants, partners in a long-term lesbian relationship, wanted to adopt two children jointly but were prohibited from doing so by the Child

¹⁶³ 2000 3 SA 684 (C).

¹⁶⁴ Cronjé and Heaton *South African family law* (2004) 2nd ed 265.

¹⁶⁵ 2002 10 BCLR 1006 (CC), 2003 2 SA 198 (CC).

Care Act 74 of 1983 and the Guardianship Act 192 of 1993.¹⁶⁶ Sections 17(a), 17(c) and 20(1) of the Child Care Act and section 1(2) of the Guardianship Act provided for the joint adoption and guardianship of children by married persons only. Consequently, the second applicant alone became the adoptive parent.

The applicants brought an application in the Pretoria high court challenging the constitutionality of the relevant provisions. They argued that these provisions violated their rights to equality and dignity and further violated section 28(2) of the Constitution which states:

‘A child’s best interests are of paramount importance in every matter concerning the child.’

The applicants further argued that the non-recognition of the first applicant as a parent, in the context of her relationship with the second applicant and their relationship with the adopted children, perpetuated the fiction of family homogeneity based on the mother/father model and accordingly disregarded developments that had taken place in the country, including the enactment of the Constitution.¹⁶⁷

Kgomo J, who presided in the high court, found that the provisions of the Child Care Act and Guardianship Act violated the Constitution and ordered that the unconstitutionality be corrected by the reading in of words into the impugned provisions to allow for joint adoption and guardianship of children by same-sex life partners.¹⁶⁸ This judgement was confirmed by the constitutional court.

Skweyiya AJ, who delivered the constitutional court’s judgement, held that the exclusion of same-sex life partners from adopting children where they would otherwise be suitable to do so did not serve the best interests of the children. Thus the exclusion was in direct conflict with section 28(2) of the

¹⁶⁶ The latter Act was repealed by the Children’s Act 38 of 2005 on 1 July 2007.

¹⁶⁷ At par 28.

¹⁶⁸ At par 2.

Constitution.¹⁶⁹ The exclusion also deprived children of the possibility of acquiring a loving and stable family life as required by section 28(1)(b).¹⁷⁰ The court further held that the failure of the law to recognise the value and worth of the first applicant as a parent to the adoptive children was demeaning and limited her right to dignity and equality and that this limitation was not justifiable.¹⁷¹

These findings are a true reflection of democratic values where equal protection and recognition are afforded to all irrespective of diversities. This judgement can be seen as a rejection of the view that exposure to a lesbian relationship will be detrimental to a child's well-being.¹⁷²

In *J v Director-General, Department of Home Affairs*¹⁷³ lesbian life partners had twins as a result of artificial insemination using the ova of the first applicant and the sperm of an anonymous male donor. The fertilised ova were implanted into the second applicant who gave birth to the twins. The applicants wanted to be registered and recognised as the parents of the twins but their registration was refused by the Department of Home Affairs. The applicants thereupon successfully applied to the Durban high court for an order directing the respondent to issue the applicants with a birth certificate for each child reflecting the second applicant as their mother and the first applicant as their parent with their surname being the surname of the first applicant.

Magid J, presiding in the high court, *inter alia*, declared regulation 5 of the regulations issued under the Births and Deaths Registration Act 51 of 1992 unconstitutional as it did not make provision for the registration of same-sex life partners as the parents of children born to them and provided for the registration of one male and one female parent only. Magid J also declared that the first applicant was a natural parent and guardian of the children. He

¹⁶⁹ At par 22.

¹⁷⁰ At par 22.

¹⁷¹ At pars 29 and 37.

¹⁷² As had been held in *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W).

¹⁷³ 2003 5 BCLR 463 (CC), 2003 5 SA 621 (CC).

held that the circumstances required that the first applicant's right to human dignity in terms of section 10 of the Constitution and the twin's right to family and parental care in terms of section 28(1)(b) demanded that her rights as the genetic mother of the twins and the twin's right to have a claim against her had to be recognised by the law. The court further declared section 5 of the Children's Status Act 82 of 1987¹⁷⁴ to be inconsistent with the Constitution. This section differentiated between married and unmarried couples in that children born to a married couple as a result of artificial insemination would be regarded as their legitimate child while in the case of an unmarried couple the child would be regarded as extra-marital.¹⁷⁵

The constitutional court confirmed the unconstitutionality of section 5 of the Children's Status Act. The court held that section 5 unfairly discriminated between married persons and same-sex life partners and was inconsistent with section 9(3) of the Constitution which prohibits discrimination on the ground of sexual orientation.¹⁷⁶ Furthermore, the differentiation between children born by artificial insemination to married and unmarried parents amounted to unfair discrimination on the grounds of social origin and birth.

The result of this decision is that a child who is born as a result of artificial insemination of a woman in a same-sex life partnership is deemed to be the legitimate child of the same-sex life partners.¹⁷⁷ Very importantly in my view, this decision changed the concept of the traditional nuclear family by confirming the existence of a different type of family which is entitled to equal respect and full protection under the law.

¹⁷⁴ The latter Act was repealed by the Children's Act 38 of 2005 on 1 July 2007.

¹⁷⁵ With the partial coming into operation of the Children's Act 38 of 2005 on 1 July 2007 children are no longer termed 'extra-marital' or 'legitimate'. Now they are respectively referred to as children born of unmarried parents and children born of married parents: section 19(1), 20 and 21 of the Children's Act.

¹⁷⁶ 2003 5 BCLR 463 (CC) at par 13.

¹⁷⁷ Cronjé and Heaton *Casebook on family law* (2004) 2nd ed 405.

2.7.2.5 AFFORDING MARRIAGE RIGHTS TO SAME-SEX COUPLES

The common-law definition of marriage excludes same-sex life partners from entering into marriage. The common-law definition expressly makes provision for a voluntary union for life between one man and one woman, to the exclusion of all others while it lasts.¹⁷⁸ Although the Marriage Act 25 of 1961 does not define marriage it contains a marriage formula which only makes provision for persons of the opposite sex to declare that they accept each other as husband and wife.¹⁷⁹ In *Fourie v Minister of Home Affairs*¹⁸⁰ the applicants, both women, had approach the Transvaal provincial division for an order declaring their marriage to be recognised as legally valid under the Marriage Act and to direct the respondents to register their marriage in terms of the provisions of the Marriage Act and the Identification Act 68 of 1997. The same-sex couple based their argument on the fact that the common law had developed in such a manner that it could recognise marriage between persons of the same-sex as a legally valid marriage in terms of the provisions of the Marriage Act. The application was dismissed by the Transvaal provincial division on the ground that the relief sought was incompatible with the Marriage Act.

On appeal to the supreme court of appeal¹⁸¹ the decision of the high court was reversed. The supreme court of appeal held that refusal of the Transvaal provincial division to develop the common law in accordance with the spirit, purport and objectives of the Constitution amounted to non-compliance with sections 8(3), 36(1), 39(2) and 173 of the Constitution which places courts under a general obligation to develop the common law appropriately should the common law be deficient.¹⁸² The supreme court of appeal concluded that the common-law definition of marriage deprived same-sex couples of the option of getting married and therefore denied gays and lesbians the option of solemnising their union and further denied them the opportunity to gain certain

¹⁷⁸ See, eg, the sources cited in fn 27 above. See also Sinclair assisted by Heaton *The law of marriage* (1996) 305.

¹⁷⁹ S 30(1).

¹⁸⁰ TPD 2002-10-18 case number 17280/02.

¹⁸¹ *Fourie and Another v Minister of Home Affairs and Others* 2005 3 SA 429 (SCA).

¹⁸² At pars 4 and 5.

benefits, protections and duties.¹⁸³ The exclusionary definition of marriage injured gays and lesbians because it implied a judgement on them and suggested that their relationships and commitments were inferior. It excluded them from a community of moral equals that the Constitution promised to create for all.¹⁸⁴ Although the Marriage Act contains no definition of marriage, the Act was enacted on the assumption that the common-law definition of marriage applied to heterosexual marriages only and it was this definition that underlined the Act.¹⁸⁵ The supreme court of appeal developed the common-law definition of marriage to embrace same-sex partners by defining 'marriage' as 'the union of two persons to the exclusion of all others for life'.

The Marriage Act presented a further impediment to the relief sought by the appellants. Section 30(1) of the Act contains a default marriage formula which requires a marriage officer to put the default formula to the couple during the marriage ceremony. The default formula requires the couple to declare whether they accept each other as 'lawful wife (or husband)'.¹⁸⁶ The formula therefore makes provision for the declaration by opposite sex couples only and excludes same-sex couples. Only the Minister of Home Affairs has the authority to approve a formula that differs from the default formula. Cameron JA, delivering the majority judgement, held that the exclusion of same-sex couples from the default formula could not be corrected by the reading in of words to include same-sex partners as had been done in many other cases. He held that the development of the common-law definition of marriage would take practical effect as soon as the Minister of Home Affairs approved another formula which encompassed same-sex marriage.¹⁸⁷ The supreme court of appeal therefore reversed the decision of the Transvaal provincial division replacing it with an order declaring that the intended marriage between the appellants would be capable of being recognised as a legally valid marriage, provided that the formalities as set out by the Marriage Act were complied

¹⁸³ At par 15.

¹⁸⁴ At par 15.

¹⁸⁵ At par 27.

¹⁸⁶ At par 27.

¹⁸⁷ At par 37.

with.¹⁸⁸ Cameron JA importantly emphasised that neither this decision, nor the ministerial grant of a formula which would encompass same-sex couples would in any manner compel any religious organisation or minister of religion to condone or perform same-sex marriages.¹⁸⁹

The decision of the supreme court of appeal was set aside and replaced by the constitutional court in *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amicus Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs*.¹⁹⁰ The constitutional court held that the failure of the common law and the Marriage Act to provide for means whereby same-sex couples could enjoy the same status, entitlements and responsibilities that are afforded to heterosexual couples through marriage constituted an unjustifiable violation of their right to equal protection under the law under section 9(1) of the Constitution, their right not to be unfairly discriminated against in terms of section 9(3) of the Constitution, and their right to dignity in terms of section 10 of the Constitution.¹⁹¹

The constitutional court declared the common-law definition of marriage to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the benefit coupled with the responsibilities it accords to heterosexual couples. The court also declared the omission from section 30(1) of the Marriage Act after the words 'or husband' of the word 'or spouse' unconstitutional. The declarations of invalidity were suspended for 12 months to allow Parliament to correct the unconstitutionality.

In delivering the majority judgement, Sachs J referred to *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others*¹⁹² where O'Regan J had pointed out that:

¹⁸⁸ At pars 49 and 150.

¹⁸⁹ At par 36.

¹⁹⁰ 2006 1 SA 524 (CC).

¹⁹¹ At par 114.

¹⁹² 2000 3 SA 936 (CC).

'It would be inappropriate for this Court to seek to remedy the inconsistency in the legislation under review. The task of determining what guidance should be given to decision-makers and, in particular, the circumstances in which a permit may justifiably be refused is primarily a task for the Legislature and should be undertaken by it. There is a range of possibilities that the Legislature may adopt to cure the unconstitutionality'.¹⁹³

Sachs J concluded that it was the duty of Parliament to restructure the institution of marriage. He therefore concluded that the constitutional court had to suspend the order of invalidity to give Parliament the opportunity to correct the defect itself.¹⁹⁴ If Parliament failed to cure the defect within 12 months, the words 'or spouse' would automatically be read into section 30(1) of the Marriage Act and then the Marriage Act would become the legal vehicle enabling same-sex couples to achieve the status and benefits afforded by marriage.¹⁹⁵

Although the order of invalidity was suspended for a period of 12 months the case embraced the right to be different and still be entitled to equal respect, protection and self-worth. With this judgement South Africa became the first country in Africa to extend marriage rights to same-sex couples. The Civil Union Act 17 of 2006 was enacted as a result of the *Fourie* judgement. This Act affords marriage rights to same-sex couples and will be discussed in chapter 3.

2.8 SUMMARY AND CONCLUSION

The oppression and marginalisation of homosexual persons were relegated to a past era as a result of the political transition that took place with the acceptance of a new constitutional democracy. The Bill of Rights guarantees every one the right to be equally treated, respected and protected irrespective

¹⁹³ At par 134.

¹⁹⁴ 2006 1 SA 524 (CC) at pars 135 and 136.

¹⁹⁵ At par 161.

of diversities. The *Fourie* judgement was the logical outcome of the growing body of progressive judgements regarding the rights of same-sex couples. The deference to the legislature by the constitutional court based on the moral and religious sensitivities of the case is, however, illogical if one takes into account that the majority norm is predominantly against the recognition of same-sex marriage. The legislature sought to give effect to the decision in *Fourie* by enacting the Civil Union Act. The following chapter will consist of an in-depth discussion of the legal consequences of the enactment of the Civil Union Act.

'The strength of the nation envisaged by the Constitution comes from its capacity to embrace all its members with dignity and respect. In the words of the Preamble, South Africa belongs to all who live in it, united in diversity. What is at stake in this case, then, is how to respond to legal arrangements of great social significance under which same-sex couples are made to feel like outsiders who do not fully belong in the universe of equals.'¹

3 THE CIVIL UNION ACT 17 OF 2006

3.1 INTRODUCTION

This chapter consists of a comprehensive discussion of the Civil Union Act (hereinafter the Act) that came into operation on 30 November 2006 as a result of the *Fourie* judgement handed down by the constitutional court on 1 December 2005. A short overview will be given on the legislative process that eventually led to the enactment of the Act with reference to the recommendations made by the South African Law Reform Commission and the draft Civil Union Bill. Thereafter a general description of the Act will be given. It will be indicated who has the capacity to enter into a civil union and the requirements for the solemnisation and registration of a civil union as set out by the Act will be discussed. This will be followed by a critical discussion on the shortcomings of the Act.

3.2 THE LEGISLATIVE PROCESS THAT LED TO THE ENACTMENT OF THE CIVIL UNION ACT

3.2.1 THE RECOMMENDATIONS MADE BY THE SOUTH AFRICAN LAW REFORM COMMISSION (SALRC) TO EXTEND MARRIAGE RIGHTS TO SAME-SEX COUPLES

In the Discussion Paper on domestic partnerships, the SALRC raised the possibility of the extension of marriage rights to same-sex couples in 1998.² The Commission's final report in its study of domestic partnerships was published in March 2006. The Commission made certain recommendations that it submitted would satisfy the equality provision of the Constitution.³ As a

¹ As per Sachs J in *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amicus Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 1 SA 524 (CC) at par 61.

² Discussion Paper 104 (Project 118) (2003) *Domestic Partnerships*.

³ Report on Project 118 (2006) *Domestic Partnerships* at par 5.6.

first choice, the Commission recommended the amendment of the Marriage Act of 1961 by the insertion of a definition of marriage that extends marriage in terms of the Act to same-sex and opposite-sex couples; the amendment of the Marriage Act by the insertion of a definition of the word 'spouse'; and the amendment of the marriage formula in the Marriage Act to include the words 'or spouse'.⁴ To accommodate the religious and moral objections that were raised against the recognition of same-sex marriage, the Commission recommended a second choice, the enactment of the 'Orthodox Marriage Act' (the so-called Dual Act option) that would only be available to opposite-sex couples.⁵ The amended Marriage Act would be called the 'Reformed Marriage Act'.⁶

Both proposals of the Commission were all-encompassing, considering the right to equal protection and benefit of the law by same-sex couples and taking into account religious and moral objections that were raised against the recognition of same-sex marriage.⁷

3.2.2 DRAFT CIVIL UNION BILL

The legislature, however, discarded the reformative options recommended by the SALRC.⁸ When the Civil Union Bill⁹ (hereinafter the Bill) was presented to Parliament at the end of August 2006 it was received with much disapproval. Much debate revolved around the procedural issue as to whether the Bill had been properly tabled to the Home Affairs Portfolio Committee and whether it

⁴ *Idem*, at pars 5.6.6 and 5.6.7.

⁵ *Idem*, at pars 5.6.17 and 5.6.23.

⁶ The SALRC recommended a different name for the amended Marriage Act in order to differentiate between 'orthodox marriages' and 'reformed marriages'.

⁷ In the *Fourie* judgement, Sachs J held that it was necessary to take cognisance of the reform process recommended by the SALRC in determining the appropriate remedy to be ordered. He further held the reform process was conducted in a 'holistic, systematic, structured and consultative' manner and of value to the Legislature in drafting the appropriate legislation (at par 125). His decision to afford Parliament the opportunity to correct the legal position with regard to same-sex marriage was largely based on the research initially conducted by the SALRC.

⁸ Sinclair 'A new definition of marriage: gay and lesbian groups may marry' (2008) *The International Survey of Family Law* 397 at 402.

⁹ Draft Civil Union Bill, published in the *Government Gazette* 29169 of 13 August 2006.

had been properly certified by the State Law Advisors.¹⁰ The Bill proposed the implementation of a separate institution for same-sex couples — civil partnerships.¹¹ However, the legal consequences of marriage would apply *mutatis mutandis* to civil partnerships.¹² The proposed civil partnership differed from traditional marriage in three fundamental ways: it would not be called a marriage (except if the parties prefer to refer to their civil partnership as a marriage but this would be allowed only during the solemnisation of the civil partnership);¹³ marriage officers employed by the state would have the right to refuse to solemnise a civil partnership on the grounds of conscience;¹⁴ and it would only be available to same-sex couples, not to heterosexual couples.¹⁵

Activists and members of the Lesbian Gay Bisexual Transgendered and Intersex (LGBTI) community were displeased with the Bill, arguing that it represented an attempt to create a ‘separate but equal’ marriage institution that would ‘protect’ ‘real marriage’ from ‘contamination’ and ‘defilement’ by same-sex couples, while pretending to afford same-sex couples with equal marriage rights.¹⁶ They further argued that the Bill contradicted the instructions set out in the *Fourie* judgement where the constitutional court expressly stated that Parliament should avoid implementing a remedy that would provide for ‘separate but equal’ rights to same-sex couples that would in their context and application create new forms of oppression.¹⁷ It was argued that the Bill created a separate and inferior institution which failed to recognise both tangible legal consequences and intangible benefits that flow

¹⁰ Smith and Robinson ‘The South African *Civil Union Act* 2006: progressive legislation with regressive implications?’ (2008) 22 *International Journal of Law, Policy and the Family* 356 at 358.

¹¹ Clause 2(a) of the Civil Union Bill. A ‘civil partnership’ is defined as ‘the voluntary union of two adult persons of the same sex that is solemnised and registered in accordance with the procedures prescribed in this Act to the exclusion, while it lasts, of all others’: clause 1 of the Bill.

¹² Clause 13(1).

¹³ Clause 11.

¹⁴ Clause 6(1).

¹⁵ Clause 1.

¹⁶ De Vos ‘A judicial revolution? The court-led achievement of same-sex marriage in South Africa’ (2008) 2 *Utrecht Law Review* 162 at 167. See also De Vos ‘The “inevitability” of same-sex marriage’ (2007) 23 *South African Journal on Human Rights* 432 at 458.

¹⁷ 2006 1 SA 524 (CC) at par 150.

from entering into marriage.¹⁸ Accordingly, the Bill deprived same-sex couples of the right to access the status associated with traditional marriage and endorsed the view that same-sex couples are somehow immoral and impure and that heterosexual marriage must be protected from this revulsion.¹⁹

Gay and lesbian activists launched a sustained attack on the draft Bill stating that it was insulting and humiliating towards people who would prefer to marry a member of their own sex.²⁰ The fact that the Bill did not provide same-sex life partners with marriage rights but with a mere second-class institution called a 'civil partnership' affirmed the view that the legislature was reluctant to grant equal marriage rights to same-sex couples and expressed an intolerance for the plurality of the South African society.²¹ This view of gay and lesbian activists resonated with some members of the ANC because it reminded them of similarities associated with apartheid. Therefore, the ANC members of the Home Affairs Portfolio Committee came to the conclusion that it was necessary to amend the draft Bill.²² In early November 2006 the National Assembly adopted a substantially amended Civil Union Bill which provides for same-sex couples and heterosexual couples to enter into a civil union. The Civil Union Act came into operation on 30 November 2006.

3.3 GENERAL DESCRIPTIONS OF THE CIVIL UNION ACT

3.3.1 DEFINITION AND FORMULATION OF A CIVIL UNION

The Act defines a civil union as 'the voluntary union of two persons who are both 18 years or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed

¹⁸ De Vos 'A judicial revolution? The court-led achievement of same-sex marriage in South Africa' (2008) 2 *Utrecht Law Review* 162 at 168.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Barnard 'Totalitarianism, (same-sex) marriage and democratic politics in post-apartheid South Africa' (2007) 23 *South African Journal on Human Rights* 500 at 516.

²² De Vos 'A judicial revolution? The court-led achievement of same-sex marriage in South Africa' (2008) 2 *Utrecht Law Review* 162 at 169. See also de Vos 'The "inevitability" of same-sex marriage' (2007) 23 *South African Journal on Human Rights* 459.

in this Act, to the exclusion, while it lasts, of all others'.²³ The Act therefore applies to civil union partners joined in a civil union.²⁴ It is important to note that the Act applies to both same-sex and opposite couples in a monogamous relationship.

The objectives of the Act are:

- (a) to regulate the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership; and
- (b) to provide for the legal consequences of the solemnisation and registration of civil unions.²⁵

3.3.2 REQUIREMENTS FOR THE SOLEMNISATION AND REGISTRATION OF A CIVIL UNION

3.3.2.1 GENERAL

Prospective civil union partners may enter into a contract of engagement, variously referred to as a 'betrothal' or 'espousal'. By entering into this contract *sui generis* the civil union partners promise to enter into a civil union on a particular or determinable future date. However, an engagement contract is not a prerequisite for the conclusion of a legally recognised civil union.²⁶ A civil union provides for only two persons²⁷ who are 18 years²⁸ or above to conclude either a marriage or a civil partnership. A person in a civil union may not conclude a marriage under the Marriage Act or the Recognition of Customary Marriages Act 120 of 1998²⁹ and a person married under the Marriage Act or Recognition of Customary Marriages Act is not allowed to

²³ S 1.

²⁴ S 3.

²⁵ S 2.

²⁶ See Cronjé and Heaton *South African family law* (2004) 2nd ed 7 for a discussion of the definition and formation of an engagement contract between a man and woman. See also Hahlo *The South African Law of Husband and Wife* (1985) 5th ed 45 and Sinclair assisted by Heaton *The law of marriage* (1996) 313-314. The definition and formation now also apply to prospective civil union partners.

²⁷ S 8(1).

²⁸ See the definition of 'civil union' in s 1 of the Act.

²⁹ S 8(2).

register a civil union.³⁰ A civil union is therefore monogamous, may only be entered into by adults and may not co-exist with a civil or customary marriage. A prospective civil union partner, who has previously entered into a civil or customary marriage or a registered civil union under the Civil Union Act, must present the marriage officer with a certified copy of the divorce order or death certificate of the former spouse or civil partner as proof that the previous marriage or civil union has been terminated.³¹ A marriage officer may not solemnise or register a civil union if the certified copy is not in his or her possession.³²

Apart from being of the same-sex, the prospective civil union partners may not be prohibited by law from concluding a civil or customary marriage.³³ Accordingly, the same requirements as to capacity that apply in civil and customary marriages apply to civil unions. Thus, for example, mentally ill persons are absolutely incapable of entering into a civil union; there must be *consensus* between the parties to enter into a civil union; and the civil union must be lawful, for example, the partners to a civil union must not be within the prohibited degrees of relationship.³⁴

3.3.2.2 THE PRESCRIBED FORMALITIES

A civil union must be solemnised by a marriage officer³⁵ in accordance with the provisions and requirements set out in the Act.³⁶ Among these requirements are that religious denominations or organisations must apply in

³⁰ S 8(3).

³¹ S 8(4).

³² S 8(5).

³³ S 8(6).

³⁴ See Cronjé and Heaton *South African family law* (2004) 2nd ed Chapter 3 for a similar discussion of the legal requirements for the conclusion of a valid civil marriage. See also Sinclair assisted by Heaton *The law of marriage* (1996) Chapter 7 for a general discussion of capacity to marry.

³⁵ S 1 of the Act defines a 'marriage officer' as (a) a marriage officer *ex officio* so designated by virtue of s 2 of the Marriage Act; or (b) any minister of religion, or any person holding a responsible position in any religious denomination, designated as a marriage officer under s 5 of the Act.

³⁶ S 4(1). Subject to the provisions of the Act, the marriage officer has all the powers, responsibilities and duties conferred upon him or her under the Marriage Act, to solemnise a civil union: s 4(2).

writing to the Minister³⁷ for approval to conduct civil unions.³⁸ Only after approval has been granted by the Minister may a minister of religion or any person holding a responsible position in that religious organisation submit a written request to the Minister or any officer in the public service authorised thereto by the Minister to be designated as a marriage officer for the purposes of solemnising civil unions in accordance with the provisions of the Act and further in accordance with the rites of that specific religious institution.³⁹ It is clear from the provisions of the Act that religious marriage officers are not allowed to submit individual written requests to be designated as marriage officers to conduct a civil union under the Act. In order to solemnise a civil union both the religious institution and religious official must apply for the required approval.⁴⁰

It is important to note that an *ex officio* marriage officer⁴¹ is not compelled to solemnise a same-sex civil union if he or she objects on the ground of conscience, religion or belief.⁴² This provision amounts to possible sexual orientation discrimination by a state organ which will probably be unconstitutional if challenged. This issue will be discussed below under the heading: Particular problems arising from the Civil Union Act. A marriage officer may solemnise and register a civil union on any day of the week between 8h00 and 16h00.⁴³ The civil union must be solemnised and registered in a public office or private dwelling house with open doors or on any premises used for such purposes by the marriage officer. However, a civil union may be solemnised elsewhere if one or either of the parties is incapable

³⁷ The Minister of Home Affairs. See the definition of 'Minister' in s 1 of the Act.

³⁸ S 5(1).

³⁹ S 5(4).

⁴⁰ De Vos 'A judicial revolution? The court-led achievement of same-sex marriage in South Africa' (2008) 2 *Utrecht Law Review* 162 at 170.

⁴¹ S 2(1) and (2) of the Marriage Act defines an *ex officio* marriage officer as 'Every magistrate, every special justice of the peace and every Commissioner' and states that the marriage officer shall 'by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office'. Furthermore, 'the Minister and any officer in the public service authorized thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area'.

⁴² S 6 of Act 17 of 2006.

⁴³ S 10(1).

of being present at the abovementioned places due to serious, longstanding illness or serious bodily injury.⁴⁴

The requirements for the solemnisation of a civil union are very similar to requirements for the solemnisation of a civil marriage in terms of the Marriage Act. Before solemnisation of a civil union can take place the prospective civil union partners must furnish the marriage officer with their identity documents⁴⁵ or identity affidavits.⁴⁶ Alternatively, one party may furnish his or her identity document while the other party submits an identity affidavit.⁴⁷

Both parties and at least two competent witnesses are required to be personally present during the civil union ceremony.⁴⁸ The conclusion of a civil union through a representative on behalf of either party is therefore not allowed.⁴⁹

At the commencement of the ceremony the marriage officer must ask the parties whether their civil union should be known as a marriage or a civil partnership.⁵⁰ The marriage officer must put the prescribed questions to each party separately, and each of them must reply in the affirmative:

'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage/civil partnership with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful spouse/civil partner?'

⁴⁴ S 10(2).

⁴⁵ Issued under the provisions of the Identification Act 68 of 1997.

⁴⁶ S 7 of Act 17 of 2006. In terms of reg 3 of the regulations issued under the Act on 29 November 2006 the affidavit of identity must be in a form similar to Form A in the Annexure but this regulation was amended by schedule 2 of the First Amendment of Civil Union Regulations, 2006 as published in the *Government Gazette* 31750 of 2 January 2009 which stipulates that the affidavit must be in a form similar to DHA-1763. The identity affidavit must state the reasons for not having an identity document, the particulars of the deponent and the particulars of the prospective civil union partner.

⁴⁷ S 7(c).

⁴⁸ S 10(2). Section 9 of the Act allows anyone to object in writing to a proposed civil union and a marriage officer may only proceed with the solemnisation if he or she is satisfied that there is no lawful impediment to the proposed civil union.

⁴⁹ S 10(3).

⁵⁰ S 11(1).

After each party has replied in the affirmative the parties must give each other the right hand and the marriage officer must declare the marriage/civil partnership solemnised in the following words:

'I declare that A.B. and C.D. here present have been lawfully joined in a marriage/civil partnership'.⁵¹

When this declaration is made by the marriage officer the civil union legally comes into existence. If an error, omission or oversight is committed with regard to the questions or the declaration or the requirement that the parties must give each other the right hand, the marriage/civil partnership is nevertheless valid if the error, omission or oversight occurred in good faith or due to the physical disability of one or both of the parties, if the solemnisation of the civil union in all other respects complied with the provisions of the Civil Union Act.⁵²

3.3.2.3 REGISTRATION OF A CIVIL UNION

Prior to entering into the civil union the prospective civil union partners must separately and in writing declare their willingness to enter into a civil union with one another by signing the prescribed document⁵³ in the presence of two witnesses.⁵⁴ The marriage officer and the two witnesses must sign the written declaration to certify that it was made in their presence.⁵⁵

Once the civil union has been solemnised, the marriage officer must issue the civil union partners with a registration certificate stating that they have entered

⁵¹ S 11(2).

⁵² S 3.

⁵³ In terms of reg 5(1) of the regulations issued under the Act the prescribed document must be in a form similar to Form B in the Annexure. This regulation was amended by schedule 3(a) of the First Amendment of Civil Union Regulations, 2006 as published in the *Government Gazette* 31750 of 2 January 2009 which stipulates that the prescribed document must be in a form similar to DHA-1764 in the Annexure.

⁵⁴ S 12(1). The word 'prospective' and the phrase 'their willingness to enter into a civil union with one another' in s 12(1) suggest that the registration of a civil union should occur prior to the solemnisation of a civil union. This, however, is absurd as registration can only take place after solemnisation and it can accordingly be argued that s 12(1) is a pre-solemnisation requirement.

⁵⁵ S 12(2).

into either a marriage or a civil partnership depending on the decision they made as to the term they wish their union to be known by.⁵⁶ The registration certificate serves as *prima facie* proof that a valid civil union exists between the parties.⁵⁷

3.4 LEGAL CONSEQUENCES OF A CIVIL UNION

Section 13(1) of the Act provides that the legal consequences of marriage as contemplated in the Marriage Act apply *mutatis mutandis* to a civil union. In other words the Act provides for the application of the necessary changes to contextualise the reference to marriage in any other law including the common law so that they can operate in respect of a civil union.⁵⁸ The Act further dictates that, with the exception of the Marriage Act 25 of 1961 and Recognition of Customary Marriages Act 120 of 1998, any reference to husband, wife or spouse in any other law including the common law includes a civil union partner.⁵⁹

3.4.1 INVARIABLE LEGAL CONSEQUENCES OF A CIVIL UNION

The most important invariable legal consequences of a civil union include the change in the partners' status; the creation of a *consortium omnis vitae* and a reciprocal duty of support between the partners; the acquisition of a right to occupy the matrimonial home and use the household assets; and automatic acquisition of parental responsibilities and rights in respect of children born of the union.⁶⁰ Some particular problems arising from the acquisition of parental responsibilities and rights will be discussed below under the heading: Particular problems arising from the Civil Union Act.

⁵⁶ S 12(3). In terms of reg 5(2) of the regulations issued under the Act the registration certificate must be in a form similar to Form C in the Annexure.

⁵⁷ S 12(4). S 12(5) requires a marriage officer to keep record of all the civil unions conducted by him or her and to transmit the civil union register to the public services official responsible for the population register within the area concerned: s 12(6).

⁵⁸ S 13(2)(a).

⁵⁹ S 13(2)(b).

⁶⁰ See eg Cronjé and Heaton *South African family law* (2004) 2nd ed Chapter 5 and Sinclair assisted by Heaton *The law of marriage* (1996) Chapter 11 for a general discussion of the invariable consequences of marriage. These consequences also apply to a civil union.

3.4.2 VARIABLE CONSEQUENCES OF A CIVIL UNION

3.4.2.1 MATRIMONIAL PROPERTY REGIME

The variable consequences of a civil union relate to the matrimonial property regime that exists during the subsistence of a civil union. The common law and the Matrimonial Property Act 88 of 1984 provide civil union partners who are domiciled in South Africa with the option of entering into a civil union which is either in community of property or out of community of property with the inclusion or exclusion of the accrual system.

In South Africa the primary matrimonial property regime is the system of universal community of property. Thus, as in a civil marriage, there is a rebuttable presumption that when parties enter into a civil union they do so in community of property.⁶¹ The characteristics of universal community of property entail that both partners to a civil union become co-owners in equal undivided shares of all the assets and liabilities they have at the time of entering into a civil union as well all the assets and liabilities they obtain during the subsistence of their civil union.⁶² Upon entering into a civil union the individual estates of the partners unite into one joint estate for the duration of the civil union and both partners enjoy equal powers with regard to the administration of the joint estate.⁶³ Upon the dissolution of a civil union all the liabilities/debts are first paid from the joint estate and the residue of the joint estate is then distributed equally between the partners.⁶⁴

Should the prospective civil union partners choose to deviate from a civil union in community of property, they have to enter into an antenuptial contract

⁶¹ *Edelstein v Edelstein* 1952 3 SA 1 (A); *Brummund v Brummund's Estate* 1993 2 SA 494 (NmHC).

⁶² See *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388 at 395.

⁶³ S 14 of the Matrimonial Property Act 88 of 1984. For a general discussion of the variable consequences of a civil marriage entered into in community of property see eg Cronjé and Heaton *South African family law* (2004) 2nd ed Chapter 6; Hahlo *The South African Law of Husband and Wife* (1985) 5th ed Chapter 11; Visser and Potgieter *Introduction to family law* (1998) 2nd ed Chapter 7 and 9. These consequences now also apply to a civil union.

⁶⁴ *De Wet v Jurgens* 1970 3 SA 38 (A) at 46.

prior to solemnisation and registration of their civil union to regulate the matrimonial consequences of their civil union. The antenuptial contract must comply with the formalities and requirements as set out in section 87 of the Deeds Registries Act 47 of 1937. If the contract does not comply with these requirements it is valid only as between the civil union partners *inter partes* and is not binding on any third party who is not a party to the informal contract.⁶⁵

There are three variations of civil unions out of community of property namely:

1. Civil unions out of community of property and community of profit and loss without the accrual system (complete separation of property).
2. Civil unions out of community of property with retention of community of profit and loss.
3. Civil unions out of community of property with the accrual system.⁶⁶

It must be noted that section 21(1) of the Matrimonial Property Act allows civil union partners to apply jointly to a court to change their applicable matrimonial property system. They must comply with the statutory requirements and provide the court with sound reasons for the intended change, give notice of the intended change to all creditors and prove that no other person will be prejudiced by the intended change.⁶⁷

If a civil union partner is not domiciled in South Africa a problem arises in determining the applicable matrimonial property system. According to our law

⁶⁵ S 86 of Act 47 of 1937. See also *Ex parte Spinazze* 1985 3 SA 650 (A); *Odendaal v Odendaal* 2002 2 All SA 94 (W). S 88 of Act 47 of 1937, however, provides for postnuptial execution and registration of an antenuptial contract that did not comply with the formalities of notarial execution and registration.

⁶⁶ For a general discussion of the variable consequences of a civil marriage entered into out of community of property see Cronjé and Heaton *South African family law* (2004) 2nd ed Chapter 7; Hahlo *The South African Law of Husband and Wife* (1985) 5th ed Chapter 15,16 and 17; Visser and Potgieter *Introduction to family law* (1998) 2nd ed Chapter 10. These consequences now also apply to civil unions.

⁶⁷ S 21(1)(a)-(c) of the Matrimonial Property Act 88 of 1984.

the patrimonial consequences of a marriage are regulated by the law of the place where the husband is domiciled at the time of marriage (also known as the husband's *lex loci domicilii*). In terms of section 13(1) and 13(2) of the Civil Union Act this rule applies to civil unions too. The drafters of the Civil Union Act should have made provision for a matrimonial property system based on the choice-of-law rule as it will be problematic to determine the 'husband' in a same-sex civil union in order to establish the applicable matrimonial property system. This problematic issue will be discussed below under the heading: Particular problems arising from the Civil Union Act.

3.4.2.2 THE DISSOLUTION OF A CIVIL UNION

Civil unions can be dissolved by way of death or divorce. The Divorce Act 70 of 1979, which regulates divorce and its consequences, applies *mutatis mutandis* to a civil union concluded under the Civil Union Act. Section 3 of the Divorce Act as read with section 13(2) of the Civil Union Act provides for two no-fault grounds of divorce, namely:

1. the irretrievable breakdown of the civil union as contemplated in section 4 of the Divorce Act;
2. the mental illness or the continuous unconsciousness of a partner to a civil union, as contemplated in section 5 of the Divorce Act.

Upon the dissolution of the civil union the patrimonial consequences of the civil union will be regulated by the matrimonial property regime the partners chose upon entering into the civil union.⁶⁸ However, it is accepted practice to regulate the consequences of divorce by means of a settlement agreement entered into between the partners which may be incorporated into the divorce

⁶⁸ For a general discussion of the dissolution of a civil marriage by divorce see eg Cronjé and Heaton *South African family law* (2004) 2nd ed Chapter 11; Hahlo *The South African Law of Husband and Wife* (1985) 5th ed Chapter 21; Visser and Potgieter *Introduction to family law* (1998) 2nd ed 157-175.

order.⁶⁹ If the civil union partners did not enter into a settlement agreement regarding the payment of maintenance by one of the partners to the other partner a court may, in terms of section 7(2) of the Divorce Act, make a maintenance order in favour of one partner until the death or remarriage of the partner who is entitled to maintenance. When making a maintenance order the court must consider the factors listed in section 7(2) and make a maintenance order that will be fair according to the merits and circumstances of each case.⁷⁰

In terms of section 9(1) of the Divorce Act as read with section 13(2) of the Civil Union Act a court may order complete or partial forfeiture by one party in favour of the other of benefits acquired during the subsistence of the civil union.⁷¹

The court will take the following factors into account in respect of granting a forfeiture order:

1. The duration of the civil union.
2. The circumstances which led to the breakdown of the civil union
3. Any substantial misconduct on the part of either party.⁷²

All three factors need not be alleged and proved⁷³ and a court will only grant a forfeiture order if it is satisfied that in the absence of such an order, 'the one

⁶⁹ For a general discussion of the patrimonial consequences of divorce see eg Cronjé and Heaton *South African family law* (2004) 2nd ed Chapter 12; Hahlo *The South African Law of Husband and Wife* (1985) 5th ed 372-385; Visser and Potgieter *Introduction to family law* (1998) 2nd ed 176-188.

⁷⁰ *Swart v Swart* 1980 4 SA 364 (O). For a general discussion of maintenance of a spouse after divorce see eg Cronjé and Heaton *South African family law* (2004) 2nd ed Chapter 13 and Hahlo *The South African Law of Husband and Wife* (1985) 5th ed 352-370.

⁷¹ For a general discussion of forfeiture of patrimonial benefits upon divorce see eg Cronjé and Heaton *South African family law* (2004) 2nd ed 131. See also Hahlo *The South African Law of Husband and Wife* (1985) 5th ed 372.

⁷² Cronjé and Heaton *South African family law* (2004) 2nd ed 131. See also Hahlo *The South African Law of Husband and Wife* (1985) 5th ed 374.

⁷³ *Wijker v Wijker* 1993 4 SA 720 (A).

party will in relation to the other party be unduly benefited'.⁷⁴ The effect of a forfeiture order is that a party never loses his or her own assets but only the right to share in the patrimonial benefits he or she has derived from the civil union.⁷⁵

Section 7(3) to (6) which allows a court to transfer one party's assets or a part thereof to the other party as the court may deem just is not applicable to civil unions. These provisions apply only to spouses who were married with complete separation of property prior to the coming into operation of the Matrimonial Property Act 88 of 1984 on 1 November 1984 or the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 on 2 December 1988. As civil unions were first permitted in 2006, all civil unions fall outside the ambit of section 7(3) to (6) of the Divorce Act.

In terms of section 6(1)(a) of the Divorce Act a decree of divorce shall not be granted if a court is not satisfied that the interests of the minor or dependant children born of the civil union are not satisfactorily provided for or that the provisions for the children are not the best that can be achieved in the specific situation. The court must further, in terms of section 6(1)(b), consider the report and recommendations made by the family advocate in terms of section 4(1)(a) of the Mediation in Certain Divorce Matters Act 24 of 1987 in order to assist the court to make an order regarding maintenance, care and contact that will promote the best interests of the children born of the civil union.

Although the Civil Union Act formally affords same-sex couples the same rights and responsibilities the Marriage Act affords heterosexual couples some inequalities and differentiations still exist and are discussed next.

⁷⁴ *Wijker* at 726.

⁷⁵ *Rousalis v Rousalis* 1980 3 SA 446 (C) at 450. See Cronjé and Heaton *South African family law* (2004) 2nd ed 133 for a discussion on which benefits can be forfeited in a civil marriage in community of property and a civil marriage out of community of property. The discussion now also applies to civil unions. See also Glover in Clark (ed) *Family law service* par D9 and Hahlo *The South African Law of Husband and Wife* (1985) 5th ed 376.

3.5 PARTICULAR PROBLEMS ARISING FROM THE CIVIL UNION ACT

The Civil Union Act represents the legislature's response to the constitutional court's findings in the *Fourie*⁷⁶ case that same-sex couples must be provided with the same 'status, rights and responsibilities' the law accords to heterosexual couples. To determine whether the Act complies with the constitutional court order it is necessary to investigate whether the Civil Union Act is a mere substandard product of a failed conciliation between social and political issues or in fact represents a transformation of South African family law that acknowledges the existence of a diverse range of family forms.

3.5.1 EX OFFICIO MARRIAGE OFFICERS NOT COMPELLED TO SOLEMNISE SAME-SEX CIVIL UNIONS

3.5.1.1 ANOMALIES BETWEEN MARRIAGE OFFICERS CREATED BY THE MARRIAGE ACT AND CIVIL UNION ACT

Marriages and civil unions can be solemnised by either religious marriage officers or civil servants (*ex officio* marriage officers) appointed to fulfil this task. In terms of the Marriage Act⁷⁷ a civil servant appointed as a marriage officer must solemnise all marriages placed before him or her and is not allowed to object to solemnising a marriage on the grounds of conscience, religion or belief.⁷⁸ For example, an *ex officio* marriage officer with Christian beliefs cannot refuse to solemnise the marriage of a Jewish couple. In order to accommodate certain religious beliefs, the Marriage Act makes provision for the solemnisation of marriages by religious marriage officers according to the rites of Christian, Jewish or Mohammedan beliefs and the rites of any Indian religion.⁷⁹ These religious marriage officers are not compelled to solemnise a marriage which does not conform to the rites or beliefs of their chosen

⁷⁶ 2006 1 SA 524 (CC).

⁷⁷ Act 25 of 1961.

⁷⁸ S 2.

⁷⁹ S 3(2).

religion.⁸⁰ For example, a Christian marriage officer cannot be compelled to solemnise a Jewish marriage.

The provisions of the Civil Union Act which regulate the solemnisation of civil unions by marriage officers differ from the provisions of the Marriage Act as discussed above. Section 5 of the Civil Union Act regulates the designation of ministers of religion and persons attached to religious organisations as marriage officers. As indicated above under the heading 'Prescribed Formalities'⁸¹ the Act requires written approval for both religious organisations and religious officials to conduct civil unions, while in terms of the Marriage Act only one application suffices.⁸² The reason for this requirement is probably to elicit any objections that may arise on the grounds of conscience or religious beliefs to solemnise a same-sex civil union. This section, however, contains no provision for a religious marriage officer to object, on the grounds of his or her conscience or religious belief, to the solemnisation of a civil union which does not conform to the rites, tenets or doctrines of his or her religious beliefs. This is in contrast with the position in terms of section 31 of the Marriage Act which does empower religious marriage officers to object to conducting civil marriages which do not conform to the rites, tenets or doctrines of their religious beliefs. The effect of the omission in section 5 of the Civil Union Act is that, for example, a Christian marriage officer cannot refuse to conduct the civil union of a same-sex couple with Jewish beliefs.⁸³

⁸⁰ S 31.

⁸¹ At par 3.3.2.2.

⁸² Bilchitz and Judge 'The Civil Union Act: messy compromise or giant leap forward?' in Judge *et al To have and to hold: The making of same-sex marriage in South Africa* (2008) at 158; Bonthuys 'Irrational accommodation: conscience, religion and same-sex marriage in South Africa' (2008) 125 *South African Law Journal* 473 at 475; De Vos 'A judicial revolution? The court-led achievement of same-sex marriage in South Africa' (2008) 4 *Utrecht Law Review* 162 at 172.

⁸³ A further consequence of this provision that needs briefly to be mentioned due to the limited scope of this study is the fact that religious marriage officers' individual beliefs relating to, for example, same-sex marriage are bound by the doctrines of the institution that they are associated with. A religious institution that fails to apply for a designation to solemnise same-sex unions can prevent a religious marriage officer from solemnising same-sex civil unions. According to Bilchitz and Judge 'The Civil Union Act: messy compromise or giant leap forward?' in Judge *et al To have and to hold: The making of same-sex marriage in South Africa* (2008) at 158 the state only recognises the view of the majority opinion of a religious institution as opposed to minorities. They argue that this violation of neutrality will have a detrimental effect on ministers of religion who wish to solemnise same-sex unions on the basis of their own beliefs but

In terms of section 6 of the Civil Union Act an *ex officio* marriage officer is not compelled to solemnise a civil union between same-sex parties if he or she objects thereto on the grounds of conscience, religion and belief. An *ex officio* marriage officer is therefore allowed to refuse to solemnise a same-sex civil union. This means that an *ex officio* marriage officer with Christian beliefs will not be allowed to object to solemnising a civil union on the grounds of conscience, religion or belief of a heterosexual couple who are, for example, Hindu. The only ground for objection is therefore based on a person's homosexual orientation. Thus, the conscience provision in the Civil Union Act accommodates the right to freedom of conscience, religion and belief of civil servants who are marriage officers and who object to the solemnisation of a civil union by same-sex parties but on the other hand limits the constitutional rights of same-sex couples who wish to marry in terms of the Civil Union Act.⁸⁴ The constitutionality of this section will be discussed below.

3.5.1.2 RELIGIOUS ACCOMMODATION VERSUS SEXUAL ORIENTATION

It can be argued that the *Fourie*⁸⁵ judgement provided an escape route for *ex officio* marriage officers with religious objections to conduct same-sex civil unions by stating (as per Sachs J) that:

‘The principle of reasonable accommodation could be applied by the State to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience’.⁸⁶

who are prohibited from solemnising same-sex civil unions in terms of s 5(4) of the Civil Union Act because the ministers' associated religious institutions do not condone same-sex civil unions and did not apply to the Minister for approval to conduct civil unions as required by s 5(1) of the Civil Union Act.

⁸⁴ Bonthuys 'Irrational accommodation: conscience, religion and same-sex marriage in South Africa' (2008) 125 *South African Law Journal* 473 at 478.

⁸⁵ 2006 1 SA 524 (CC).

⁸⁶ *Fourie* at par 159.

The constitutional court has developed and applied the concept of reasonable accommodation in various cases.⁸⁷ The main issue is whether a specific person can be exempted from complying with general rules in order to accommodate that person's religious beliefs. In the context of the present research it is therefore necessary to establish whether the religious accommodation provided for by the Civil Union Act is reasonable and whether the limitation placed on same-sex couples' ability to conclude a civil union is justifiable.

I submit that the accommodation of the religious beliefs of *ex officio* marriage officers violates a same-sex couple's right to equality before the law and equal protection and benefit of the law and not to be discriminated against on the ground of sexual orientation in terms of sections 9(1) and (3) of the Constitution and the right to dignity in terms of section 10 of the Constitution. In order to determine whether a violation of the equality clause is present the guidelines as set out by the constitutional court in *Harksen v Lane NO*⁸⁸ must be applied.⁸⁹

⁸⁷ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC); *Prince v President, Cape Law Society* 2002 2 SA 794 (CC); *MEC for Education: KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC).

⁸⁸ 1998 1 SA 300 (CC).

⁸⁹ See *Harksen v Lane NO* 1998 1 SA 300 (CC) at par 53. The enquiry involves the following issues: (a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination. (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If the discrimination is on an unspecified ground, unfairness will have to be established by the complainant. The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 9(3) and (4). (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 36 of the Constitution). See also Currie and De Waal *The Bill of Rights Handbook* (2005) 5th ed at par 9.2(b).

When applying the guidelines as set out in the *Harksen* case it must firstly be determined whether section 6 of the Civil Union Act differentiates between categories or groups of people and if so, whether the differentiation bears a rational connection to a legitimate governmental purpose. The provision differentiates between same-sex and opposite sex couples in that it allows *ex officio* marriage officers to exercise a discretion not to officiate at a same-sex union on the grounds of a religious/conscientious objection. This objection applies to same-sex couples only. The religious accommodation of *ex officio* marriage officers is clearly an attempt by the legislature to establish conciliation between the conflicting right of religion, conscience and belief on the one hand and the right to be free from sexual orientation discrimination on the other hand. I submit that in view of the legal and social history of gay men and lesbian women this is not a legitimate governmental purpose. Thus, the religious accommodation violates the equality clause.

'Everyone has inherent dignity and the right to have their dignity respected'.⁹⁰ Section 6 of the Civil Union Act limits same-sex couples' access to general public services and accordingly impairs the ability of same-sex couples to conclude a civil union and to enjoy family life. This provision constitutes an infringement of the right to dignity which includes the right to family life as interpreted by the constitutional court in *Dawood v Minister of Home Affairs*.⁹¹ The Constitution provides for the limitation of the rights contained in the Bill of Rights but requires that the limitation must be in terms of a law of general application and must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account

⁹⁰ S 10 of the Constitution, 1996.

⁹¹ 2000 3 SA 936 (CC). In *Dawood v Minister of Home Affairs* 2000 1 SA 997 (C) at 1035-1036 Van Heerden AJ held that the 'most obvious home' for the protection of the 'core element' of the right to family life is found in s 10 of the Constitution. She further held that section 10 must be interpreted in a 'purposive' manner in order for the right to dignity to afford protection to family life (at 1038). The constitutional court confirmed the approach of Van Heerden AJ in *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) where O'Regan J emphasised that legislation which significantly impairs the ability of individuals to achieve personal fulfilment in an aspect of life that is of central importance to them will constitute an infringement of the right to dignity (at par 28). The ruling in the *Dawood* case was applied and confirmed by the constitutional court in *Booyesen v Minister of Home Affairs* 2001 4 SA 485 (CC).

certain relevant factors.⁹² It is therefore necessary to determine whether the limitations of the rights to equality and dignity can be justified in terms of the limitation clause.

Only a 'law of general application' can legitimately limit a right in the Bill of Rights.⁹³ The 'law of general application' requirement illustrates the basic principle of 'liberal political philosophy and of constitutional law known as the rule of law'.⁹⁴ In order to qualify as a 'law of general application' the legislation must be clear and accessible and phrased in a specific manner so that those who are affected by it can determine the extent of their liberties and responsibilities.⁹⁵ Importantly, the law must apply impersonally and uniformly in the whole of South Africa and not just to particular groups or people, it must apply equally to all and it must not be arbitrary in its application.⁹⁶ I argue that section 6 of the Civil Union Act dictates a personal and unequal application directed towards specific individuals, namely same-sex couples, on the basis of their sexual orientation and is therefore not a 'law of general application' for the purposes of section 36 of the Constitution. Ackermann J has given a detailed formulation why legislation which does not constitute a law of general application has no room in a constitutional state by stating that:

'In reaction to our past, the concept and values of the constitutional State, of the "regstaat", and the constitutional right to equality before the law are deeply foundational to the creation of the 'new order' referred to in the preamble. The detailed enumeration and description in s 33(1) of the criteria which must be met before the Legislature can limit a right entrenched in chap 3 of the Constitution emphasise the importance, in our new constitutional State, of reason and justification when rights are sought to be curtailed. We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be

⁹² S 36(1) of the Constitution, 1996.

⁹³ Currie and De Waal *The Bill of Rights Handbook* (2005) 5th ed at par 7.2(a)(i).

⁹⁴ *Ibid.*

⁹⁵ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) at par 47.

⁹⁶ Currie and De Waal *The Bill of Rights Handbook* (2005) 5th ed at par 7.2(a)(ii).

such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution. Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action or decision-making is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow'.⁹⁷

In order for a limitation to be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' the limitation created by the specific law must serve a constitutionally tenable purpose. In other words, there must be an acceptable proportionality between the detriments created by the law and the benefits it is designed to achieve.⁹⁸ It necessitates the weighing up of competing interests and ultimately an assessment based on proportionality.⁹⁹ In terms of section 36(1)(a)-(e) of the Constitution the following factors must be taken into account to determine the justifiability of the limitation of a constitutional right:

- (a) The nature of the right.
- (b) The importance of the purpose of the limitation.
- (c) The nature and the extent of the limitation.
- (d) The relation between the limitation and its purpose.
- (e) Less restrictive means to achieve the purpose.

⁹⁷ *S v Makwanyane* 1995 3 SA 391 (CC) at par 156.

⁹⁸ *Makwanyane* at par 104. For a general discussion of the reasonableness and justifiability of the limitation of fundamental human rights see Currie and De Waal *The Bill of Rights Handbook* (2005) 5th ed par 7.2(b).

⁹⁹ *S v Makwanyane* 1995 3 SA 391 (CC) at par 104.

According to section 1 of the Constitution, the Republic of South Africa is based on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms'. The importance of the rights to equality and dignity cannot be overemphasised in a country based on democratic values. Human dignity is a core value of the 'objective, normative value system' established by the Constitution.¹⁰⁰ The origin of the right to human dignity has been linked to Kantian moral philosophy, where human dignity is considered to be what gives a person their intrinsic worth;¹⁰¹ in other words, it 'requires us to acknowledge the value and worth of all individuals as members of society'.¹⁰² Every person possesses human dignity in equal measure and everyone must be treated as equally worthy of respect and concern.¹⁰³ The right to dignity together with the right to life are the most important human rights in the Bill of Rights and we are required to value these two rights above all others.¹⁰⁴

Equality is a complex and deeply contentious social ideal when one considers the process of transformation from a government which dictated discrimination to a government where the achievement of equality is the most important priority.¹⁰⁵ Equality embraces the 'right to be different' and affirms that difference should not be the basis for exclusion, marginalisation and stigma — at best it celebrates the vitality that difference brings to any society.¹⁰⁶ Section 9 of the Constitution guarantees that the law will protect and benefit people equally and prohibits unfair discrimination directed towards categories of people who have been disadvantaged by past discrimination.

When considering the nature and importance of the right to dignity and equality and not to be discriminated against on the ground of sexual

¹⁰⁰ See Currie and De Waal *The Bill of Rights Handbook* (2005) 5th ed par 10.1 citing *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at par 56.

¹⁰¹ Currie and De Waal *The Bill of Rights Handbook* (2005) 5th ed par 10.1.

¹⁰² *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) at par 29.

¹⁰³ *National Coalition* at par 30.

¹⁰⁴ *National Coalition* at par 28. See also *S v Makwanyane* 1995 3 SA 391 (CC) at par 144 and *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) at par 41.

¹⁰⁵ Currie and De Waal *The Bill of Rights Handbook* (2005) 5th ed par 9.1.

¹⁰⁶ *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) at par 60.

orientation it is necessary to take cognisance of the history of the individuals who are affected by section 6 of the Civil Union Act. Homosexuals suffered a harsh fate during apartheid where homosexual behaviour was punished by religion and imposed by the law. In *National Coalition for Lesbian and Gay Equality v Minister of Justice*¹⁰⁷ (sodomy case) the constitutional court acknowledged and confirmed that gay men and lesbian women are a permanent minority in society and have in the past suffered from patterns of disadvantage,¹⁰⁸ and emphasised that discrimination directed towards homosexual persons occurred at a 'deeply intimate level of human existence and rationality'.¹⁰⁹ Given the historical and current resentment of the majority of religious institutions of homosexual behaviour it is only logical that gay and lesbian couples are more reliant on the State for conducting their same-sex civil unions.¹¹⁰

The effect of the limitation imposed by the religious accommodation of *ex officio* marriage officers is that it limits same-sex couples' access to basic state administrative services that are freely available to heterosexual couples.¹¹¹ Public officials, who include *ex officio* marriage officers, are obliged to uphold the law in an objective manner and may not cast judgement on individuals who approach them to fulfil an official function.¹¹² From a state perspective, the institution of marriage is of a civil nature and not a religious ceremony at all. By allowing *ex officio* marriage officers to refuse to solemnise same-sex civil unions the state consents to a 'religious veto' exercised by a public official: a 'veto' which the state itself is prohibited from exercising.¹¹³ The impact, both practical and symbolic, on members of the gay community can be dramatic because these individuals are required to accept the

¹⁰⁷ 1999 1 SA 6 (CC).

¹⁰⁸ At par 26.

¹⁰⁹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) at par 42.

¹¹⁰ MacDougall 'Refusing to officiate at same-sex marriages' (2006) 69 *Saskatchewan Law Review* 351 at 359.

¹¹¹ *Ibid.*

¹¹² Bilchitz and Judge 'The Civil Union Act: messy compromise or giant leap forward?' in Judge *et al To have and to hold: The making of same-sex marriage in South Africa* (2008) at 157. See also Wintemute 'Religion vs sexual orientation: A clash of human rights?' (2002) 1 *Journal of Law and Equality* 125 at 141.

¹¹³ MacDougall 'Refusing to officiate at same-sex marriages' (2006) 69 *Saskatchewan Law Review* 351 at 356.

disadvantages imposed upon them by the religious faith of *ex officio* marriage officers. Section 7(2) of the Constitution dictates that the state must respect, protect, promote and fulfil the rights contained in the Bill of Rights. It can therefore be argued that allowing an *ex officio* marriage officer – a servant representing the state – to refuse to solemnise a same-sex civil union is inconsistent with section 7(2) of the Constitution in that it fails to respect and promote the rights to dignity and equality.

The social impact of the religious accommodation principle represents an oblique statement by the law that same-sex relationships are in some sense inherently more controversial than heterosexual relationships.¹¹⁴ The principle further affirms that same-sex couples may still be treated like outcasts not worthy of equal treatment and not entitled to the benefits and responsibilities associated with marriage and therefore disregards same-sex couples' right to self-definition in a most profound way. The practical effect of this accommodation of religious beliefs is that same-sex couples will find it tremendously difficult to find marriage officers willing to conduct their same-sex civil unions given the fact of wide-spread homophobia in South Africa.¹¹⁵

In a democratic society as contemplated by the Constitution the secular and sacred must co-exist in a mutually respectful manner. In the *Fourie*¹¹⁶ case the constitutional court acknowledged the important function religion fulfils in our society.¹¹⁷ The constitutional court, however, emphasised that it would be out of order to employ the religious sentiments of some institutions to determine the constitutional rights of others. The constitutional court held that the majoritarian opinion (in this instance the religious beliefs of individuals) is in most instances harsh towards minorities (homosexual individuals) who do not conform to majority beliefs or thoughts, and added that in order to

¹¹⁴ Bilchitz and Judge 'The Civil Union Act: messy compromise or giant leap forward?' in Judge *et al To have and to hold: The making of same-sex marriage in South Africa* (2008) at 157.

¹¹⁵ Bonthuys 'Irrational accommodation: conscience, religion and same-sex marriage in South Africa' (2008) 125 *South African Law Journal* 473 at 477. See also De Vos 'A judicial revolution? The court-led achievement of same-sex marriage in South Africa' (2008) 4 *Utrecht Law Review* 162 at 172.

¹¹⁶ 2006 1 SA 524 (CC).

¹¹⁷ *Fourie* at par 92.

determine whether majoritarian and minoritarian positions are involved, the measures under scrutiny which promote or degrade the achievement of human dignity, equality and freedom must be evaluated.¹¹⁸ According to Lenta there is a presumption that favours the accommodation of religious sentiments.¹¹⁹ This presumption is rebuttable 'in the event that religious groups claim that their religion commands them to violate fundamental rights of individuals'.¹²⁰ This argument is confirmed by section 15(1) of the Constitution which reads: 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion'. Section 31(2) dictates that the right to freedom of religion 'may not be exercised in a manner inconsistent with any provision of the Bills of Rights'. It can therefore be argued that *ex officio* marriage officers are allowed to hold homophobic beliefs but are prevented by section 31(2) of the Constitution from exercising these beliefs in a manner that amounts to unfair discrimination on the ground of sexual orientation.¹²¹

The scope of section 6 of the Civil Union Act is so wide that it not only accommodates the religious beliefs of *ex officio* marriage officers but provides for objections on the grounds of conscience and belief. Bonthuys argues that the grounds of conscience and belief are problematic in the sense that neither the Civil Union Act nor the Constitution requires that these beliefs must be rational or that they must be a central part of a system of religious beliefs.¹²² It is therefore possible for an *ex officio* marriage officer with no religious beliefs to impose a moral judgement based on irrational and homophobic beliefs on a same-sex couple and object to solemnising a civil union on any absurd ground.¹²³ Based on the abovementioned submissions I argue that the accommodation of the rights of conscience and belief is too broad and that it

¹¹⁸ *Ibid.*

¹¹⁹ Lenta 'Muslim headscarves in the workplace and in schools' (2007) 124 *South African Law Journal* 296 at 297.

¹²⁰ *Ibid.*

¹²¹ Currie and De Waal *The Bill of Rights Handbook* (2005) 5th ed par 9.1.

¹²² *Ibid.* See also Bonthuys 'Irrational accommodation: conscience, religion and same-sex marriage in South Africa' (2008) 125 *South African Law Journal* 473 at 479.

¹²³ *Ibid.*

confers rights upon *ex officio* marriage officers to reinforce marginalisation directed towards gay and lesbian couples.¹²⁴

The primary purpose of the Civil Union Act is to protect the rights to dignity and equality of same-sex couples and to remedy the intentional discrimination the unreformed South African family imposed upon them.¹²⁵ The preamble of the Civil Union Act acknowledges that the family law dispensation that existed after the commencement of the Constitution failed to 'provide for same-sex couples to enjoy the status and benefits coupled with the responsibilities that marriage accords heterosexual couples'. Section 6 is clearly in direct conflict with the objectives of the Civil Union Act and undermines the purpose of the Act to remove discrimination on the ground of sexual orientation and to uphold the constitutional rights to equality and dignity.

3.5.1.3 TO SUMMARISE

The state does not have an unlimited duty to accommodate religious beliefs. Where there is a compelling need for a service, for example, the solemnisation of same-sex civil unions and where undue hardship will be incurred if the service is not provided the state needs not to accommodate religious and other beliefs.¹²⁶ It is a known fact that gay men and lesbian women incurred undue hardship in the past. Such undue hardship will still prevail if the availability of same-sex marriage is subjected to the religious and

¹²⁴ The broader powers of *ex officio* marriage officers to refuse to solemnise same-sex unions on the grounds of conscience and belief can lead to chaos in state institutions if all citizens demand to be served by a civil servant with a similar sexual orientation or civil servants demand to provide public services only to citizens who conform to their preferences. MacDougall 'Refusing to officiate at same-sex marriages' (2006) 69 *Saskatchewan Law Review* 355-356 argues that 'there certainly is no instance of suggested reciprocity in terms of grounds for refusal to officiate'. He points out that it will be impractical for a homosexual *ex officio* marriage officer to refuse to officiate the marriage of individuals who, for example, express hostility towards homosexuality or whose religious or cultural beliefs are directed against homosexual behaviour. He further points out that if an *ex officio* marriage officer can refuse to officiate at a same-sex marriage it is only logical that citizens can refuse to be served by a homosexual *ex officio* marriage officer. He concludes by stating that '[a]ll of these parameters only highlight the narrowness of the proposals to allow refusals to officiate'.

¹²⁵ Bonthuys 'Irrational accommodation: conscience, religion and same-sex marriage in South Africa' (2008) 125 *South African Law Journal* 473 at 479.

¹²⁶ Ngwena 'Conscience objection and legal abortion in South Africa: delineating the parameters' (2003) 28 *Journal for Juridical Science* 1 at 10.

other beliefs of *ex officio* marriage officers. Section 6 of the Civil Union Act creates the impression that the state accepts the moral and religious characterisation of homosexuality by *ex officio* marriage officers and that, although the state and judiciary acknowledge that same-sex marriage is constitutionally necessary, it still remains morally questionable. It is therefore recommended that section 6 of the Act must be repealed and that only religious marriage officers must be allowed to object to the solemnisation of same-sex civil unions if homosexuality is condoned by the specific religious institution and that only one application by a religious marriage officer suffices. Only then will it be possible for the conflicting rights of religion and sexual orientation to co-exist in a constitutional dispensation that will advance the accommodation of diversity in a pluralistic society.

3.5.2 MARRIAGEABLE AGE

Only a person of 18 years or older is permitted to enter into a civil union.¹²⁷ A minor can therefore not enter into a civil union even if he or she is assisted by his or her guardian. This differs from the legal position in terms of the Marriage Act and Recognition of Customary Marriages Act.

In terms of section 24(1) of the Marriage Act read with section 18(3)(c) and (5) of the Children's Act 38 of 2005 a minor may enter into a civil marriage if he or she has the consent of all his or her guardians. If the minor is a boy below the age 18 years or a girl below the age of 15 years the consent of the Minister of Home Affairs must be obtained in addition to the consent of the minors' guardians. It must be noted that children below the age of puberty¹²⁸ are not permitted to enter into a civil marriage, and that the Minister's authority to

¹²⁷ See the definition of 'civil union' in s 1 of the Act. A further implication of the age requirement in the Civil Union Act (which will not be discussed due to the limited scope of this study) is that minors who concluded either a customary or civil marriage and thereby attained majority will not be allowed to conclude a civil union if the civil or customary marriage is dissolved by either death or divorce while the person is still below the age of 18 years. This is so because s 1 of the Civil Union Act expressly requires that the partners to a civil union must be '18 years of age or older'.

¹²⁸ At common law the age of puberty is 12 years for girls and 14 years for boys.

grant consent therefore applies only to civil marriages of girls between the ages of 12 and 15 years and boys between the ages of 14 and 18 years.¹²⁹

The Recognition of Customary Marriages Act requires that both prospective spouses must be above the age of 18 years.¹³⁰ However, section 4(a) authorises the Minister or any officer in the public service authorised in writing thereto by the Minister, to grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer is of the view that such marriage is desirable and in the interests of the parties in question. Thus, in the case of civil and customary marriages minors may marry if they obtain certain persons' consent.

In terms of section 7(1) of the Constitution, the Bill of Rights '... enshrines the rights of all people in our country ...' and therefore most of the rights in the Bill of Rights are afforded to 'everyone'. Children enjoy protection and rights in terms of the general provisions of the Bill of Rights (that is, rights afforded to everyone) and in terms of section 28 which affords protection to children only. The supremacy of the Constitution¹³¹ demands that all laws and conduct must be consistent with the provisions of the Bill of Rights and that all the obligations set out by the Constitution must be fulfilled. Any inconsistency (law or conduct) with the Constitution will be declared invalid to the extent of the inconsistency.¹³² The Civil Union Act completely excludes minors from entering into a civil union. The question that has to be answered is whether the blanket ban on a civil union by minors is constitutionally tenable.

3.5.2.1 IS THE BLANKET BAN IN CONFLICT WITH THE BEST INTERESTS OF MINOR CHILDREN?

It can be argued that the blanket ban is in conflict with section 28(2) of the Constitution which dictates that 'a child's best interests are of paramount

¹²⁹ Cronjé and Heaton *South African family law* (2004) 2nd ed 22; see also Sinclair assisted by Heaton *The law of marriage* (1996) 367 and Hahlo *The South African Law of Husband and Wife* (1985) 5th ed 90.

¹³⁰ S 3(1)(a)(i) of Act 120 of 1998.

¹³¹ S 2 of the Constitution, 1996.

¹³² S 172(1)(a) of the Constitution, 1996.

importance in every matter concerning a child'.¹³³ The Children's Act also promotes the best interests of the child¹³⁴ and sets out general principles which must guide the implementation of all legislation and guide all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.¹³⁵ Importantly, subject to any lawful limitation, all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights in terms of the Bill of Rights, the best interests of the child standard and all other rights and principles as set out in terms of the Children's Act.¹³⁶

The best interests of the child standard¹³⁷ has been described as '[a] golden thread which runs throughout the whole fabric of our law relating to

¹³³ Art 3(1) of the Convention on the Rights of the Child of 1989 stipulates that the best interests of the child must be 'a primary' concern in all actions relating to a child. It is clear that this provision sets a lower standard than s 28(2) of the Constitution. South Africa ratified the Convention on 16 June 1995. See also art 4 of the African Charter on the Rights and Welfare of the Child.

¹³⁴ S 7.

¹³⁵ S 6(1)(a) and (b).

¹³⁶ S 6(2)(a).

¹³⁷ One of the major problems with the best interests of the child standard was the vagueness and indeterminacy of the concept (see, for example, Bonthuys 'The best interests of children in the South African Constitution' (2006) 20 *International Journal of Law, Policy and the Family* 23; see also Clark 'A "golden thread"? Some aspects of the application of the standard of the best interest of the child in South African family law' (2000) 1 *Stellenbosch Law Review* 3 and Heaton 'Some general remarks on the concept "best interests of the child"' (1990) 53 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 95). It can be argued that the guidelines provided for by s 7 of the Children's Act eliminate most of the indeterminacies. According to Heaton 95 (citing Elster 'Solomonic judgements: against the best interest of the child' (1987) *University of Chicago Law Review* 12) what is best for a specific child or children in general cannot be established with any 'degree of certainty'. 'In order to establish what will be in a child's best interests, (a) all the options must be known, (b) all the possible outcomes of each option must be known, (c) the probabilities of each outcome occurring must be known and (d) the value attached to each outcome must be known' (Heaton 95). But even if all the outcomes can be ascertained it will still be impossible to determine with absolute certainty whether a single decision relating to a child will promote the best interests of that child. The best interests of the child standard is mostly based on mere speculation (Heaton 96). Another obstacle in determining the best interests of a child is whether a child's interests must be evaluated from a short-term, medium-term or long-term perspective (Heaton 96-97). It is submitted that a child's interests must be determined by taking into account the short, medium and long term implications and that the desired outcome must reflect a decision that promotes the child's physical, emotional and intellectual well-being and, importantly, that the child's autonomy was maintained in such a manner that the decision promotes the child's social relationships (*ibid*). Another aspect that needs to be addressed is whether a child's best interests must be determined from a subjective or objective approach. The objective approach entails that the view of the particular community of which the child forms part must be taken into account to determine what will be in a child's best interests, while the

children'.¹³⁸ For this reason the Constitution dictates that a child's best interests are of paramount importance in every matter relating to a child: the principle is not limited to decisions relating to guardianship, care or contact.¹³⁹ It can be argued that the definition of a civil union in its current form, which excludes minors from entering into a civil union where they would otherwise be permitted to do so in terms of the Marriage Act and Recognition of Customary Marriages Act, is in conflict with the requirement that the child's best interests must be paramount. A child's best interests cannot be served if a child is prohibited from performing a certain juristic act (in this instance from entering into a civil union) without taking into account the age, maturity, stage of development and any other relevant characteristics or surrounding circumstances of a minor child as required by sections 7(g)(i) and (iv) of the Children's Act. The Civil Union Act fails to promote the interests of minor children to achieve the social status and financial stability a civil union can afford minor children.

3.5.2.2 A VIOLATION OF MINORS' CONSTITUTIONAL RIGHTS TO EQUALITY AND DIGNITY

I submit that the blanket ban on a civil union by a minor violates the minor's constitutional rights to equality and dignity.¹⁴⁰ The blanket ban further amounts to discrimination on the grounds of sexual orientation, age and marital status and is presumed to be unfair discrimination in terms of section 9(5) of the

subjective approach only takes cognisance of the opinion of the child, his or her parents and interested parties on the particular matter. What is suggested is that a combination of both the subjective and objective approaches must be followed (Heaton 97). However, in instances where it must be decided whether minors must be allowed to enter into a same-sex civil union the matter becomes more complex due to widespread homophobic views. I submit that the child's maturity and emotional development must be the main consideration and that in this particular regard the subjective approach must prevail.

¹³⁸ *Kaiser v Chambers* 1969 4 SA 224 (C) at 228.

¹³⁹ The application of the best interest of the child standard is not limited to rights provided for only by s 28 of the Constitution, 1996. See Currie and De Waal *The Bill of Rights Handbook* (2005) 5th ed at par 27.1.

¹⁴⁰ See 'Religious Accommodation versus Sexual Orientation' at par 3.5.1.2 for a comprehensive discussion of the violation of the constitutional rights of equality and dignity of same-sex couples by the Civil Union Act that allows for refusal by an *ex officio* marriage officer to solemnise a same-sex civil union on the grounds of religion, conscience and belief. This discussion also applies to the violation of minors' rights to equality and dignity imposed by the age requirement.

Constitution. The following discussion of the abovementioned violation of minors' constitutional rights will focus on minors who are attracted to members of their own sex.

Equality includes the full and equal enjoyment of all rights and freedoms.¹⁴¹ By excluding minors who are attracted to members of their own sex from entering into a civil union while permitting opposite sex minors to enter into marriage (which is governed by alternative legislation), amounts to unequal treatment. This exclusion deprives a specific group of minors – minors who are attracted to members of their own sex – of the opportunity to enjoy the same status, entitlements and responsibilities the Marriage Act and Recognition of Customary Marriages Act accord minors who are allowed to either enter into a civil or customary marriage if they obtain the necessary consent. The legislation that regulates the legal capacity of minors to conclude either a marriage or a civil union clearly differentiates between minors according to their sexual orientation and age. Accordingly, minors who are attracted to members of their own sex have no legal means to enter into a relationship recognised by law. The age restriction militates against compliance with section 9(1) of the Constitution which guarantees the right to equality before the law and equal protection and benefit of the law.

Setting the age requirement at 18 years further violates a minors' right to inherent dignity. Although the Constitution does not contain an express right to family life the constitutional court interpreted the right to dignity in a purposive manner in order for the right to dignity to encompass the right to family life.¹⁴² The exclusion of minors from the option of 'entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations'¹⁴³ perpetuates a sense of inferiority and signifies that minors who are attracted

¹⁴¹ S 9(2) of the Constitution, 1996.

¹⁴² See fn 91 for a discussion of the Cape provincial division's judgement on the interpretation of the right to dignity as inclusive of the right to family life especially in instances where this advances the achievement of personal fulfilment. The decision was confirmed by the constitutional court in *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC).

¹⁴³ *Fourie v Minister of Home Affairs* 2005 3 BCLR 241 (SCA) at par 14.

to members of their own sex lack the inherent humanity to have their family life respected and protected: this constitutes a serious invasion of their dignity.

3.5.2.3 ADDITIONAL ARGUMENTS

The blanket ban on minors' entering into a civil union is also in conflict with the constitutional court judgement in the *Fourie*¹⁴⁴ case. In the majority judgement as per Sachs J key principles were laid down to guide the legislative process to amend existing marriage laws. Sachs J held that the 'law concerned with family formation and marriage requires equal celebration'¹⁴⁵ and that the required remedy must amount to equal treatment, but he acknowledged that differential treatment may be required in order to overcome past discrimination.¹⁴⁶ Sachs J, however, emphasised that it was crucial that differential treatment must enhance dignity and promote the achievement of equality and that the remedy in its context and application must provide equal protection and must not create new forms of marginalisation.¹⁴⁷ It is submitted that restricting civil unions to adults creates a new form of marginalisation.

Section 39(1)(b) of the Constitution dictates the consideration of international law when interpreting the Bill of Rights. It is therefore clear that the Constitution allows reference for purposes of interpretation to international human rights law in general, for example, international conventions.¹⁴⁸ South Africa is a Contracting State to the International Convention on Consent to Marriage, Minimum Age for Marriages and Registration of Marriage of 1962 which requires Contracting States to incorporate legislative measures to indicate a minimum age for marriage but authorises a 'competent authority' to 'grant a dispensation as to age, for serious reasons, in the interest of the intending spouses'. It can therefore be argued that the age qualification for entering into a civil union is in conflict with the Convention because the Convention dictates that minors' respective interests must be taken into

¹⁴⁴ 2006 1 SA 524 (CC).

¹⁴⁵ *Fourie* at par 149.

¹⁴⁶ *Fourie* at par 152.

¹⁴⁷ *Fourie* at pars 150 and 152.

¹⁴⁸ See Currie and De Waal *The Bill of Rights Handbook* (2005) 5th ed at par 6.4.

account when setting a minimum age requirement. The legislature failed to take cognisance of the Convention when it drafted the Civil Union Act.

3.5.2.4 TO SUMMARISE

The sexual orientation provision protects a particular group of individuals: individuals who are attracted to members of their own sex. The main reason for the inclusion of this provision in the Constitution was to provide protection to a group of people who experienced humiliation, stigmatisation and prejudice. The constitutional court described the impact of discrimination on gays and lesbians as serious and characterised them as a group of people with ‘vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves’.¹⁴⁹ Minors who are attracted to members of their own sex experience this ‘increased vulnerability’ at a more extensive level because of their sexual orientation and age. The impact of the exclusion of minors from the ambit of the Civil Union Act is severe, because it creates the impression that an individual must first reach majority and attain a certain degree of maturity in order to establish his or her sexual orientation. Accordingly, minor children who are attracted to members of their own sex have no available option to enter into a relationship recognised by law. Based on the grounds of their sexual orientation, age and marital status they are denied the privileges associated with marriage.

Based on the abovementioned submissions I conclude that the violation of the rights to human dignity and equality and discrimination based on sexual orientation, age and marital status cannot be justified in terms of section 36 of the Constitution. The definition of a civil union is inconsistent with the values that our Constitution aspires to and must be amended to allow minors below the ages of 18 years to enter into a civil union if it will promote the minors’ best interests.

¹⁴⁹ As per Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) at par 25.

3.5.3 THE PATRIMONIAL CONSEQUENCES OF A SAME-SEX CIVIL UNION

In terms of section 13(1) and (2) of the Civil Union Act the Matrimonial Property Act 88 of 1984 is applicable to civil unions. Before entering into a civil union the prospective civil union partners must indicate whether they prefer to enter into a civil union in community of property or out of community of property with the inclusion or exclusion of the accrual system. In other words they must indicate the applicable matrimonial property system that will regulate the proprietary consequences of their civil union. Upon dissolution of the civil union, by either death or divorce, the patrimonial consequences of the civil union will be governed by their chosen matrimonial property system.

However, if one of the same-sex civil union partners is domiciled in a foreign country the regulation of the proprietary consequences becomes problematic. The civil union partners may enter into an antenuptial agreement to indicate a choice of law (*lex causae*) that will govern the proprietary consequences of their civil union. The choice of law specified in the antenuptial agreement must be applied to the full, subject, however, to relevant considerations of public policy.¹⁵⁰ Other matrimonial issues, for example, maintenance, custody and forfeiture of benefits¹⁵¹ will be regulated by the *lex fori*.¹⁵² This view is confirmed by section 2(3) of the Divorce Act 70 of 1979.

In the absence of an express antenuptial agreement the patrimonial consequences of marriage are governed by the husband's *lex loci domicilii* at

¹⁵⁰ See Forsyth *Private International Law* (2003) 4th ed 283-286 for a discussion of the essential validities, the construction of and capacity to enter into antenuptial agreements. See also s 87(1) and (2) of the Deeds Registries Act 47 of 1937 which regulates the notarial execution and registration of antenuptial agreements.

¹⁵¹ Forfeiture is governed by s 9(1) of the Divorce Act 70 of 1979.

¹⁵² *Holland v Holland* 1973 1 SA 897 (T) at 904; see also Forsyth *Private International Law* (2003) 4th ed 286; Neels 'Die internasionale privaatreg en die herverdelingsbevoegdheid by egskeiding' (1992) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 336 at 337; Heaton and Schoeman 'Foreign marriages and section 7(3) of the Divorce Act 70 of 1979' (2000) 63 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 141 at 144-145.

the time of marriage.¹⁵³ However, in a same-sex civil union it is impossible to determine who the 'husband' is and which legal system will regulate the patrimonial consequences of a same-sex civil union. The *lex loci domicilii* rule cannot be applied to same-sex civil unions and it can be argued that it violates same-sex couples' right to equality in terms of section 9 of the Constitution because it, *inter alia*, unfairly discriminates against same-sex civil union partners on the ground of their sexual orientation in terms of section 9(3) and (5) of the Constitution.¹⁵⁴

Reform regarding the *lex loci domicilii* rule is inevitable in order to regulate the patrimonial consequences of same-sex civil union partners domiciled in foreign countries. A further argument in favour of reform is the abolition of the wife's domicile of dependence by section 1 of the Domicile Act 3 of 1992. The determination of the matrimonial property regime with exclusive reference to the husband's domicile is in conflict with the equality provision of the Constitution and probably unconstitutional. Even after several suggestions by various academic authors that the *lex domicilii matrimonii* rule should be reassessed, South African private international law still has no other replacement available to fill the void. The reality of increased global migration, the protection of the justified expectation of spouses/civil union partners together with the demands of conflict justice and legal certainty require that the legislature should enact an appropriate rule as a matter of urgency.¹⁵⁵

3.5.3.1 PROPOSALS TO REFORM THE *LEX DOMICILII MATRIMONII* RULE

The introduction of 'new' connecting factors, as an alternative to the use of domicile as the connecting factor, to regulate the patrimonial consequences of marriage and now also civil unions requires comparative research because it

¹⁵³ *Frankel's Estate v The Master* 1950 1 SA 220 (A); *Sperling v Sperling* 1975 3 SA 707 (A).

¹⁵⁴ Heaton *South African law of persons* (2008) 3rd ed 42.

¹⁵⁵ Schoeman 'The South African conflict rule for proprietary consequences of marriage: learning from the German experience' (2004) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 115 at 140.

is an unfamiliar territory for conflict lawyers in South Africa and because it should take cognisance of international trends in the field.¹⁵⁶

After a detailed comparative research study by Schoeman it was suggested that German private international law presents itself as an excellent system to assist with the reform of the *lex domicilii matrimonii* rule because this field of law faced the same difficulties some time ago. The proprietary consequences of marriage before German private international law was reformed were governed by the husband's nationality to the exclusion of that of the wife. However, with the enactment of a written constitution in Germany which included a gender equality provision the husband's nationality as the connecting factor was declared unconstitutional by the Federal Constitutional Court of Germany known as the *Bundesverfassungsgericht*.¹⁵⁷ The reference to the law of the husband's nationality as the governing law to determine the patrimonial consequences of the marriage was replaced with the principle of common nationality of both spouses at the time of marriage. If the spouses do not share a common nationality their common habitual residence at the time of marriage is considered as the next connecting factor. If the spouses do not share a common nationality or common habitual residence at the time of marriage the country with which the spouses are, in any other way,¹⁵⁸ most closely jointly connected at the time of marriage is reverted to as a last resort. In the case of immovable property the spouses may choose the *lex situs* of such property as the governing system.¹⁵⁹ Accordingly, the spouses are prevented from selecting a completely 'unconnected' legal system as the

¹⁵⁶ *Idem*, at 117.

¹⁵⁷ *Idem*, at 122.

¹⁵⁸ Although the German legislator did not provide a list of factors to be taken into consideration the following important factors were mentioned: 'common social ties of a couple to a country through descent, culture, language, occupation or trade; common ordinary or simple residence which is not of a mere fleeting nature; the intended acquisition of a common nationality; the intended acquisition of a first common habitual residence; the place of the conclusion of the marriage provided that is not merely fortuitous, but strengthened by the nationality or habitual residence of one of the spouses or another factor' (Schoeman 132).

¹⁵⁹ Art 15 of the Introductory Act to the German Civil Code (EGBGB) as cited by Schoeman in 'The South African conflict rule for proprietary consequences of marriage: learning from the German experience' (2004) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 115 at 127.

governing law.¹⁶⁰ The proprietary consequences of marriage are still governed by the immutability principle (limited to the time of marriage) and the retention of this principle in South African private international law can also be justified on the basis that it will lead to havoc if the *lex causae* for proprietary consequences changes every time the spouses attain dissimilar nationalities or change their habitual residence.¹⁶¹ In the supreme court of appeal judgement in the *Fourie*¹⁶² case Farlam JA in his minority judgement emphasised the impossibility of applying the *lex domicilii matrimonii* to same-sex couples but held it was not an insoluble problem and referred to the suggestions made by Schoeman as the most probable solution.

A five-step model was proposed by Stoll and Visser¹⁶³ in the absence of an express or tacit antenuptial agreement. In this instance the proprietary consequences of the couple's marriage must be governed by the law of the country of the common domicile of the spouses at the time of the marriage. If the spouses do not have a common domicile, the law of the common habitual residence of the spouses at the time of the marriage applies. In the absence of a common habitual residence, the law of the common nationality of the spouses applies. Lastly, if the spouses do not have a common nationality, the law of the state with which both spouses are most closely connected will govern the proprietary consequences of the marriage.¹⁶⁴ The latter proposal is supported by Neels and Wethmar-Lemmer¹⁶⁵ especially with reference to the connecting factors of habitual residence and nationality because both these factors are increasingly employed as connecting factors in South African private international law mostly under the influence of international conflicts conventions.¹⁶⁶ A perfect example of such an international convention, to which South Africa is not a Contracting State, is the Hague Convention on the

¹⁶⁰ *Idem*, at 132.

¹⁶¹ *Idem*, at 132-133.

¹⁶² 2005 3 BCLR 241 (SCA); 2005 3 SA 429 (SCA).

¹⁶³ Stoll and Visser 'Aspects of the reform of German (and South African) private international family law' (1989) *De Jure* 330.

¹⁶⁴ *Idem*, at 335.

¹⁶⁵ Neels and Wethmar-Lemmer 'Constitutional values and the proprietary consequences of marriage in private international law – introducing the *lex causae proprietatis matrimonii*' (2008) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 587

¹⁶⁶ *Idem*, at 588.

Law Applicable to Matrimonial Property Regimes (hereinafter the Convention) which came into operation on 1 September 1992.

The Convention establishes common provisions concerning the law applicable to matrimonial property regimes¹⁶⁷ and provides a suitable solution to spouses who are domiciled in different jurisdictions. Article 3 of the Convention governs the position where spouses entered into an antenuptial agreement before entering into marriage and allow spouses to select only one of the following laws to regulate their matrimonial property regime: the law of any state of which either spouse is a national at the time of designation; the law of the state in which either spouse has their habitual residence at the time of designation; or the law of the first State where one of the spouses establishes a new habitual residence after marriage. The spouses' choice of law will be applied in full to all their property. The Convention, however, provides for an exception with respect to immovable property in that the spouses have the option to apply the national law of the place where the immovables are situated (*lex situs*).

Article 4 of the Convention governs the position where the spouses have failed to enter into an antenuptial agreement before marriage. In this instance the matrimonial property regime is governed by the law of the state in which both spouses establish their first habitual residence after marriage or by the law of the state of the common nationality of the spouses. If the spouses do not have a habitual residence after marriage in the same state, nor have a common nationality, their matrimonial property regime will be governed by the internal law of the state the spouses are most closely connected to.

The term *lex domicilii matrimonii* is no longer suitable to indicate the applicable matrimonial property regime to regulate the proprietary consequences of marriage. This is due to the fact that the abovementioned proposals refer to connecting factors other than only domicile. After a

¹⁶⁷ The Convention does not apply to maintenance obligations between the spouses, succession rights of surviving spouses or the capacity of spouses: art 1 of the Convention.

comprehensive study into Latin terminology Neels and Wethmar-Lemmer came to the conclusion that the term *lex causae proprietatis matrimonii* (in English one could utilise the phrase ‘the proper law of the proprietary consequences of marriage’ or in Afrikaans ‘die *lex causae* van die vermoënsregtelike gevolge van die huwelik’) will be the most proper concept to indicate the legal system applicable to the proprietary consequences of marriage.¹⁶⁸

3.5.3.2 TO SUMMARISE

It is recommended that South Africa accede to the Hague Convention on the Law Applicable to Matrimonial Property Regimes 1992 in order to achieve conflict justice and legal certainty. This will promote the purpose of conflicts justice which is the ‘correct and proper ordering of relationships among private parties’ or ‘a *just* ordering of private life’¹⁶⁹ and this can be achieved through the connecting factors provided for by the Convention. As far as private international law is concerned, a constitutional equality clause impacts upon the connecting factor itself, which implies that the conflict rule must conform to the constitutional guarantee of equality.¹⁷⁰ I submit that the Convention will provide spouses/civil union partners with equal opportunities on the private international law level and, importantly, it will reform the current position of inequality imposed upon spouses/civil union partners by the *lex domicilii matrimonii* rule.

3.6 THE ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS BY SAME-SEX CIVIL UNION PARTNERS

Before the coming into operation of the Children’s Act 38 of 2005, children were categorised as either legitimate or illegitimate but, with the enactment of

¹⁶⁸ Neels and Wethmar-Lemmer ‘Constitutional values and the proprietary consequences of marriage in private international law – introducing the *lex causae proprietatis matrimonii*’ (2008) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 587 at 592.

¹⁶⁹ Schoeman in ‘The South African conflict rule for proprietary consequences of marriage: learning from the German experience’ (2004) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 115 at 123.

¹⁷⁰ *Idem*, at 124.

the Children's Act 'the law shifted its emphasis from labelling children to labelling the marital status of their parents'.¹⁷¹ A child is now referred to as a 'child born of married parents' or a 'child born of unmarried parents'.¹⁷² The acquisition of parental responsibilities and rights is now also determined by the marital status of the parents.¹⁷³ Because it is impossible for same-sex civil union partners to conceive children by way of natural means the acquisition of parental responsibilities and rights is mostly achieved through adoption and artificial fertilisation.

3.6.1 FEMALE CIVIL UNIONS

The adoption of children by female civil union partners is currently regulated by section 17(a) and (c) of the Child Care Act 74 of 1983. The effect of adoption is that an adopted child must for all purposes in law be regarded as the child of the adoptive parents as if the adopted child was born to the civil union partners.¹⁷⁴ Both the adoptive parents acquire full parental responsibilities and rights in respect of their adoptive child. The position as regards acquisition of parental responsibilities and rights by same-sex civil union partners through adoption will remain the same when the provisions of the Children's Act 38 of 2005 on adoption come into operation.¹⁷⁵

Partners to an all-female civil union may also wish to become the parents of a naturally conceived child. In this instance one of the partners must commit an adulterous act with a male person willing to assist with the conception.¹⁷⁶ Only the partner who is the biological mother and gives birth to the child has full parental responsibilities and rights in respect of the child.¹⁷⁷ The other partner will only acquire full responsibilities and rights in respect of the child if she

¹⁷¹ Heaton *South African law of persons* (2008) 3rd ed 49.

¹⁷² *Ibid.* However, the biological mother of a child whether married or unmarried has full parental responsibilities and rights in respect of the child: s 19(1) of the Children's Act.

¹⁷³ See ss 19-21 of the Children's Act.

¹⁷⁴ S 20(2) of the Child Care Act 74 of 1983.

¹⁷⁵ Chapter 15 of the Children's Act will regulate adoption procedures. This chapter did not come into operation on 1 July 2007 when some sections of the Act were brought into force: See *Government Gazette* 30030 of 27 June 2007.

¹⁷⁶ Louw 'The acquisition of shared parental responsibility by same-sex civil union partners' (2007) *Obiter* 324 at 325.

¹⁷⁷ S 19 of the Children's Act.

applies for the adoption of the child in a joint application with the partner who gave birth to the child.¹⁷⁸

Section 40(1) of the Children's Act 38 of 2005 regulates the status of a child who is born as a result of artificial fertilisation.¹⁷⁹ A child born as a result of artificial fertilisation of one of the civil union partners using the gametes¹⁸⁰ of any person other than a civil union partner will be regarded as a child born from married parents, provided that both civil union partners consented to the artificial fertilisation.¹⁸¹ Prior to the coming into operation of section 40 of the Children's Act, a child born as a result of artificial fertilisation of a partner in a same-sex life partnership was considered a child born of married parents. This was the result of the constitutional court decision in *J v Director General, Department of Home Affairs*¹⁸² where the court declared section 5 of the Children's Status Act 82 of 1987 unconstitutional to the extent that it denied a child born as a result of artificial fertilisation the same status as a child born of married parents. However, the Children's Status Act was repealed by the Children's Act. The unamended section 5 of the Children's Status Act was re-enacted by section 40 of the Children's Act. In respect of civil union partners the re-enactment of the unamended version is not a problem, because section 13 of the Civil Union Act equates civil unions and civil marriages. A child who is born as a result of the artificial fertilisation of a same-sex civil union partner therefore qualifies as a child born of married parents. However, a child who is born to same-sex life partners who have not entered into a civil union is deemed to be a child born of unmarried parents because such same-sex life partners are not covered by the wording of section 40 of the Children's Act. Section 40 of the Children's Act may lead to a constitutional challenge on the

¹⁷⁸ S 17(c) of the Child Care Act read with s 13(2) of the Civil Union Act. See also s 231(1)(c) of the Children's Act.

¹⁷⁹ 'Artificial fertilisation' means the introduction, by means other than natural means, of a male gamete into the internal reproductive organs of a female person for the purpose of human reproduction. Artificial fertilisation includes the bringing together of a male and female gamete outside the human body with the view of placing the product of a union of such gametes in the womb of the female person as well as the actual placing of the such product in the woman's womb (*in vitro* fertilisation): s 1(1) of the Children's Act.

¹⁸⁰ 'Gamete' means either of the two generative cells essential for human reproduction: s 1(1) of the Children's Act.

¹⁸¹ S 40(1)(a) of the Children's Act read with s 13(2) of the Civil Union Act.

¹⁸² 2003 5 BCLR 463 (CC).

same grounds that led to the declaration of unconstitutionality of section 5 of the Children's Status Act. This particular problem will be discussed in the next chapter.

3.6.2 MALE CIVIL UNION PARTNERS

The discussion of adoption under the previous heading 'Female civil union partners' apply *mutatis mutandis* to male civil union partners.

Surrogate motherhood is the only option available for male civil union partners who wish to conceive a child who is genetically related to at least one of the partners. Surrogacy refers to the 'situation where the surrogate mother¹⁸³ undertakes to be artificially fertilised for the purposes of bearing a child for the commissioning parents¹⁸⁴ and handing over that child to the commissioning parents upon the birth or within a reasonable time thereafter so that the child will become the commissioning parents' child as if he or she were born from the commissioning parents'.¹⁸⁵ The provisions of the Children's Act regarding surrogate motherhood are not yet in operation. At present, surrogacy is therefore unregulated by statute. The effect is that only the woman who gives birth to a child who was conceived as a result of artificial fertilisation is for all purposes regarded as the child's mother and only she acquires rights and duties in respect of the child,¹⁸⁶ while the male gamete donor has no parental responsibilities and rights, unless he as an unmarried father who qualifies for full parental responsibilities and rights in terms of section 21 of the Children's Act. The other male civil union partner who did not donate his gametes will have no parental responsibilities and rights in respect of the child unless the

¹⁸³ 'Surrogate mother' means an adult woman who enters into a surrogate motherhood agreement with the commissioning parent: s 1 (1) of the Children's Act.

¹⁸⁴ 'Commissioning parent' means a person who enters into a surrogate mother agreement with a surrogate mother: s 1 (1) of the Children's Act.

¹⁸⁵ Heaton *South African law of persons* (2008) 3rd ed 50.

¹⁸⁶ This is so because she is the child's biological mother (s 19 of the Children's Act) and because there is no surrogate motherhood agreement in existence between the surrogate mother and commissioning parents.

woman who gives birth consents to the joint adoption of the child by both civil union partners.¹⁸⁷

3.7 EXCLUSION OF GAY IDENTITY IN AFRICAN COMMUNITIES FROM THE AMBIT OF THE CIVIL UNION ACT

The Civil Union Act has been criticised on the ground that it caters only for gays and lesbian who identify themselves openly as homosexual and who profess to have a fixed sexual orientation which they cannot change.¹⁸⁸ Bonthuys points out that many African people who are involved in same-sex relationships do not fit this profile.¹⁸⁹ In some instances their same-sex conduct coincides with heterosexual relationships or is associated with particular life stages.¹⁹⁰ Importantly, Africans do not necessarily identify themselves as exclusively lesbian or gay, but often take on the gender identity of the opposite sex.¹⁹¹ Bonthuys argues that the Civil Union Act fails to reflect a perception or understanding of the complexities and nuances of same-sex relationships in African communities and that the Act only represents the civil law model of marriage characterised by monogamy and moral values based on Judaeo-Christian beliefs.¹⁹² This is undoubtedly true. The Act has to be understood in its historical context. As was explained in chapter 2, the enactment of the Civil Union Act was the result of the decision in *Minister of Home Affairs v Fourie*.¹⁹³ The focus of that case was the exclusion of same-sex life partners whose relationship closely resembles a civil marriage but who were denied the rights, privileges and benefits associated with a civil marriage. The object of the Act was not the regulation of all types of same-sex

¹⁸⁷ S 17(a) and (c) of the Child Care Act read with s 13(2) of the Civil Union Act. See also s 231(1)(a)(i) and (c) of the Children's Act.

¹⁸⁸ Bonthuys 'Race and gender in the Civil Union Act' (2007) 23 *South African Journal on Human Rights* 526 at 536.

¹⁸⁹ *Ibid.* See also Pantazis *et al* in Bonthuys and Albertyn (ed) in *Gender, Law and Justice* (2007) at par 5.1.2 for a historical overview of gay African men and par 5.3.1 of the same source for a discussion of African lesbians.

¹⁹⁰ Bonthuys 'Race and gender in the Civil Union Act' (2007) 23 *South African Journal on Human Rights* 526 at 537.

¹⁹¹ See Pantazis *et al* in Bonthuys and Albertyn (ed) in *Gender, Law and Justice* (2007) at par 5.1.4.

¹⁹² Bonthuys 'Race and gender in the Civil Union Act' (2007) 23 *South African Journal on Human Rights* 526 at 531 and 537.

¹⁹³ 2006 1 SA 524 (CC).

relationships. Additional legislation may be necessary to regulate these relationships. Because the present research is of limited scope and the present chapter focuses specifically on the Civil Union Act, the issue of the need for further legislation to govern other types of same-sex relationships will not be investigated in this dissertation.

3.8 CONCLUSION

Some academic authors argue that the Civil Union Act is a badly-drafted piece of legislation: the product of a rushed legislative process that will only promote the existence of 'an already disjointed legal landscape'.¹⁹⁴ I submit that certain provisions of the Civil Union Act are unacceptable and must be challenged, but in its broader context the Act represents a giant leap forward for South African family law. Importantly, the Act provides equal status for same-sex relationships and acknowledges the existence of a diverse range of family forms. Unfortunately, formal legal equality will only gradually transform into social equality, with the result that continued discrimination on the basis of sexual orientation is inevitable.¹⁹⁵ Continued activism, public engagement and education are necessary to ensure that the Civil Union Act's potential is indeed realised not only in the legal sphere but in the wider social arena.¹⁹⁶ 'At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomforting'.¹⁹⁷

Before the coming into operation of the Civil Union Act, rights and benefits were extended to same-sex life partners because they were excluded from the institution of civil marriage. Marriage rights are now provided by the Civil

¹⁹⁴ Smith and Robinson 'The South African *Civil Union Act* 2006: progressive legislation with regressive implications?' (2008) 22 *International Journal of Law, Policy and the Family* 356.

¹⁹⁵ Bilchitz and Judge 'For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa' (2007) 23 *South African Journal on Human Rights* 466 at 498.

¹⁹⁶ *Idem*, at 499.

¹⁹⁷ *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) at par 60.

Union Act. However, the current legal position of same-sex life partners who fall outside the ambit of the Act is uncertain. The next chapter will investigate the current legal recognition and protection afforded to the latter types of same-sex relationships by our law.

'The importance of the family unit for society is recognised in international human rights instruments . . . [T]hey state that family is the "natural" and "fundamental" unit of our society. However, families come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms'.¹

4 RECOGNITION AND LEGAL CONSEQUENCES OF SAME-SEX LIFE PARTNERSHIPS

4.1 INTRODUCTION

This chapter consists of a discussion on the recognition and legal consequences of same-sex life partnerships. A life partnership can be described as a living arrangement where two people live together in a relationship analogous to a marriage² which produces a 'sense of responsibility and commitment and creates dependence between the parties'.³ Various terms are used to define these relationships, for example, shacking-up, *de facto* marriage, quasi marriage or domestic partnerships,⁴ but for the purposes of this study the term same-sex life partnership is used. According to statistics there are more than one million South Africans who are in non-marital relationships with their intimate partners.⁵ According to Goldblatt one of the main reasons for the prevalence of such relationships in South Africa is the 'extent of migrancy in our country'.⁶

Before the coming into operation of the Civil Union Act 17 of 2006 the common-law definition of marriage and certain exclusionary statutory

¹ *Dawood and another v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) at 960.

² Cronjé and Heaton *South African family law* (2004) 2nd ed 227; Sinclair assisted by Heaton *The law of marriage* (1996) 268.

³ Goldblatt 'Regulating domestic partnerships – a necessary step in the development of South African family law' (2003) 120 *South African Law Journal* 610 at 611.

⁴ Cronjé and Heaton *South African family law* (2004) 2nd ed 227; Schweltnus in Clark (ed) *Family law service* (1988) at par N2; Sinclair assisted by Heaton *The law of marriage* (1996) 268.

⁵ Goldblatt 'Regulating domestic partnerships – a necessary step in the development of South African family law' (2003) 120 *South African Law Journal* 610.

⁶ *Ibid.*

provisions had the result that a same-sex life partnership was the only option available to same-sex life partners who wanted some form of legal recognition for their relationship. This chapter will give an overview of current legal mechanisms at the disposal of same-sex parties who do not enter into a civil union. The regulation of these relationships by means of the ordinary rules of the law will be dealt with first. This will be followed by a discussion of the legal recognition that has been conferred on same-sex life partnerships which are not solemnised and registered under the Civil Union Act. The essential criteria for the establishment of a permanent same-sex life partnership will also be discussed. The chapter will conclude with a brief mention of the Draft Domestic Partnership Bill, 2008.

4.2 PROTECTION OF LIFE PARTNERS BY MEANS OF THE ORDINARY RULES OF THE LAW

4.2.1 GENERAL

The legal consequences of a civil union do not automatically apply if a couple choose not to make their relationship official but decide merely to cohabit as life partners. Same-sex life partners may use contracts to regulate the legal consequences of their relationship and to create some financial security between the partners themselves and third parties.⁷ They may, for example, purchase assets jointly, or jointly enter into lease agreements and credit agreements. The terms and conditions of each agreement will determine each partner's individual rights and obligations.⁸ In most instances both life partners are 'joint owners of the assets acquired and joint debtors in respect of the obligations incurred'.⁹ The acquisition of property prior to and during the subsistence of the life partnership will be discussed below under the heading 'Financial consequences of same-sex life partnerships'.

⁷ Beukes *Lewensverhoudings: enkele juridiese aspekte* (2006) 84; Cronjé and Heaton *South African family law* (2004) 2nd ed 234.

⁸ *Ibid.*

⁹ Cronjé and Heaton *South African family law* (2004) 2nd ed 234 fn 52.

The same-sex life partners may also enter into a life partnership contract or a universal partnership to regulate the consequences of their relationship. These contracts will be discussed first.

4.2.2 LIFE PARTNERSHIP CONTRACTS

Same-sex life partners may enter into a life partnership contract (also known as a cohabitation or domestic partnership contract) to determine the rights and duties of each partner during the subsistence of the life partnership and to regulate the financial and proprietary consequences upon termination of the life partnership. A life partnership contract may contain any provision which is not impossible, against the law or immoral.¹⁰ The contract may, for example, contain provisions relating to the occupation and ownership of the common home, the procedure for the division of household goods after the termination of the life partnership, deal with ownership of assets owned before the inception of the life partnership and during its subsistence and provide for maintenance liability during the subsistence of the life partnership and after its termination.¹¹ It is recommended that a life partnership contract be in writing, signed and if possible witnessed.¹²

It must be noted that in the past it was uncertain whether life partnership contracts were valid as they were branded as contracts upholding sexual immorality and consequently being contrary to public policy. According to Hahlo it is illogical to argue that public morals are served in declaring such a contract immoral¹³ and Heaton comments that the growing recognition of

¹⁰ Cronjé and Heaton *South African family law* (2004) 2nd ed 236; Heaton 'An overview of the current legal position regarding heterosexual life partnerships' (2005) 68 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 662 at 666.

¹¹ Schwellnus in Clark (ed) *Family law service* (1988) at par N22; Sinclair assisted by Heaton *The law of marriage* (1996) 281 fn 54.

¹² Schwellnus in Clark (ed) *Family law service* (1988) at par N22.

¹³ *Idem*, at par N21.

life partnerships necessitates recognition of the validity of contracts to regulate the legal consequences of life partnerships.¹⁴

Importantly, the Constitution prohibits discrimination on the ground of marital status¹⁵ and it can therefore be argued that declaring a life partnership contract contrary to public policy will be unconstitutional when one considers the permissive decisions regarding the recognition and protection of same-sex life partnerships under a constitutional dispensation based on human rights.

4.2.3 CONTRACTS OF UNIVERSAL PARTNERSHIP

Same-sex life partners may also enter into a universal partnership either expressly or tacitly.¹⁶ A universal partnership is a partnership *sui generis*¹⁷ which comes into existence when the following requirements for formation are complied with namely, each party must contribute to the enterprise by bringing something into the partnership or undertake to bring something into it in future; the aim of the partnership must be to make a profit; the partnership must operate for the parties' joint benefit and the contract between the parties must be legitimate.¹⁸

Where the partners fail to enter into an express agreement the existence of a tacit agreement is determined with reference to the partners' conduct; in other words, the factual situation and the objectives of the parties are considered, taking into account the circumstances and facts of each

¹⁴ Cronjé and Heaton *South African family law* (2004) 2nd ed 236. See also Heaton 'An overview of the current legal position regarding heterosexual life partnerships' (2005) 68 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 662 at 666-667.

¹⁵ S 9(3) of the Constitution, 1996.

¹⁶ *V (also known as L) v De Wet* 1953 1 SA 612 (O); *Ally v Dinath* 1984 2 SA 451 (T).

¹⁷ Van Niekerk (ed) *A practical guide to patrimonial litigation in divorce actions* (1999) at par 2.7.2.

¹⁸ *Mühlmann v Mühlmann* 1981 4 SA 632 (T) and confirmed by the appellate division: 1984 3 SA 102 (A); See also Cronjé and Heaton *South African family law* (2004) 2nd ed 234; Schwellnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 8; Schwellnus in Clark (ed) *Family law service* (1988) at par N5; Van Niekerk (ed) *A practical guide to patrimonial litigation in divorce actions* (1999) at par 3.5.2. See also Heaton 'An overview of the current legal position regarding heterosexual life partnerships' (2005) 68 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 662 at 665.

case.¹⁹ For example, 'to provide for the livelihood and comfort of the parties, and their children, including the proper education of the latter' has been regarded as compliance with the making-a-profit object and therefore as being sufficient for partnership purposes.²⁰

Two classes of universal partnerships can be distinguished namely, *societas universorum bonorum* (partnership of all property) and *societas universorum quae ex quaestu veniunt* (partnership of all profits).²¹ The *societas universorum bonorum* is more suitable for same-sex life partners because it encompasses all property owned by each partner at the time of entering into the life partnership and property acquired during the subsistence of the life partnership. This includes donations, inheritances and acquisitions from commercial undertakings.²² This type of universal partnership establishes a type of community of property between the partners, debt liability on a *pro rata* basis and the equal division of assets upon termination of the life partnership.²³ In terms of the *societas universorum quae ex quaestu veniunt* the partners share only in the profit of commercial undertakings acquired during the subsistence of the universal partnership. This form of universal partnership is therefore inadequate to regulate the financial consequences of a same-sex life partnership.²⁴

If the life partners formed a universal partnership, the partnership property is co-owned by the partners as the common owners of the property in

¹⁹ *Ally v Dinath* 1984 2 SA 451 (T) at 454. See also Schweltnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 8 and Schweltnus in Clark (ed) *Family law service* (1988) at par N5.

²⁰ *Isaacs v Isaacs* 1949 1 SA 952 (C) at 956; According to De Groot 3.12.1 as cited by Eloff J in *Ally v Dinath* 1984 2 SA 451 (T) at 455 the aim should be '*gemene baat te trekken*'. In this case the court held that 'the objective of the accumulation of an appreciating joint estate . . . is sufficient'.

²¹ *Isaacs v Isaacs* 1949 1 SA 952 (C); Benade *et al Ondernemingsreg* (2008) 4th ed at par 2.33.

²² Benade *et al Ondernemingsreg* (2008) 4th ed at par 2.34. See also Schweltnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 7 and Schweltnus in Clark (ed) *Family law service* (1988) at par N5.

²³ Benade *et al Ondernemingsreg* (2008) 4th ed at par 2.36.

²⁴ *Idem*, at pars 2.37-2.39.

undivided shares.²⁵ During the subsistence of the universal partnership one of the partners may not use the property in such a manner as to exclude the other partner entirely from controlling the partnership property, may not pledge the partnership property for a personal debt and may not alienate partnership property without the other partner's consent.²⁶ The partnership agreement determines which assets fall into the partnership. In the absence of an express agreement all partnership property at the date of dissolution of the universal partnership falls to be divided between the partners.²⁷ The ratio in which they own the property respectively is determined in accordance with their agreement. In the absence of an agreement the shares of each partner should accord with the contributions made by each individual partner.²⁸ It has been held that maintaining the common household qualifies as a contribution.²⁹ The partners share equally in the assets only if their respective contributions are equal or if the ratio of their contributions cannot be determined with some degree of certainty.³⁰

The universal partnership can be terminated by agreement between the partners, by the death of one of the partners or by insolvency of one of the partners or the partnership.³¹ Partnership debts still outstanding after the dissolution of the partnership can be claimed from the former partners individually.³²

²⁵ *Muller v Pienaar* 1968 3 SA 195 (A) at 202. See also Schweltnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 7.

²⁶ Schweltnus in Clark (ed) *Family law service* (1988) at par N5.

²⁷ For a discussion on which property forms part of a universal partnership and to what extent see *V (also known as L) v De Wet* 1953 1 SA 612 (O); *Ally v Dinath* 1984 2 SA 451 (T). See also Schweltnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 9.

²⁸ Schweltnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 9.

²⁹ *Isaacs v Isaacs* 1949 1 SA 952 (C) at 954.

³⁰ *V (also known as L) v De Wet* 1953 1 SA 612 (O) at 615. See also Schweltnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 9.

³¹ Schweltnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 9.

³² *Herbst v Solo Boumateriaal* 1993 1 SA 397 (T) at 399.

The *actio pro socio* is a personal remedy which arises from the partnership agreement. This remedy entitles a partner to institute an action for specific performance or fulfilment of certain obligations arising from the partnership agreement and may be instituted either during the subsistence of the partnership or after the dissolution of the partnership. One of the partners may further institute the *actio communi dividundo* after the dissolution of the partnership for the division of partnership assets which have not yet been divided.³³

Although the existence of a universal partnership is sometimes difficult to prove it provides both partners with the opportunity to share in all property and profit acquired during the subsistence of the partnership and, in some instances, even property acquired before the commencement of the partnership. It therefore establishes a type of community of property without entering into marriage.

4.2.4 FINANCIAL CONSEQUENCES OF SAME-SEX LIFE PARTNERSHIPS

4.2.4.1 PROPERTY ACQUIRED PRIOR TO AND DURING THE SUBSISTENCE OF THE SAME-SEX LIFE PARTNERSHIP

If the same-sex life partners did not enter into a life partnership contract or universal partnership, private property acquired prior to the commencement of the life partnership is the partners' individual property and is not co-owned by them.³⁴ In other words, no community of property is created. The same principle applies if property is purchased by one of

³³ For a complete discussion on the *actio pro socio* and *actio communi dividundo* see *Robson v Theron* 1978 1 SA 841 (A). See also Benade *et al Ondernemingsreg* (2008) 4th ed at pars 4.34-3.37. See also Van Niekerk (ed) *A practical guide to patrimonial litigation in divorce actions* (1999) at par 3.5.4.

³⁴ Schwelnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 10; Schwelnus in Clark (ed) *Family law service* (1988) at par N6. See also Hahlo 'The law of concubinage' (1972) 89 *South African Law Journal* 321 at 326.

the same-sex life partners during the life partnership; ownership of the purchased property vests solely in the purchaser.³⁵

4.2.4.2 THE COMMON HOME

In instances where life partners jointly enter into a lease agreement to rent their common home the rights and duties of the partners and the landlord are governed by the lease agreement and the common law.³⁶ According to the common law each same-sex life partner is liable only for his or her share of the rent.³⁷ However, in instances where the lease agreement states that the parties are jointly and severally liable for the rent either partner may be held accountable for the full amount of the rent.³⁸ In the case of a joint lease, both same-sex life partners have 'security of tenure' in the sense of having the right to reside in the leased property for the duration of the lease.³⁹ If it is a sole tenancy, the non-tenant partner has no legal responsibilities and rights with regard to the leased property and is for that reason not liable to pay rent. A non-tenant also has no 'security

³⁵ Schweltnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 10; Schweltnus in Clark (ed) *Family law service* (1988) at par N7; See also Schweltnus 'The legal position of cohabitants in South African law' (1995) *Obiter* 133 at 139.

³⁶ See Schweltnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 16-19 for a discussion of joint and sole tenancy by cohabitants.

³⁷ Schweltnus in Clark (ed) *Family law service* (1988) at par N10.

³⁸ See Roelou Barry (Edms) *Bpk v Bosch* 1967 1 SA 54 (C) at 59 where the court referred to the general principle in our common law that where parties to a lease agreement have joint liability each party will only be liable for his or her equal share of rent unless it can be proved that they are liable *in solidum* and then only can each of them be held liable for the full amount of rent.

³⁹ Schweltnus in Clark (ed) *Family law service* (1988) at par N10; See also Schweltnus 'The legal position of cohabitants in South African law' (1995) *Obiter* 133 at 145. If the life partners terminate their relationship before the lease agreement expires and they are unable to decide who will remain in the leased home the partners will have a 'deadlock'. And if the partners decide who will remain in the leased home and the lease agreement creates joint and several liability and the remaining partner defaults payment, the landlord has the right to claim the full payment from the other partner even if he or she does not live in the leased home anymore. If the partner pays the rent he or she will have a legal claim against the remaining partner who defaulted. This is so because any agreement between the partners to indemnify the partner who leaves the leased home from paying rent is only binding *inter partes*: see Schweltnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 17.

of tenure' and can be evicted by the tenant partner upon termination of the life partnership.⁴⁰

If the same-sex life partners are joint legal co-owners of the common home, their respective shares are reflected on the title deed of the registered property.⁴¹ Both partners, as the co-owners of the common home, are entitled to share in the profits generated from their home in accordance with their respective shares and are also liable to share expenses relating to the maintenance of property.⁴² If there is a mortgage bond over the common home, it will be in both partners' names with the result that both partners are jointly and severally liable for payment of the mortgage bond irrespective of their individual shares in the property.⁴³ If one of the same-sex life partners defaults in the repayment of his or her share of the mortgage bond, the creditor can obtain summary judgement against both same-sex life partners for the full outstanding mortgage loan or a court may order that the property be sold in execution to cover the debt.⁴⁴

As joint owners, both same-sex life partners have the right to occupy the common home. Neither partner may evict the other partner from or exclude him or her from controlling the joint property⁴⁵ or compel the other partner to sell the property after the termination of their relationship.⁴⁶ In

⁴⁰ Schwellnus in Clark (ed) *Family law service* (1988) at par N10; See also Schwellnus 'The legal position of cohabitantes in South African law' (1995) *Obiter* 133 at 146.

⁴¹ See Schwellnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 19-21 for a discussion of property co-owned by life partners. See also Schwellnus 'The legal position of cohabitantes in South African law' (1995) *Obiter* 133 at 147.

⁴² Schwellnus in Clark (ed) *Family law service* (1988) at par N11.

⁴³ *Ibid.*

⁴⁴ The life partners as joint owners of the common home are liable *in solidum* (jointly and severally) until the mortgage is paid-up in full. See Schwellnus in Clark (ed) *Family law service* (1988) at par N11 fn 8.

⁴⁵ See *Rosenbuch v Rosenbuch* 1975 1 SA 181 (W) at 183 where Colman J held that the remedy of the *mandament van spolie* would be applicable where a partner has been wrongfully deprived of possession. The purpose of the *mandament van spolie* is to restore possession to the possessor; the relationship status between the parties is irrelevant in this regard.

⁴⁶ Schwellnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 20.

the event of any dispute between the joint owners either partner can approach a competent court which has jurisdiction in the matter for relief by instituting the *actio communi dividundo* for the immediate division of the joint property or in the alternative an adjustment claim.⁴⁷

Same-sex life partners are allowed to sell their respective shares in the joint property to a third party without obtaining the other partner's consent but only in instances where the partners have not entered into a life partnership contract or universal partnership regulating the alienation of their joint property.⁴⁸ In the event of the death of one of the co-owners his or her share in the property forms part of his or her deceased estate.⁴⁹ A deceased same-sex partner may bequeath his or her share in the joint property to the other partner, who will then acquire full ownership of the property, or to a third party with the effect of establishing co-ownership between the third party and the surviving partner.⁵⁰

If the property is registered in the name of only one of the same-sex life partners, the non-owner partner has no rights to the property.⁵¹ The registered owner may sell the property without the other partner's consent or knowledge and may even evict the non-owner partner from the common home after the termination of the relationship.⁵² It seems that the non-owner partner does, however, have a right to reasonable notice to leave the property.⁵³

⁴⁷ *Ibid.* The court has a wide discretion to make any order which it deems to be fair and equitable in the circumstances and may, for example, order one joint owner to pay a certain sum to the other owner in order to equalise division and if the property is indivisible the court may award the property to one of the joint owners subject to the payment of compensation to the other owner. See *Bennett NO v Le Roux* 1984 2 SA 134 (ZH) at 136.

⁴⁸ See Schwellnus in Clark (ed) *Family law service* (1988) at par N11.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ See Schwellnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 21-22 for a discussion of the position if the property is owned by only one of the life partners. See also Schwellnus 'The legal position of cohabitantes in South African law' (1995) *Obiter* 133 at 149.

⁵² See Schwellnus in Clark (ed) *Family law service* (1988) at par N12.

⁵³ This principle applies with regard to *precario habens* in general. See *Theron v Joynt* 1950 3 SA 758 (O) at 762.

4.2.4.3 JOINT BANK ACCOUNT

Same-sex life partners are not allowed to open a joint bank account but an account can be opened in the name of one of the same-sex life partners with the non-account holder having signing power to use the account.⁵⁴ The liability for repayment to the bank, for example, in the case of a bank overdraft is solely the responsibility of the account holder.⁵⁵

4.2.4.4 MAINTENANCE

A reciprocal duty of support is one of the *ex lege* consequences of a valid civil union⁵⁶ and does not apply to same-sex life partners who do not make their relationship official in terms of the Civil Union Act. During the subsistence of the same-sex life partnership and after its termination no right to claim maintenance exists between the same-sex life partners.⁵⁷ A same-sex life partner is not entitled to reclaim any monies spent on maintaining the other same-sex life partner, unless such a partner can prove a claim on the ground of unjustified enrichment.⁵⁸

The courts have, however, recognised the existence of a voluntary (that is, a contractual) assumption of a reciprocal duty of support, either expressly or tacitly, between same-sex life partners in order to extend some spousal benefits to same-sex life partners. For example, in *Langemaat v Minister of Safety and Security*⁵⁹ the court held that where a same-sex life partnership has existed for many years in a common home the parties to

⁵⁴ Schwellnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 12 and also Schwellnus in Clark (ed) *Family law service* (1988) at par N8.

⁵⁵ *Ibid.*

⁵⁶ See Cronjé and Heaton *South African family law* (2004) 2nd ed 52 for a general discussion of the reciprocal duty of support between spouses. The reciprocal duty of support applies to civil unions too.

⁵⁷ Schwellnus in Clark (ed) *Family law service* (1988) at par N9.

⁵⁸ Cronjé and Heaton *South African family law* (2004) 2nd ed 236-237. See also Schwellnus *The legal implications of cohabitation in South Africa: A comparative approach* (1994) 13 and Schwellnus in Clark (ed) *Family law service* (1988) at par N9.

⁵⁹ 1998 3 SA 312 (T).

that union must owe each other a duty of support.⁶⁰ The Maintenance Act 99 of 1998 also recognises the legal duty of any person to maintain any other person irrespective of the nature of the relationship between those persons.⁶¹ The Act therefore applies to the enforcement of a contractual duty of support between same-sex life partners.⁶²

4.2.5 AGENCY

The capacity to purchase household necessities is one of the invariable consequences of a civil union.⁶³ In order for a same-sex life partner to have the capacity to conclude a contract for household necessities in both same-sex partners' names the other same-sex life partner must appoint the latter as his or her agent.⁶⁴

4.2.6 WILL

Life partners may appoint each other in their wills or in a joint will as their respective heirs.⁶⁵

Now that the protection of same-sex life partners by means of the ordinary rules of the law have been discussed it is necessary to deal with the legal recognition that has been afforded to a same-sex life partnership which has not been solemnised and registered under the Civil Union Act.

⁶⁰ *Langemaat* at 316. See also Clark 'Families and domestic partnerships' (2002) 119 *South African Law Journal* 634 at 639. On this case, see also par 2.7.2.2 above.

⁶¹ S 2(1).

⁶² See also Cronjé and Heaton *South African family law* (2004) 2nd ed 58.

⁶³ See Cronjé and Heaton *South African family law* (2004) 2nd ed 55 for a discussion of the requirements for the capacity to incur debts for household necessities. These requirements apply to civil unions too.

⁶⁴ *Ibid.* See also Hahlo 'The law of concubinage' (1972) 89 *South African Law Journal* 321 at 326.

⁶⁵ Beukes *Lewensverhoudings: enkele juridiese aspekte* (2006) 85; Cronjé and Heaton *South African family law* (2004) 2nd ed 236.

4.3 THE LEGAL RECOGNITION WHICH HAS BEEN AFFORDED TO SAME-SEX LIFE PARTNERSHIPS WHICH HAVE NOT BEEN SOLEMNISED AND REGISTERED UNDER THE CIVIL UNION ACT

4.3.1 GENERAL

Before the coming into operation of the Civil Union Act two primary sources conferred limited legal recognition on same-sex relationships. Firstly, various constitutional court judgements extended some of the benefits and rights associated with marriage to the parties to a 'same-sex life partnership'. Secondly, there are several statutes that include same-sex partners in the ambit of their provisions to the extent that these partners comply with certain factual criteria.⁶⁶ Although same-sex life partnerships have attracted some rights, these types of non-marital relationships do not enjoy any specific legal status.⁶⁷ 'Status' in this sense refers to 'peculiar rights and duties, capacities and incapacities' which the law ascribes to members of a certain class or group.⁶⁸

4.3.2 CONSTITUTIONAL JURISPRUDENCE

The concept of a 'same-sex life partnership' was first recognised by the constitutional court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (hereafter *National Coalition*).⁶⁹ In this case the court restructured the conformist social order of intimate monogamous relationships and acknowledged the existence of 'another form of life partnership which is different from marriage as recognised by law. This form of life partnership is represented by a conjugal relationship between two people of the same sex'.⁷⁰ The court found that same-sex life partnerships may perhaps differ with regard to duration and content but in

⁶⁶ Schäfer in Clark (ed) *Family law service* (1988) at par R1.

⁶⁷ Schäfer 'Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships' (2006) 123 *South African Law Journal* 626.

⁶⁸ *Ibid.*

⁶⁹ 2000 2 SA 1 (CC). On this case, see also par 2.7.2.3 above.

⁷⁰ *National Coalition* at par 36.

essence these life partnerships represented an 'intimate and mutually interdependent' relationship.⁷¹ This judgement introduced the concept of a 'same-sex life partnership' in 'our legal vocabulary as a term of art' and conferred a sense of status upon gay and lesbian relationships.⁷² In this case the court held that the constitutional rights to equality and dignity dictated the recognition and extension of spousal benefits (here, immigration rights) to gay and lesbian partners in a permanent same-sex life partnership.⁷³

In order to determine whether a same-sex life partnership is in existence, the court in *National Coalition* suggested a non-exhaustive list of factors to serve as 'threshold criteria', namely '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 responsibility 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'.⁷⁴

The court emphasised that none of these criteria is indispensable for establishing a same-sex life partnership; what is important is the totality of

⁷¹ *National Coalition* at par 17.

⁷² Schäfer 'Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships' (2006) 123 *South African Law Journal* 626 at 628.

⁷³ *National Coalition* at par 97.

⁷⁴ *National Coalition* at par 88. See also Goldblatt 'Regulating domestic partnerships – a necessary step in the development of South African family law' (2003) 120 *South African Law Journal* 610 at 625 for a further discussion of the criteria for a life partnership.

the facts presented by the partners and the intention of the same-sex life partners to form a permanent same-sex relationship.⁷⁵

The concept was further developed by subsequent judgements by the constitutional court and the supreme court of appeal. However, the development was inconsistent, with the courts employing a diverse range of definitions and criteria.⁷⁶ The most telling example of inconsistency is created by the required presence of a reciprocal duty of support or the voluntary assumption of a contractual duty of support between same-sex life partners in some cases.

In *Satchwell v President of the Republic of South Africa*,⁷⁷ a case regarding pension benefits, the constitutional court required the presence of a reciprocal duty of support between partners in order to extend benefits under the Judge's Remuneration and Conditions of Employment Act 88 of 1989 to a judge's same-sex life partner. The court further emphasised that section 9 of the Constitution does not require that spousal benefits be extended to same-sex partners who have not undertaken a reciprocal duty of support.⁷⁸ In a subsequent case, *Gory v Kolver*,⁷⁹ the constitutional court declared section 1(1) of the Intestate Succession Act 81 of 1987 unconstitutional because it failed to include in its ambit the surviving partners to permanent same-sex life partnerships in which the partners had undertaken reciprocal duties of support. In *Gory* the requirement of proof of the undertaking of reciprocal duties of support was imposed as a matter of course without the court undertaking any assessment of whether

⁷⁵ *National Coalition* at par 88.

⁷⁶ See *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC), 2003 4 SA 266 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *J v Director-General, Department of Home Affairs* 2003 5 SA 621 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA); *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) and *Gory v Kolver* 2007 4 SA 97 (CC).

⁷⁷ 2002 6 SA 1 (CC). On this case, see also par 2.7.2.2 above.

⁷⁸ *Satchwell* at par 24.

⁷⁹ 2007 4 SA 97 (CC). On this case, see also par 2.7.2.2 above.

it was an appropriate *sine qua non* for establishing the right to inherit on intestacy.⁸⁰

The courts have taken the following factors into account to establish the existence of a reciprocal duty to support: the duration of the relationship; its exclusive nature; whether the partners shared family responsibilities and pooled their sources and income; the acknowledgement by friends and family of their life partnership; and the extent to which they have made provision for financial support for the surviving partner.⁸¹ It is evident from the above-mentioned cases that the undertaking of a reciprocal duty of support is a *sine qua non* in instances where recognition of a same-sex relationship has financial implications.⁸²

In instances where, for example, recognition is sought for the extension of immigration rights⁸³ to same-sex life partners or for the acquisition of parental responsibilities and rights by same-sex life partners⁸⁴ the presence of a proven reciprocal duty of support is not required.⁸⁵ This approach of constructing a hierarchy of same-sex life partnerships was recognised in *J v Director General, Department of Home Affairs*⁸⁶ where Goldstein J held that:

⁸⁰ Gory at par 19. See also Wood-Bodley 'Establishing the existence of a same-sex life partnership for the purposes of intestate succession' (2008) 125 *South African Law Journal* 259 at 271. Wood-Bodley argues that it is illogical to link the right to inherit on intestacy with the requirement of a proven reciprocal duty of support. He submits, and correctly so, that in many cases partners to a same-sex life partnership may not be in need of financial support and therefore exclude the duty of support and that this exclusion should not deprive a same-sex life partner of the right to inherit on intestacy.

⁸¹ See, for example, *Du Plessis v Road Accident Fund* 2003 11 BCLR 1220 (SCA), 2004 1 SA 359 (SCA) pars 12 and 13. See also Schäfer in Clark (ed) *Family law service* (1988) at par R5.

⁸² Schäfer in Clark (ed) *Family law service* (1988) at par R7. See also Wood-Bodley 'Establishing the existence of a same-sex life partnership for the purposes of intestate succession' (2008) 125 *South African Law Journal* 259 at 271 and Schäfer 'Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships' (2006) 123 *South African Law Journal* 626 at 630.

⁸³ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC).

⁸⁴ *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *J v Director-General, Department of Home Affairs* 2003 5 SA 621 (CC).

⁸⁵ Schäfer in Clark (ed) *Family law service* (1988) at par R7.

⁸⁶ 2003 5 SA 621 (CC). On this case, see also par 2.7.2.4 above.

‘Where a statute is challenged on the ground that it is under-inclusive and for that reason discriminates unfairly against gays and lesbians on the grounds of their sexual orientation, difficult questions may arise in relation to the determination of the particular relationships entitled to protection, and the appropriate relief. *The precise parameters of relationships entitled to constitutional protection will often depend on the purpose of the statute*’ (emphasis added).⁸⁷

The result of the differentiation on the ground of the presence or absence of a reciprocal duty of support is that it establishes two sets of same-sex life partnerships. The effect of the hierarchy is that some gay en lesbian couples may find themselves in an undesirable situation of being able to enjoy some rights but denied the benefit of others.

4.3.3 STATUTORY RECOGNITION AND PROTECTION

Several statutes include same-sex partners within the parameters of their provisions.⁸⁸ For example, in section 1 of Employment Equity Act 55 of 1998 ‘family responsibility’ is defined as ‘the responsibility of employees in relation to their spouse or partner, their dependant children or other members of their immediate family who need their care and support’. ‘Partner’ is not defined by the Act but can be interpreted to include a same-sex life partner. Section 27 of the Basic Conditions of Employment Act 75 of 1997 requires an employer to give an employee three days’ paid leave in the event of death of the employee’s ‘spouse or life partner’. Although it is not defined by the Act, ‘life partner’ in this regard can also include a same-sex life partner. Since the coming into operation of the Taxation Laws Amendment Act 5 of 2001 same-sex life partners have also been included in the definition of ‘spouse’ in the Transfer Duty Act 40 of 1949, the Estate Duty Act 45 of 1955 and the Income Tax Act 58 of 1962.

⁸⁷ J at par 24.

⁸⁸ For a detailed discussion of statutory recognition see Schäfer in Clark (ed) *Family law service* (1988) at pars R11-R36. See also.par 2.7.1 above.

4.3.4 CONTINUED PROTECTION AND RECOGNITION UNDER LEGISLATION AND JUDICIAL DEVELOPMENTS AFTER THE ENACTMENT OF THE CIVIL UNION ACT 2006

4.3.4.1 GENERAL

The Civil Union Act did not alter or displace the pre-existing rights extended to same-sex life partners by legislation and judicial developments. Importantly, the constitutional court in *Gory v Kolver*⁸⁹ confirmed that any change in the law pursuant to *Minister of Home Affairs v Fourie*⁹⁰ did not automatically amend those statutes where the reading-in of words was used as a remedy to give effect to gay men and lesbian women's constitutional rights to equality and dignity.⁹¹ This includes, for example, the right of same-sex couples to adopt children jointly, to enjoy immigration rights, pension benefits and the right to inherit intestate from each other.⁹² South African law, therefore, attributes limited legal consequences to same-sex life partnerships which impersonate civil marriage although the life partnerships are not solemnised and registered under the Civil Union Act.

However, the legal position relating to the acquisition of parental responsibilities and rights by permanent same-sex life partners by means of artificial fertilisation has been amended by section 40 of the Children's Act 38 of 2005. Section 40(1)(a) of the Children's Act excludes same-sex life partners from its ambit because it only makes provision for married persons to be regarded as the parents of a child born as a result of artificial fertilisation. The legal consequences of section 40 of the Children's Act on same-sex life partners and children born as a result of artificial fertilisation from a permanent same-sex life partnership will be discussed next.

⁸⁹ 2007 4 SA 97 (CC).

⁹⁰ 2006 1 SA 524 (CC).

⁹¹ *Gory* at par 28.

⁹² See Chapter 2 pars 2.7.2.2 - 2.7.2.4 for a comprehensive discussion of the extension of spousal benefits and rights to same-sex life partners in a same-sex life partnership.

4.3.4.2 CHILDREN BORN FROM A PERMANENT SAME-SEX LIFE PARTNERSHIP AS A RESULT OF ARTIFICIAL FERTILISATION

In *J v Director-General, Department of Home Affairs*⁹³ the constitutional court declared section 5 of the Children's Status Act 82 of 1987 unconstitutional because this section differentiated between married and unmarried couples in that a child born to a married couple as a result of artificial fertilisation was regarded as their legitimate child while in the case of unmarried parents the child was regarded as extra-marital. The court held that section 5 unfairly discriminated between married couples and same-sex life partners and amounted to unfair discrimination on the grounds of marital status and sexual orientation in terms of section 9(3) of the Constitution. Furthermore, the differentiation between children born through artificial fertilisation to married and unmarried parents constituted unfair discrimination on the grounds of social origin and birth.⁹⁴ The unconstitutionality was corrected by the reading in of the words 'or permanent same-sex life partner' in various parts of section 5.

The amended Children's Status Act was repealed as a whole by the Children's Act.⁹⁵ Section 40 of the latter Act re-enacted section 5 of the unamended Children's Status Act which excluded permanent same-sex life partners from its ambit. Section 40(1)(a) of the Children's Act states that:

'Whenever the gamete⁹⁶ or gametes of any person other than a *married* person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation⁹⁷ of one spouse, any child born of that spouse as a result of artificial fertilisation must for all purposes be regarded to be the child of

⁹³ 2003 5 SA 621 (CC). On this case, see also par 2.7.2.4 above.

⁹⁴ *J* at par 27.

⁹⁵ S 313 read with Schedule 4 of the Children's Act.

⁹⁶ For a definition of 'gamete' see fn 180 of Chapter 3.

⁹⁷ For a definition of 'artificial fertilisation' see fn 179 of Chapter 3.

those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation’.

The effect of this provision is that a child who is born of same-sex life partners as a result of artificial fertilisation is regarded as a child born of ‘unmarried parents’.⁹⁸ In terms of section 40(2) of the Children’s Act, the same-sex life partner who gives birth to the child is regarded as the child’s parent if her ovum was used for the artificial fertilisation and only she acquires full parental responsibilities and rights in respect of the child in terms of section 19(1) of the Children’s Act.⁹⁹ Section 40(3) expressly provides that no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and the gamete donor unless the donor is the child’s birth mother.¹⁰⁰ Thus, only the birth mother is deemed to be the child’s parent. She, *inter alia*, has an obligation to maintain the child and the child has a claim against her for maintenance to the exclusion of the birth mother’s permanent same-sex life partner.

Unlike section 40(1)(a) of the Act which disregards the biological contribution of the gamete donor in the case of artificial fertilisation of a married person, section 40(2) does not deem an unmarried woman’s gametes to have been used for her artificial fertilisation.¹⁰¹ The effect of this provision is that in the cases where a same-sex life partner is artificially inseminated using the ova (*in vitro* fertilisation) of the other same-sex life partner the latter might qualify as the child’s biological

⁹⁸ With the enactment of the Children’s Act ‘the law shifted its emphasis from labelling children to labelling the marital status of their parents’. A child is now referred to as ‘a child born of married parents’ and ‘a child born of unmarried parents’. See ss 19-21, 38, 40 and 233 of the Children’s Act. See also Heaton *South African law of persons* (2008) 3rd ed 49.

⁹⁹ ‘The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child’: s 19(1). Parental responsibilities and rights consist of the responsibility and the right to care for the child; to maintain contact with the child; to act as the guardian of the child; and to contribute to the maintenance of the child: s 19(2).

¹⁰⁰ S 40(3)(a).

¹⁰¹ See Heaton ‘Parental responsibilities and rights’ in Davel and Skelton (eds) *Commentary on the Children’s Act* (2007) 3-7.

parent,¹⁰² 'for biological motherhood is not a right, responsibility, duty or obligation as envisaged by section 40(3)'; it is a biological fact.¹⁰³ Although the ovum donor may qualify as the biological mother of the child, she does not acquire any parental responsibilities and rights in respect of the child because the definition of 'parent' in section 1 of the Act excludes any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation.

The same-sex life partner who did not give birth to the child will only acquire full parental responsibilities and rights in respect of the child if she adopts the child.¹⁰⁴ A further possibility for the acquisition of parental responsibilities and rights is entering into a parental responsibilities and rights agreement with the mother of the child. A person having an interest in the care, well-being and development of the child may enter into a parental responsibilities and rights agreement with the mother.¹⁰⁵ The mother's same-sex life partner qualifies as such a person. A same-sex life partner can further apply for the court-ordered assignment of care, contact and guardianship.¹⁰⁶

The constitutionality of section 40 of the Children's Act can be challenged on the same grounds that led to the declaration of unconstitutionality of section 5 of Children's Status Act in the *J* case.¹⁰⁷ It can be argued that section 40 of the Children's Act differentiates between married and unmarried couples and constitutes discrimination on the grounds of marital

¹⁰² The Act does not define the term 'biological parent' but in the absence of surrogacy or artificial fertilisation using a donor's ovum the term clearly refers to the child's birth mother: see in this regard Heaton 'Parental responsibilities and rights' in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 3-6.

¹⁰³ Heaton 'Parental responsibilities and rights' in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 3-43.

¹⁰⁴ S 17(c) of the Child Care Act 74 of 1983. See also s 231(1)(c) of the Children's Act.

¹⁰⁵ S 22 of the Children's Act. This section did not come into operation on 1 July 2007 when some sections of the Act were brought into force: see *Government Gazette* 30030 of 27 June 2007.

¹⁰⁶ S 23 and 24 of the Children's Act. These sections also did not come into operation on 1 July 2007 when some sections of the Act were brought into force: see *Government Gazette* 30030 of 27 June 2007.

¹⁰⁷ For a discussion of *J* see the first paragraph above under this heading and Chapter 2 at par 2.7.2.4.

status and sexual orientation¹⁰⁸ which is presumed to be unfair in terms of section 9(5) of the Constitution. On the other hand it can be argued that same-sex couples now have the option to enter into a legally recognised civil union under the Civil Union Act and that any discrimination that section 40 may constitute can be justified on the ground that the partners chose not to make their relationship official.¹⁰⁹

I argue that section 40 ignores the existence and development of other family forms as recognised by the constitutional court in various cases. 'Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons — all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law'.¹¹⁰ The failure to include same-sex life partners in the ambit of section 40 clearly amounts to a violation of section 9(1) of the Constitution, which guarantees everyone equality before the law and equal protection and benefit of the law.

Families come in different shapes and sizes and the definition of what a family encompasses changes as social practices and traditions change.¹¹¹ 'In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms'.¹¹² Section 40 entrenches two particular forms of family life, namely a civil marriage and a civil union,¹¹³ and denies the same-sex life partner who did not give birth to the child as a result of artificial fertilisation a right to family life, which constitutes a violation of the inherent dignity of such a same-sex life partner in terms of section 10 of the Constitution.¹¹⁴

¹⁰⁸ S 9(3) of the Constitution, 1996.

¹⁰⁹ Heaton *South African law of persons* (2008) 3rd ed 51. See also Louw 'The acquisition of shared parental responsibility by same-sex civil union partners' (2007) *Obiter* 324 at 327.

¹¹⁰ *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) at par 11.

¹¹¹ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) at par 31.

¹¹² *Dawood* at par 31.

¹¹³ S 13(2) of the Civil Union Act which equates a civil union and a civil marriage.

¹¹⁴ See fn 91 Chapter 3 for a discussion of the right to dignity, which encompasses the right to family life.

I further submit that the exclusion of permanent same-sex life partners from the joint acquisition of parental responsibilities and rights of a child born as a result of artificial fertilisation is illogical. This submission is based on the extension of joint adoption rights to permanent same-sex life partners¹¹⁵ and the provision for the conclusion of a surrogate motherhood agreement¹¹⁶ by permanent same-sex life partners. Both adoption and surrogacy confer full parental responsibilities and rights upon permanent same-sex life partners.

I recommend that section 40 of the Children's Act must be amended to include permanent same-sex life partners in its ambit. Such an amendment is further necessary because the Children's Act only makes provision for the acquisition of parental responsibilities and rights by the child's biological mother and married or unmarried fathers; the position of same-sex parents is therefore unsatisfactory. This amendment will provide a child born from a permanent same-sex life partnership as a result of artificial fertilisation with parental care as required by section 28(1)(b) of the Constitution and will be a true reflection of the democratic values of equality and dignity which our Constitution aspires to.

4.4 ESSENTIAL CRITERIA FOR THE EXISTENCE OF A SAME-SEX LIFE PARTNERSHIP

Same-sex life partnerships fall outside the ambit of the Civil Union Act but still remain a legally recognised family form because the latter Act did not displace or alter pre-existing rights extended to same-sex life partners. Permanent same-sex life partnerships have not been defined in a comprehensive manner. It is submitted that in order for such a life partnership to exist and to confer entitlements to certain spousal benefits on the parties the presence of following criteria is essential.

¹¹⁵ S 17 (a) the Child Care Act 74 of 1983. See also s 231(1)(a)(ii) Children's Act.

¹¹⁶ See Chapter 19 of the Children's Act. This chapter also did not come into operation on 1 July 2007 when some sections of the Act were brought into force: see *Government Gazette* 30030 of 27 June 2007.

4.4.1 *CONSORTIUM OMNIS VITAE*

Under South African common law only a civil marriage (and now also a civil union)¹¹⁷ ‘creates a physical, moral and spiritual community of life’¹¹⁸ – a *consortium omnis vitae*. This community of life includes ‘reciprocal obligations of cohabitation, fidelity and sexual intercourse’.¹¹⁹ The concept ‘*consortium omnis vitae*’ has not been defined in a comprehensive manner but it consists of various personality rights emanating from marriage and civil unions.¹²⁰ It has been described as:

‘An abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage . . . These embrace intangibles, such as loyalty and sympathetic care and affection, concern, as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in support-generating business’.¹²¹

In *Grobbelaar v Havenga*¹²² it was held that ‘companionship, love, affection, comfort, mutual services, sexual intercourse – all belong to the married state. Taken together, they make up the *consortium*’. It can be concluded that ‘*consortium*’ is termed ‘as an umbrella word for all the legal rights of one spouse to the company, affection, services and support of the other’.¹²³

In *National Coalition*, Ackermann J, emphasised the accelerating process of transformation that has taken place in family relationships and specifically the reform relating to the societal and legal concept of family

¹¹⁷ Cronjé and Heaton *South African family law* (2004) 2nd ed 49. A civil union now also creates a *consortium omnis vitae* as one of its invariable consequences.

¹¹⁸ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) at par 33. See also Sinclair assisted by Heaton *The law of marriage* (1996) 422.

¹¹⁹ *Dawood* at par 33; Sinclair assisted by Heaton *The law of marriage* (1996) 423.

¹²⁰ *Wiese v Moolman* 2009 3 SA 122 (T) 126.

¹²¹ *Peter v Minister of Law and Order* 1990 4 SA 6 (E) at 9G-H.

¹²² 1964 3 SA 522 (N).

¹²³ *Peter* at 9F.

and what it encompass.¹²⁴ He referred to submissions made by Sinclair and Heaton¹²⁵ that the South African 'heterogeneous society is fissured by difference of language, religion, race, cultural habit, historical experience and self-definition and, consequently, reflects widely varying expectations about marriage, family life and the position of women in society'.¹²⁶ In response to the pluralism and diversity of our society, Ackermann J acknowledged and confirmed the ability of gay men and lesbian women to establish a *consortium omnis vitae*.¹²⁷

I argue that the presence of a *consortium omnis vitae* is a *sine qua non* for a same-sex life partnership to qualify for the extension of certain benefits associated with the institution of marriage. The onus rests on the same-sex life partners to prove on a balance of probabilities that they have created a *consortium*.

4.4.2 THE INTENTION OF CREATING A *PERMANENT* SAME-SEX LIFE PARTNERSHIP

It is impossible to determine the exact moment at which a same-sex relationship becomes a permanent same-sex life partnership.¹²⁸ In all the cases where constitutional protection and recognition were requested same-sex partners had to prove the existence of a permanent life partnership. The meaning of 'permanence' in this context refers to 'an established intention of the parties to cohabit with one another

¹²⁴ *National Coalition* at par 47.

¹²⁵ Sinclair assisted by Heaton *The law of marriage* (1996) 7 citing Ken Owen 'One nation or several? Radical oligarchy or hodgepodge of tribes? Is diversity the glory of South Africa, or its cross?' *Business Day* 26 June 1990.

¹²⁶ *National Coalition* at par 47.

¹²⁷ *National Coalition* at par 53.

¹²⁸ Schäfer in Clark (ed) *Family law service* (1988) at par R6. See also Wood-Bodley 'Establishing the existence of a same-sex life partnership for the purposes of intestate succession' (2008) 125 *South African Law Journal* 259 at 261 and Schäfer 'Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships' (2006) 123 *South African Law Journal* 626 at 629.

permanently'.¹²⁹ The partners must therefore have the intention of being in a permanent life partnership as opposed to a temporary one.¹³⁰

The intention of permanence must not be confused with the duration of the same-sex life partnership. In most of the cases concerning the recognition of same-sex life partnerships the partners had cohabitated for lengthy periods. For example, in *Farr v Mutual and Federal Insurance Co Ltd*¹³¹ the partners cohabitated for 10 years; in *Satchwell v President of the Republic of South Africa*¹³² the partners cohabitated for 15 years; in *Du Toit v Minister for Welfare and Population Development*¹³³ the partners cohabitated for 12 years. However, in *Gory v Kolver*¹³⁴ the partners cohabited for a period of only about 10 months before the relationship was ended by the death of one of the partners. Although the partners cohabited for a short period the court found that, based on the evidence adduced, the partners had committed themselves in a 'permanent partnership in which the partners had undertaken reciprocal duties of support'.¹³⁵ A long period of cohabitation is therefore not an essential requirement for a permanent same-sex life partnership. The existence of a permanent same-sex life partnership is a question of fact which must be determined in light of the intention of the partners as established by the facts and circumstances of each case.

¹²⁹ *National Coalition* at par 86.

¹³⁰ Wood-Bodley 'Establishing the existence of a same-sex life partnership for the purposes of intestate succession' (2008) 125 *South African Law Journal* 259 at 261.

¹³¹ 2000 3 SA 684 (C). On this case, see also par 2.7.2.3 above.

¹³² 2002 6 SA 1 (CC), 2003 4 SA 266 (CC). On this case, see also par 2.7.2.2 above.

¹³³ 2003 2 SA 198 (CC). On this case, see also par 2.7.2.4 above.

¹³⁴ 2007 4 SA 97 (CC). On this case, see also par 2.7.2.2 above.

¹³⁵ *Gory* at par 51.

4.5 DRAFT DOMESTIC PARTNERSHIP BILL 2008

In 2001 the South African Law Reform Commission undertook an investigation into the recognition of domestic partnerships.¹³⁶ In 2003 the Commission published a *Discussion Paper 104* which contained recommendations to regulate the legal consequences of domestic partnerships.¹³⁷ The Commission's investigation led to the Draft Domestic Partnership Bill, 2008¹³⁸ which makes provision for the regulation of both registered¹³⁹ and unregistered domestic partnerships.¹⁴⁰

The objectives of the Draft Bill are to ensure the rights of equality and dignity of the partners in domestic partnerships and to reform family law to comply with the applicable provisions of the Bill of Rights.¹⁴¹ The Draft Bill makes provision for the recognition of the legal status of domestic partners, regulation of the rights and obligations of domestic partners, protection of the interests of both domestic partners and interested parties on the termination of domestic partnerships, and final determination of the financial relationship between the domestic partners and between domestic partners and interested parties when the domestic partnership terminates.¹⁴²

In respect of registered domestic partnerships the Draft Bill sets out the registration procedure,¹⁴³ the applicable property regime,¹⁴⁴ the duty of support¹⁴⁵ and the termination procedure.¹⁴⁶ It further makes provision for the welfare of minor children¹⁴⁷ born of the registered domestic partnership

¹³⁶ Issue Paper 17 (Project 118) (2001) *Domestic Partnerships*.

¹³⁷ Report on Project 118 (2006). *Domestic Partnerships*

¹³⁸ See *Government Gazette* 30663 of 14 January 2008.

¹³⁹ Chapter 3 of the Draft Bill.

¹⁴⁰ Chapter 4 of the Draft Bill.

¹⁴¹ Clause 2.

¹⁴² Clause 2.

¹⁴³ Clause 6.

¹⁴⁴ Clause 7.

¹⁴⁵ Clause 9.

¹⁴⁶ Clause 12.

¹⁴⁷ Clause 16.

and maintenance obligations after termination or in the event of the death of one of the domestic partners.¹⁴⁸

In respect of an unregistered domestic partnership the Draft Bill makes provision for the division of property upon termination¹⁴⁹ and liability for maintenance after the termination of the domestic partnership or in the event of the death of one of the domestic partners.¹⁵⁰

4.6 SUMMARY AND CONCLUSION

The legal recognition of a form of a conjugal relationship other than a civil marriage or a civil union – a permanent same-sex life partnership – is the result of constitutional jurisprudence in family law and the transformation of the concept ‘family’ and what it encompasses. Rights and duties continue to accrue to same-sex partners by virtue of their permanent same-sex life partnership even after the coming into operation of the Civil Union Act. However, the constitutional court judgment in *Volks NO v Robinson*¹⁵¹ will most probably have an impact on future claims by permanent same-sex life partners. In this case, the constitutional court reassessed the objective model of choice and confirmed that certain rights and duties which are attached by law to marriage need not be extended to non-marital life partners since they have chosen not to make their relationship official. The next chapter will address the constitutional aspect of the continued protection of same-sex life partnerships which are not solemnised and registered under Civil Union Act and will further deal with the constitutionality of the Civil Union Act as a separate measure to regulate same-sex marriage.

¹⁴⁸ Clauses 18 and 19.

¹⁴⁹ Clause 28.

¹⁵⁰ Clauses 28 and 29.

¹⁵¹ 2005 5 BCLR 446 (CC).

'By its very nature, the quality of fairness, like that of the mercy of justice, is not strained. The enquiry as to what is fair in our new constitutional democracy accordingly does not pass easily through the eye of the needle of black-letter law. Judicial dispassion does not exclude judicial compassion; the question of fairness must be rigorously dealt with, in a people-centred and not a rule-centred way'.¹

5 CONSTITUTIONAL ASPECTS PERTAINING TO SAME-SEX LIFE PARTNERSHIPS THAT FALL OUTSIDE THE AMBIT OF THE CIVIL UNION ACT OF 2006 AND THE CONSTITUTIONALITY OF THE CIVIL UNION ACT AS A SEPARATE MEASURE TO REGULATE SAME-SEX MARRIAGE

5.1 INTRODUCTION

This chapter, firstly, consists of a critical discussion of the continued conferment of 'spousal' benefits on partners in permanent same-sex life partnerships since the coming into operation of the Civil Union Act 17 of 2006 on 30 November 2006 and in view of the reassessment of the objective model of choice by the constitutional court in *Volks NO v Robinson*.² It will be submitted that the social reality of homophobic hate crimes within our society together with generated 'felt stigma' and 'internalized homophobia' of certain gay men and lesbian women require continued conferment of spousal benefits on those couples who are unable to make their relationship official. It will further be submitted that continued recognition of same-sex life partnerships is supported by the notion of substantive equality which encompasses a restitutionary concept of equality. Substantive equality further requires a more transformatory approach in order to achieve a society based on equality. A transformatory approach places emphasis on a more radical understanding of society within its social and historical contexts. In essence, transformative change dictates a rejection of legal formalism and requires an understanding of law as a product of social relations.³

¹ As per Sachs J in his minority judgement in *Volks v Robinson* 2005 5 BCLR 446 (CC) at par 152.

² 2005 5 BCLR 446 (CC).

³ Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 235 at 258.

The second main constitutional issue that is dealt with in this chapter is the constitutionality of the Civil Union Act as a separate measure to regulate same-sex marriage. In order to determine whether the Act is constitutionally tenable it is, firstly, necessary to ascertain if the Act complies with the guiding principles as set out by the constitutional court in *Minister of Home Affairs v Fourie*.⁴ This will be followed by a critical discussion of the enactment of a civil union regime for same-sex couples as an alternative to civil marriage available to heterosexual couples only. The chapter will conclude with an analysis of the implication of the judicial deference to the legislature by the constitutional court in *Fourie*.

5.2 THE CONSTITUTIONALITY OF THE CONTINUED CONFERMENT OF SPOUSAL BENEFITS ON SAME-SEX LIFE PARTNERS AFTER THE COMING INTO OPERATION OF THE CIVIL UNION ACT

5.2.1 A CRITICAL ANALYSIS OF *VOLKS NO V ROBINSON* AND ITS RELEVANCE FOR SAME-SEX LIFE PARTNERS

5.2.1.1 DECISION OF THE COURT A QUO

In this case, the court *a quo*,⁵ the Western Cape high court, Cape Town, declared section 2(1) of the Maintenance of the Surviving Spouses Act 27 of 1990⁶ read together with the definition of the word 'survivor' in section 1 of the Act⁷ unconstitutional. The declaration of unconstitutionality was based on the finding that the omission from the provisions of the Act of partners in a permanent life partnership constituted a violation of the right to dignity in terms of section 10 of the Constitution and also the right to equality in terms of section 9 of the Constitution. It, in particular, constituted unfair discrimination on the ground of marital status in terms of section 9(3) of the Constitution. In

⁴ 2006 1 SA 524 (CC).

⁵ *Robinson v Volks* 2004 6 SA 288 (C).

⁶ 'If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage insofar as he is not able to provide therefore from his own means and earnings': s 2(1).

⁷ A survivor is defined as 'the surviving spouse in a marriage dissolved by death': s 1.

delivering his judgement, Davis J emphasised that 'one of the core commitments of our constitutional society is the recognition of the dignity of difference'.⁸ Davis J further acknowledged that domestic partnerships are an important part of South African family law and that the effect of the failure to take cognisance of its existence 'is to undermine the dignity of difference and to render the guarantee of equality somewhat illusory insofar as a significant percentage of the population is concerned'.⁹ He then ordered the amendment of section 1 of the Maintenance of the Surviving Spouses Act to include partners in a permanent life partnership within the provisions of the Act. The declaration of unconstitutionality was then referred to the constitutional court for confirmation in terms of section 172(2)(a) of the Constitution.

5.2.1.2 THE MAJORITY JUDGEMENT OF THE CONSTITUTIONAL COURT

In delivering the majority judgement of the constitutional court, Skweyiya J found that the relevant provisions of the Maintenance of Surviving Spouses Act did not constitute a violation of the rights to equality and dignity of partners in a permanent life partnership. Skweyiya J held that the purpose of the provisions of the Act is clear in that it intends to provide for the reasonable maintenance needs of parties to a marriage that is dissolved by the death of one of the parties.¹⁰ 'The aim is to extend an invariable consequence of marriage beyond the death of one of the parties'.¹¹ Skweyiya J concluded that the only sensible interpretation of 'marriage' when viewed within the context of the Act is that it refers to a marriage that is either recognised by law or by religion and that it is illogical to include survivors of permanent life partnerships within the provisions of the Act.¹²

He did, however, acknowledge that the Act distinguishes between married and unmarried couples, which amounts to discrimination on the ground of

⁸ *Robinson* at 299D.

⁹ *Robinson* at 299H-I.

¹⁰ *Volks* at par 39.

¹¹ At par 39.

¹² At pars 41 and 43.

marital status.¹³ In order to justify the marital status discrimination, Skweyiya J held that section 15(3)(a)(i) of the Constitution recognises the social importance of marriage in our society and that marriage creates one of the most important bases for family life in our society. He held that the law may in appropriate cases extend benefits to married couples to the exclusion of unmarried couples.¹⁴ Skweyiya J concluded that the Constitution does not require a duty to be imposed upon the deceased's estate unless such a duty arose by operation of the law during the deceased's lifetime. To place such a burden on the deceased estate would be 'incongruous, unfair, irrational and untenable'.¹⁵

With regard to the question of whether the provisions of the Act constituted a violation of the right to dignity of a life partner, the court held that the dignity of a life partner is not less worthy than the dignity of someone who is married and that the right to dignity of a life partner is not violated by merely informing him or her that there is a fundamental difference between a marriage and a life partnership in relation to maintenance.¹⁶ Married couples are obliged to maintain each other by operation of the law but life partners are not in that position and accordingly 'it is not appropriate that an obligation that did not exist before death be posthumously imposed'.¹⁷

In his concurring judgement, Ngcobo J emphasised marriage's being 'a matter of choice'. 'Marriage is a manifestation of that choice and more importantly, the acceptance of the consequences of a marriage'.¹⁸ Ngcobo J further held that the law places no legal impediment on the capacity of heterosexual life partners to enter into marriage. By choosing not to enter into a marriage they deny themselves the rights and duties associated with marriage.¹⁹ He concluded that an extension of legal consequences to life partners under

¹³ At par 50.

¹⁴ At pars 52 and 54.

¹⁵ At par 60.

¹⁶ At par 62.

¹⁷ At par 62.

¹⁸ At par 93.

¹⁹ At pars 91 and 92.

these circumstances would undermine the right freely to marry and would accordingly be unacceptable.²⁰

5.2.1.3 THE MINORITY JUDGEMENT OF THE CONSTITUTIONAL COURT

In their minority judgement, Mokgoro and O'Regan JJ disagreed strongly with the views expressed in the majority judgement. Both judges acknowledged marriage as an institution of great legal significance²¹ but argued that the views expressed by the majority ignored the current position in South African society where a significant part of the population described themselves as 'living together like married partners' although they were not married.²² The approach by the majority defeats the important constitutional objective of section 9(3) of the Constitution to prohibit discrimination on the ground of marital status. It further fails to take cognisance of the historical position in our country in which only certain marriages were recognised as deserving of legal regulation and protection to the exclusion of vulnerable groups, for example, permanent life partners. The effect of the majority decision is that only 'marriage will inevitably remain privileged'.²³

Mokgoro and O'Regan JJ held that:

'It is . . . a constitutional prescript that families that are established outside of civilly recognised marriages should not be subjected to unfair discrimination'.²⁴

They further held that the unfairness of discrimination in this case is not primarily based on the fact that life partners are not afforded equivalent rights as opposed to married couples in terms of section 2(1) of the Act. The discrimination is created by the fact that neither section 2(1) of the Act nor any other legal rule regulates the rights of surviving partners in a life partnership

²⁰ At par 94.

²¹ At par 118.

²² At par 119.

²³ At par 118.

²⁴ At par 107.

which is socially and functionally similar to marriage when that life partnership is terminated by death and the surviving partner is in financial need.²⁵ Mokgoro and O'Regan JJ concluded that although marriage plays an important role in our society and is valued by most religions, the Constitution forbids the limitation of rights solely to advance certain religious views and that the unfair discrimination on the ground of marital status was not justifiable.²⁶

Sachs J agreed with the minority judgement of Mokgoro and O'Regan JJ but his approach was based on a different legal landscape. Sachs J held that the question of fairness of excluding surviving life partners from the benefits of the Act cannot be assessed by the constricted rules established by matrimonial law, but should rather be viewed within the 'broader and more situation-sensitive framework of the principles of family law, principles that are evolving rapidly in our new constitutional era'.²⁷ Under the stimulus of a new constitutional dispensation, family law represents a definite change from a definitional approach to marriage to a functional approach to the family.²⁸

According to the definitional approach only those individuals who comply with the current definition of marriage are entitled to the rights and obligations attached by law to marriage, with the result that only a legally valid marriage can create a family worthy of legal protection.²⁹ The functional approach on the other hand proposes that the definition of marriage must reflect the function it performs within society. In other words, such an approach dispenses with the legal requirements of marriage and focuses solely on the way in which a group of people functions.³⁰ This functional approach is also endorsed by the South African Law Reform Commission. According to the Commission's *Discussion Paper 104 Project 118* the exclusive nature of the common-law definition of marriage disregards the social reality that is experienced by most members of our society. The Commission states that it

²⁵ At par 135.

²⁶ At par 136.

²⁷ At par 152.

²⁸ At par 172.

²⁹ At par 172.

³⁰ At par 173.

has become inevitable to define family in accordance with the functional approach in order to extend benefits to individuals who do not fit the traditional family form.³¹ Sachs J held that such an approach displays greater fairness and brings the law in line with social reality and furthermore harmonises the law with the values underlying the Constitution.³²

Sachs J emphasised that a flexible and evolutionary approach to family life is essential in our democratic society in which pluralism and diversity are acknowledged.³³ Domestic partnerships as a form of family life provide mutual support and promote respect for stable family life and should not be subjected to moral prejudice because they are unconventional.³⁴ Sachs J concluded that if a 'familial nexus of such proximity and intensity' is established, rights must be extended to permanent unmarried life partners.³⁵

5.2.1.4 REPERCUSSIONS OF THE CONSTITUTIONAL COURT'S MODEL OF CHOICE

The view of the majority judgement in the *Volks* case is clearly based on the freedom of choice principle. This principle demands that the law must not intervene or attach consequences to relationships where parties choose not to enter into a legally valid marriage.³⁶ This approach assesses the availability of 'choice' by merely focusing on the presence or absence of legal impediments to marriage. Choice is viewed as an 'all or nothing concept' which is based on the understanding that choices are exercised by free, autonomous individuals.³⁷

³¹ Discussion Paper 104 (Project 118) *Domestic Partnerships* at par 7.1.63.

³² *Volks* at par 174.

³³ At par 188.

³⁴ At pars 156 and 203.

³⁵ At par 213.

³⁶ Wood-Bodley 'Intestate succession and gay and lesbian couples' (2008) 125 *South African Law Journal* 46 at 59; Schäfer 'Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships' (2006) 123 *South African Law Journal* 626 at 640. See also Goldblatt 'Regulating domestic partnerships – a necessary step in the development of South African family law' (2003) 120 *South African Law Journal* 610 at 615.

³⁷ Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 235 at 267.

This essentially libertarian view is in conflict with the notion of substantive equality which requires an understanding of choice that reflects the 'constraints as coming from history, from the operation of power and dominance, from socialisation, or from class, race and gender'. This notion of choice accordingly fails to take cognisance of the oppressive legal system which had a severe impact on the way many families were formed.³⁸ The majority judgement is unsatisfactory because it ignores the context in which choices are made and the impact thereof on individuals; it privileges the institution of marriage only and fails to embrace a contextual or progressive idea of cohabitation.³⁹

As indicated in the previous chapter, spousal benefits continue to accrue to partners in a permanent same-sex life partnership even after the enactment of the Civil Union Act which confers marital rights upon same-sex couples. The social and legal impact of the *Volks* judgement together with the enactment of the Civil Union Act on same-sex unions is twofold. Firstly, certain spousal benefits continue to accrue to partners in a same-sex life partnership to the exclusion of partners in a heterosexual life partnership, which amounts to differential treatment. Secondly, based on the view of the majority in *Volks*, the continued extension of spousal benefits to same-sex life partners can no longer be justified because such life partners have exercised a choice not to enter into a civil union and must therefore forfeit the rights and obligations associated with a civil union just as heterosexual life partners forfeit the rights and obligations associated with a civil marriage or civil union.

The extension of marriage rights to same-sex couples provides legal protection and social affirmation to same-sex couples whose relationships mimic the traditional heterosexual institution of marriage, but it ignores the social and economic reality of many individuals who are not in a position to 'choose' to formalise their relationship by entering into a civil union: for many

³⁸ *Ibid.*
³⁹ *Idem*, at 266.

the purported 'choice' is no choice at all.⁴⁰ I argue that in view of ongoing homophobia in our society it will be unwise to force same-sex life partners to formalise their relationship. Furthermore, the notion of substantive equality dictates the protection and recognition of family forms that differ from the traditional nuclear family which initially generated the framework which excluded 'deviant' family forms. The impact of homophobia as a social reality will be discussed next and will be followed by a discussion of the notion of substantive equality to justify the continued recognition of same-sex life partnerships.

5.2.2 HOMOPHOBIA: A SOCIAL REALITY

The freedom-of-choice principle fails to consider the context within which same-sex couples make choices whether or not to enter into a civil union. According to Wood-Bodley the extent of homophobic views in our society should not be 'underestimated or discounted'.⁴¹ For example, research has revealed that gays and lesbians are still being refused treatment by health-care practitioners because of their sexual orientation; it has been reported that several same-sex couples have been turned away by or insulted by members of the Department of Home Affairs when they wanted to enter into a civil union; discrimination at the workplace has been reported as well as difficulty in finding work if the applicants professed to be gay or lesbian.⁴²

The increased occurrences of homophobic hate crimes are one of the most profound reasons for not being openly gay or lesbian. According to the Southern Africa Report, the South African Police Services have struggled to create a culture of rights awareness within their ranks with the result that victims of homophobic hate crimes cannot be reassured of a sympathetic

⁴⁰ De Vos 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *South African Journal on Human Rights* 179 at 199; Goldblatt 'Regulating domestic partnerships – a necessary step in the development of South African family law' (2003) 120 *South African Law Journal* 610 at 616.

⁴¹ Wood-Bodley 'Intestate succession and gay and lesbian couples' (2008) 125 *South African Law Journal* 46 at 54.

⁴² *Idem*, at 55-56.

reception by the police.⁴³ Murder, sexual assault, rape and verbal abuse are mostly associated with homophobic hate crimes.⁴⁴

Wood-Bodley emphasises the fact that gays and lesbians need not personally be victim of homophobic hate crimes or hate speech in order to be affected by it.⁴⁵ Homosexual individuals who are indirectly affected by homophobic conduct experience what some psychologists describe as 'felt stigma', which refers to 'an individual's subjective experience of stigma against her or his group, including her or his awareness of the stigma's prevalence and manifestations even without having directly experienced enacted stigma'.⁴⁶ 'Felt stigma' often motivates individuals with a stigmatised condition to engage in pre-emptive, protective behaviours in order to avoid enactments of stigma. For example, these individuals may avoid contact with groups of people with homophobic views or may even attempt to conform to heterosexual behaviour in order to avoid enacted stigma.⁴⁷

The condition of 'internalized homophobia' must also be mentioned. 'Internalized homophobia' becomes apparent when gays and lesbians internalise society's negative dogma about sexual minorities. It results, *inter alia*, in an unwillingness to disclose one's homosexuality to others and the acceptance of societal stereotypes about homosexuality.⁴⁸

From the above discussion it is clear that many gay men and lesbian women may find it difficult or even impossible to choose to enter into a civil union. As De Vos correctly points out:

⁴³ *Idem*, at 56.

⁴⁴ *Ibid.* See also De Vos 'The "inevitability" of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *South African Journal on Human Rights* 432 at 463-464 and De Vos 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *South African Journal on Human Rights* 179 at 183.

⁴⁵ Wood-Bodley 'Intestate succession and gay and lesbian couples' (2008) 125 *South African Law Journal* 46 at 57.

⁴⁶ Herek and Garnets 'Sexual orientation and mental health' (2007) 3 *Annual Review of Clinical Psychology* 353 at 361.

⁴⁷ Wood-Bodley 'Intestate succession and gay and lesbian couples' (2008) 125 *South African Law Journal* 46 at 57.

⁴⁸ *Idem*, at 58.

‘In a sexist, patriarchal and homophobic society, a society in which many individuals depend on others for their social and economic survival, it will often be difficult or even impossible for individuals to “choose” to marry their same-sex sweethearts. Such a “choice” would require an individual in some form of same-sex intimate relationship to come out of the closet and to openly live the life of a “homosexual”, thus inviting rejection, hatred and violence.’⁴⁹

5.2.3 THE APPLICATION OF SUBSTANTIVE EQUALITY TO ERADICATE SYSTEMIC INEQUALITIES

Continued protection and recognition of permanent same-sex life partnerships are further supported by the notion of substantive equality. Substantive equality requires the law to guarantee the outcome of equality and to endure differential treatment to achieve this goal.⁵⁰ A substantive conception of equality further requires an examination of the actual social and historical treatment of groups in order to establish whether the Constitution’s commitment to equality is being upheld.⁵¹ The concept of substantive equality encompasses a conception of ‘restitutionary equality’⁵² as envisaged by section 9(2) of the Constitution which states that:

‘Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.’

⁴⁹ De Vos ‘Same-sex sexual desire and the re-imagining of the South African family’ (2004) 20 *South African Journal on Human Rights* 179 at 199.

⁵⁰ Currie and De Waal *Bill of Rights Handbook* (2005) 5th ed par 9.1.

⁵¹ *Ibid.* See also Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23 *South African Journal on Human Rights* 235 at 254.

⁵² The concept of ‘restitutionary equality’ was recognised by the constitutional court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) where the court acknowledged that homosexual persons have suffered considerable unfair discrimination in the past. The court further explained that it is insufficient to merely eliminate statutory provisions which have caused unfair discrimination. ‘Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied . . . One could refer to such equality as remedial or restitutionary equality’: at par 60.

Section 9(2) of the Constitution is also known as the affirmative action clause. Affirmative action entails preferential treatment for all groups of people who were disadvantaged by unfair discrimination and therefore includes gay men and lesbian women, who were historically subjected to unfair discrimination on the grounds of their sexual orientation and marital status.⁵³ Segregation and apartheid created a social and economic imbalance in society that favoured people who conformed to the heterosexual norm of behaviour and unfairly discriminated against homosexuals, who were branded as outcasts and deviants. The right to equality dictates more than mere prohibition of discrimination or unequal treatment by the state or private individuals; it imposes a positive obligation on the government to enact certain measures to ensure that everyone fully and equally enjoys all rights and freedoms.⁵⁴ Affirmative action must therefore be viewed as a 'substantive and composite part' of the right to equality.⁵⁵

The retention of spousal benefits for permanent same-sex life partners by means of judicial developments and statutory provisions may therefore qualify as 'measures' aimed at achieving substantive equality within the context of section 9(2) of the Constitution.⁵⁶ In *Minister of Finance v Van Heerden*⁵⁷ the constitutional court held that the enquiry to determine whether a 'measure' falls within the ambit of section 9(2) is threefold:

'The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the

⁵³ Affirmative action is usually associated with preferential treatment and distribution of benefits to individuals who were disadvantaged by past unfair discrimination on the grounds of their race or gender but there is no impediment in section 9(2) of the Constitution which limits affirmative action programmes to only race and gender inequalities: Currie and De Waal *Bill of Rights Handbook* (2005) 5th ed par 9.5 and fn 139.

⁵⁴ *Idem*, at par 9.5.

⁵⁵ *Ibid.*

⁵⁶ Wood-Bodley 'Same-sex couple discrimination in employment benefits: where to now?' (2008) 125 *South African Law Journal* 483 at 487.

⁵⁷ 2004 6 SA 121 (CC).

third requirement is whether the measure promotes the achievement of equality.⁵⁸

The continued conferment of 'spousal' benefits on same-sex life partners is based on the social reality that gays and lesbians are members of a vulnerable group who have been persecuted and marginalised by unfair discrimination in the past. The continued extension of 'spousal' benefits amounts to measures designed to advance the social and economic status of gays and lesbians in society with the objective of eliminating the historical burden of inequality in order to promote the achievement of equality in our society.

Based on a substantive approach to equality, the differentiation between homosexual and heterosexual couples does not amount to unfair discrimination on the ground of marital status. Discriminatory actions which are unfair in one context may not automatically be unfair in a different context.⁵⁹ We need to develop a concept of unfair discrimination which recognises 'that although a society which affords each human being equal treatment on the basis of equal worth . . . is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved'.⁶⁰ What is required in the circumstances is a conscientious understanding of the impact of the discriminatory action upon the particular group of people concerned to determine whether its overall impact is one which promotes the constitutional goal of equality or not.⁶¹

Substantive equality further demands 'transformatory' change as opposed to an inclusionary approach.⁶² An inclusionary approach to equality supports a liberal idea of inclusion into the *status quo* which broadens the umbrella of social recognition but fails to investigate the structural conditions that initiate

⁵⁸ Van Heerden at par 37.

⁵⁹ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) at par 41.

⁶⁰ *Hugo* at par 41.

⁶¹ *Hugo* at par 41.

⁶² Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 235 at 257.

and propagate systemic inequalities.⁶³ A transformatory approach on the other hand aims to address inequalities by shifting the power relation that maintains that *status quo* 'by restructuring the underlying generative framework'.⁶⁴

In most of the cases where social recognition was sought for same-sex life partners, courts reverted to a more inclusionary approach to equality. The extension of rights to same-sex life partnerships has been permitted to the extent that the life partnerships conform to the characteristics of an ideal marriage.⁶⁵ The result is therefore 'a society in which social inclusion is based on sameness, rather than difference, and which limits choice unless exercised within the stated boundaries of acceptable relationships'.⁶⁶

The notion of inclusionary equality militates against the anti-subordination principle as envisaged by the constitutional court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.⁶⁷ In this case the court held that 'the desire for equality is not a hope for the elimination of all difference' and that 'the experience of subordination . . . lies behind the vision of equality'.⁶⁸ Equality should not be confused with uniformity; equality entails 'equal concern and respect across difference' and does not presuppose the suppression of difference.⁶⁹

The Constitution imposes an obligation on the law to acknowledge the variability of human beings and further requires the abolition of the notion of the exclusivity of marriage for establishing what is legally normative.⁷⁰ The acknowledgment of human variability will broaden the scope of what is constitutionally normal in order to include the widest range of perspectives. It

⁶³ *Idem*, at 256.

⁶⁴ *Ibid.*

⁶⁵ *Idem*, at 272. See also De Vos 'The "inevitability" of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *South African Journal on Human Rights* 432 at 453.

⁶⁶ Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 235 at 272.

⁶⁷ 1999 1 SA 6 (CC).

⁶⁸ *National Coalition* at par 22.

⁶⁹ *National Coalition* at par 132.

⁷⁰ *National Coalition* at par 134.

will require a more revolutionary understanding of relationships and family law that is not governed by heterosexual marital norms or by the libertarian idea of choice but rather the enhancement of transformative ideas of diversity, human agency, context and choice.⁷¹

5.2.4 TO SUMMARISE

The Napoleonic proverb 'cohabitants ignore the law and the law ignores them' can no longer be applied within South African family law.⁷² Social reality demands the recognition of different family forms, and this implies that the law and courts must move away from defining relationships in terms of marriage and must focus on the actual function that these relationships perform within society.⁷³ Where life partnerships have created responsibilities for and expectations by partners, the law should intervene in that it must enforce such responsibilities and realise the partners' expectations.⁷⁴ The recognition of life partnerships is further supported by the right to equality which prohibits discrimination on the grounds of, *inter alia*, sexual orientation and marital status. Although the Constitution recognises the importance of marriage in section 15(3)(a)(i), it does not entrench the right to marry.⁷⁵ Reserving marriage as the only institution worthy of legal protection and social recognition creates ongoing marginalisation of an already vulnerable group. The conservative view of the majority in *Volks* that privileges marriage compels individuals to conform to the idealised heterosexual marriage. The result will inevitably be that the consensual element of marriage is eliminated because marriage will become a juristic act which is 'imposed, managed, organised, propagandised, and maintained by force'.⁷⁶ The objective model of choice militates against the right to equality, which is conceptualised as the

⁷¹ Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 235 at 273.

⁷² Discussion Paper 104 (Project 118) *Domestic Partnerships* at par 2.1.10.

⁷³ Goldblatt 'Regulating domestic partnerships – a necessary step in the development of South African family law' (2003) 120 *South African Law Journal* 610 at 616.

⁷⁴ *Idem*, at 617.

⁷⁵ Wildenboer 'Marrying domestic partnerships and the Constitution: A discussion of *Volks NO v Robinson* 2005 5 BCLR 446 (CC)' (2005) 20 *South African Public Law* 459 at 466.

⁷⁶ De Vos 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *South African Journal on Human Rights* 179 at 200.

right to be different from the stated or unstated norm without suffering adverse consequences.⁷⁷ 'Transformatory change' is essential for the restructuring of the current framework that governs family relations in society. Such an approach will dismantle the current generative framework that governs family relations, which is marriage, in order to create a framework that acknowledges a variety of family forms.

5.3 THE CONSTITUTIONALITY OF THE CIVIL UNION ACT 17 OF 2006 AS A SEPARATE MEASURE TO GOVERN SAME-SEX MARRIAGE

5.3.1 THE CONSTITUTIONAL COURT'S GUIDING PRINCIPLES TO THE LEGISLATURE

In delivering the majority judgement of the constitutional court in *Minister of Home Affairs v Fourie*,⁷⁸ Sachs J emphasised that Parliament had to 'avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation'.⁷⁹ A remedy that would amount to a 'separate but equal' approach would be unacceptable because it would serve 'as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation'.⁸⁰ Differential treatment does not necessarily constitute a violation of the dignity of same-sex couples. However, the moment that a 'separate but equal' approach amounts to repudiation or inferiority and perpetuates a caste-like status, it becomes intolerable within a constitutional paradigm.⁸¹ In essence, the constitutional court required that the legislative remedy must accord same-sex couples a public and private status equal to heterosexual couples and must also equate same-sex couples and heterosexual couples with regard to the tangible and intangible benefits associated with marriage. The remedy must further enhance the dignity of

⁷⁷ *Idem*, at 185.
⁷⁸ 2006 1 SA 524 (CC).
⁷⁹ *Fourie*, at par 150.
⁸⁰ At par 150.
⁸¹ At par 152.

same-sex couples by taking into account past unfair discrimination and continuing homophobia.⁸²

The constitutional court gave the legislature 12 months to rectify the unconstitutionality. Based on the extensive research already conducted by the South African Law Reform Commission on reform possibilities for same-sex marriage, the court concluded that the legislature would be able to fulfil its responsibility within this short period of time.

5.3.2 THE CONSTITUTIONALITY OF A CIVIL UNION REGIME AS AN ALTERNATIVE TO CIVIL MARRIAGE

The Civil Union Act makes provision for same-sex couples and heterosexual couples to enter into either a marriage or civil partnership.⁸³ At first glance the Act appears to comply with all the guiding principles provided by the constitutional court, but in view of the research conducted in Chapter 3 of this study it is evident that shortcomings within the Act may render it unconstitutional. For the purposes of the present chapter the question that must be answered is why the Marriage Act 25 of 1961 was never rectified after the constitutional court declared section 30(1) and the common-law definition of marriage to be unconstitutional. The effect of the enactment of the Civil Union Act as the remedy for the unconstitutionality of section 30(1) and the common-law definition is that heterosexual couples have a choice between the Marriage Act and Civil Union Act to formalise their relationships while same-sex couples are limited to the Civil Union Act only. The retention of the Marriage Act as an exclusive piece of legislation available to heterosexual couples only creates the impression that heterosexual couples remain 'superior' and that the institution of marriage must be protected from 'tainted' and 'inferior' homosexual couples.⁸⁴

⁸² At pars 81 and 153.

⁸³ See Chapter 3 par 3.3 for a general description of the Civil Union Act.

⁸⁴ De Vos and Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' (2007) 124 *South African Law Journal* 795 at 821.

Sinclair argues that the political and social pressure that caused the constitutional court to defer to the legislature caused the legislature to defer to the moral majority of society in formulating its remedy.⁸⁵ This submission is based on the majority judgement in *Fourie* where Sachs J held that in finding an appropriate remedy, the moral and religious sensitivities of the case called for a more tentative approach and that public debates on the sacred and the secular were essential to satisfy the concerns of religious groups and traditional leaders.⁸⁶ During the public participation process Parliament failed to comply with its constitutional duty, because it did not inform the public of the constitutional and legal limitation within which the participation process was supposed to take place.⁸⁷ Sections 59(1) and 72(1)(a) of the Constitution oblige Parliament to 'provide education that builds capacity for such participation' and to facilitate 'learning and understanding in order to achieve meaningful involvement by ordinary citizens'.⁸⁸ This must be done in order to guarantee that the public participates in the law-making process in coherence with our democracy.⁸⁹ The result of Parliament's failure to comply with its constitutional duty was a public participation process which turned into a homophobic outburst; an opportunity to advance arguments against the evils of homosexuality.⁹⁰

The public hostility against same-sex marriage certainly had an impact on the legislature's decision to enact separate legislation to regulate same-sex marriage. I submit that the inclusion of heterosexual couples within the ambit of the Civil Union Act was merely an attempt by the legislature to insure itself

⁸⁵ Sinclair 'A new definition of marriage: Gay and lesbian couples may marry' (2008) *The International Survey of Family Law* 397 at 401.

⁸⁶ *Fourie* at pars 90 and 91. See also Bohler-Muller 'Judicial deference and the deferral of justice in regard to same-sex marriages and in public consultation' (2007) 40 *De Jure* 90 at 98.

⁸⁷ De Vos and Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' (2007) 124 *South African Law Journal* 795 at 814.

⁸⁸ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) at par 131.

⁸⁹ At par 135.

⁹⁰ De Vos and Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' (2007) 124 *South African Law Journal* 795 at 814.

against a claim that separate legislation for gays and lesbians is unacceptable.⁹¹

Certain provisions of the Act apply only to same-sex couples, which renders the objectivity and constitutional commitment by the legislature to provide same-sex couples with an equal status that the law accords to heterosexual couples questionable. For example, the blanket exclusion of same-sex minors from entering into a civil union creates the impression that minors must first attain majority and some degree of maturity in order to establish their sexual orientation⁹² and that the legislature has a moral obligation to protect minors from formalised homosexual conduct. The discretion of *ex officio* marriage officers to refuse to solemnise same-sex unions on the grounds of religious/conscientious objection⁹³ and the compulsory dual application to solemnise same-sex unions by religious institutions and religious marriage officers⁹⁴ limit same-sex couples' access to formalisation of their relationships.⁹⁵

I submit that the Civil Union Act is a 'separate and *unequal*' Act which confers a second-class marital status upon same-sex couples and further produces new forms of oppression and repudiation. This is clearly in conflict with the guiding principles of the constitutional court that the legislature should not provide a remedy that in its context and application would be calculated to produce new forms of marginalisation. In instances where individuals were already subjected to past unfair discrimination and never provided with equal concern and respect because of personal characteristics, for example, homosexual orientation, any additional differential treatment imposed by

⁹¹ See also Sinclair 'A new definition of marriage: Gay and lesbian couples may marry' (2008) *The International Survey of Family Law* 397 at 404.

⁹² See Chapter 3 par 3.5.2 for a comprehensive discussion of the blanket ban on same-sex minors from entering into a civil union.

⁹³ S 6 of the Civil Union Act.

⁹⁴ S 5 of the Civil Union Act.

⁹⁵ See Chapter 3 par 3.5.1 for a comprehensive discussion of the solemnisation of same-sex unions by *ex officio* marriage officers and religious marriage officers.

legislation increases their unfair social characterisation and accordingly has a more severe impact on them, since they are already vulnerable.⁹⁶

The co-existence of the Marriage Act and Civil Union Act creates a threefold hierarchy within the institution of marriage — the heterosexual superior marriage under the Marriage Act; then the more inferior marriage or civil union between heterosexual couples; and lastly the marriage or civil union between homosexual couples.⁹⁷ Until this hierarchy is removed, homosexual couples will remain inferior. It is therefore essential, from an integrative point of view, that same-sex couples and heterosexual couples be brought together under one common institution in order to eradicate the structural inequalities.⁹⁸

Based on the above submissions, I recommend the amendment of the Marriage Act by the insertion of a definition of 'marriage' that extends marriage in terms of the Act to same-sex and opposite-sex couples; the amendment of the Act by the insertion of a definition of the word 'spouse'; and the amendment of the marriage formula in the Act to include the words 'or spouse'⁹⁹ and that the Civil Union Act be declared unconstitutional.

5.3.3 ANALYSIS AND SUMMARY

In our constitutional realm there must be mutual respect and co-existence between the secular and the sacred based on the accommodation of diversity.¹⁰⁰ The religious beliefs of some cannot be used to determine the constitutional rights of others. And, importantly, recognition should not be given to the view of the religious majority on marginalised homosexual members of our society. It is the function of our Constitution and law to step in and counteract rather than reinforce unfair discrimination against a minority

⁹⁶ *M v H* 1999 171 DLR 4th ed 577 at par 63 as cited by Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) at par 44.

⁹⁷ De Vos and Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' (2007) 124 *South African Law Journal* 795 at 822.

⁹⁸ *Idem*, at 825.

⁹⁹ Report on Project 118 (2006) *Domestic Partnership* at pars 5.6.6 and 5.6.7.

¹⁰⁰ *Fourie* at par 98.

group.¹⁰¹ This was the view expressed by the majority judgement in *Fourie* but it did not accord with the relief ordered by the court.

The judicial deference to the legislature in this case brings the transformative role of judges within the South African constitutional dispensation and the appropriate application of the doctrine of separation of powers into question.¹⁰² The Constitution vests the constitutional court with the power to declare any law inconsistent with the Constitution and invalid to the extent of its inconsistency and to make any order that is just and equitable.¹⁰³ The constitutional court further has inherent power to develop the common law taking account of the interests of justice.¹⁰⁴ With the exception of same-sex marriage, the constitutional court has in all its previous cases relating to sexual orientation applied its inherent power in order to determine appropriate relief. Sachs J was convinced that the moral and religious sensitivities of the *Fourie* case called for a more tentative approach and necessitated public participation but he ignored the reality that public sentiments are predominantly against the legalisation of same-sex marriage.¹⁰⁵ These sentiments should not prevail if they result in the continued marginalisation of minorities.

Bohler-Muller condemns the failure by the constitutional court to do justice to the particularity of the case and describes the decision as a retreat from 'ethical responsibility' by the judiciary.¹⁰⁶ Judges should rather 'guide than constrain the potential of the judiciary to carve out an institutional role that contributes meaningfully to the social transformation of South African society'.¹⁰⁷ What is therefore needed is an appropriate balance between judicial alertness and deference, as our courts have wide powers that allow for

¹⁰¹ *Fourie* at par 92.

¹⁰² Sinclair 'A new definition of marriage: Gay and lesbian couples may marry' (2008) *The International Survey of Family Law* 397 at 400.

¹⁰³ S 172(1)(a) and (b) of the Constitution, 1996.

¹⁰⁴ S 173 of the Constitution, 1996.

¹⁰⁵ Bohler-Muller 'Judicial deference and the deferral of justice in regard to same-sex marriages and in public consultation' (2007) 40 *De Jure* 90 at 98.

¹⁰⁶ *Ibid.* See also Sinclair 'A new definition of marriage: Gay and lesbian couples may marry' (2008) *The International Survey of Family Law* 397 at 400.

¹⁰⁷ Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 at 384.

flexible and *creative* (original emphasis) judicial engagement.¹⁰⁸ In *Fourie* the constitutional court clearly deferred to the legislature for political reasons.¹⁰⁹ The welfare and needs of a minority group were sacrificed in favour of public interest as well as in the interest of social stability and maintaining a good relationship with the legislature.¹¹⁰

In sum, South Africa has made a giant leap forward by providing marriage rights to same-sex couples but it is impossible to ignore the fact that the Civil Union Act represents a cautious and tentative approach that is synonymous with the view of the majority in *Fourie* and the hostile majority of our society.

5.4 CONCLUSION

The continued conferment of spousal benefits on partners in same-sex life partnerships is justified in view of ongoing homophobia in society. Furthermore, section 9(2) of the Constitution permits differential treatment for all groups of people who were subjected to unequal treatment in the past in order to alleviate social and economic imbalances that were created by segregation. Importantly, substantive equality necessitates transformatory change to eradicate systemic inequalities imposed by apartheid. The extension of marital rights to same-sex couples is insufficient to address social inequalities because it maintains the *status quo* which initially excluded same-sex couples from legal recognition. The ongoing protection of same-sex life partnerships as a family form is, therefore, essential for the achievement of a society based on equality. The Civil Union Act as a 'separate and *unequal*' measure to govern same-sex marriage indicates the prevalence of civil marriage as an exclusive institution available to heterosexual couples only. In essence, the guarantee of democratic tolerance for all who belong to South Africa still remains somewhat illusory.

¹⁰⁸ *Idem*, at 411.

¹⁰⁹ Bohler-Muller 'Judicial deference and the deferral of justice in regard to same-sex marriages and in public consultation' (2007) 40 *De Jure* 90 at 112.

¹¹⁰ *Ibid.*

The next chapter will provide a critical analysis of the emancipation of gays and lesbians in South Africa.

‘Although individuals may obtain certain rights as gay men, lesbians, bisexuals or other sexual minorities, they cannot fully claim their citizenship because they are assumed to warrant protection only in as much as they conform to the hierarchical assumptions of the heteronormative state’.¹

6 CONCLUSION: A CRITICAL ANALYSIS OF THE EMANCIPATION OF GAYS AND LESBIANS IN SOUTH AFRICA

This study was undertaken with a view to answering two questions. The first question related to the scope of the legal consequences and protection provided to same-sex couples by the Civil Union Act 17 of 2006.

In Chapter 2 of this study it was indicated that, based on the concept of marriage as defined within Christendom, any kind of recognition of same-sex unions in South Africa was forbidden.² The legal notion of marriage as defined by the common law and statutes represented principles of monogamy and heterosexuality, principles dedicated to upholding Christian beliefs. The pre-constitutional period was characterised by the presence of a distinct bias for a certain brand of Christianity which inevitably created a church-state consubstantiality. This church-state relationship provided a religious foundation for the political and social exclusion of those members of society who dared to deviate from what was regarded as normal behaviour. The religious bias formed an indispensable component of the apartheid government’s totalitarian recipe. It was concluded in Chapter 2 that the political and legal systems of pre-1994 were particularly noted for the totalitarian interference of the state with the private life of members of society.³

With the abolition of apartheid and the establishment of a new constitutional dispensation based on affirmed principles of equality, dignity and freedom it became evident that the exclusion of certain members of our society on the

¹ De Vos ‘From heteronormativity to full sexual orientation?: Equality and sexual freedom in Laurie Ackermann’s constitutional jurisprudence’ (2008) *Acta Juridica* 254 at 257.

² At par 2.2.2.

³ At par 2.3.

basis of their sexual orientation belonged to a past era. It was clear that the repressive prohibition on marriage of same-sex couples would not survive a constitutional challenge.

In *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amicus Curiae)*; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs*⁴ the constitutional court held that same-sex couples had to be provided with the same 'status, rights and responsibilities'⁵ the law accords to heterosexual couples. The court however deferred to the legislature regarding the statutory avenue through which such 'status, rights and responsibilities' should be conferred on same-sex couples. The Civil Union Act represents the outcome of the deference to the legislature by the constitutional court.

As indicated in Chapter 3 of this study the legislature provided same-sex couples with a civil union regime to formalise their relationships as opposed to a civil marriage regime, which remains exclusively reserved for heterosexual couples. Section 13(1) of the Civil Union Act equates a civil union with a civil marriage. The effect of this equation is that the variable and invariable consequences of a civil marriage apply *mutatis mutandis* to a civil union. Although the Civil Union Act formally provides same-sex couples with the same legal consequences the Marriage Act affords to heterosexual couples some inequalities and differentiations still exist – as indicated in Chapter 3 of this study.⁶ These inequalities and differentiations call the objective constitutional commitment of the legislature to the social and legal transformation of a sexual minority group disadvantaged by past discrimination into question.

The accessibility of a civil union to same-sex couples is limited by certain provisions of the Civil Union Act. For example, the Act imposes a blanket ban on minors' entering into a civil union. As pointed out in Chapter 3,⁷ this differs from the legal position in terms of the Marriage Act 25 of 1961 and

⁴ 2006 1 SA 524 (CC).

⁵ *Fourie* at par 120.

⁶ At par 3.5.

⁷ At par 3.5.2.

Recognition of Customary Marriages Act 120 of 1998 and accordingly violates the constitutional rights to equality and dignity of a minor with a same-sex orientation.⁸ The blanket ban further fails to promote the child's best interests as required by the Constitution and Children's Act 38 of 2005.⁹ In essence, minors with a same-sex orientation have no legal means to make their relationships official and are accordingly deprived of the social and legal standing that the law affords to heterosexual minors. This situation confers a sense of inferiority upon same-sex minors.

The Civil Union Act requires a dual application by religious institutions and religious marriage officers to solemnise same-sex unions.¹⁰ The Act also provides for the religious accommodation of *ex officio* marriage officers that allows for their refusal to solemnise same-sex civil unions.¹¹ Religious accommodation as provided for by the Civil Union Act creates the impression that the state supports the majoritarian opinion which condemns same-sex marriage based on moral and religious objections.

It was argued in Chapter 5 that the deference to the legislature in *Fourie* was a political decision and a failed opportunity by the constitutional court to participate in judicial activism.¹² Importantly, it was submitted that the political and social pressure that caused the constitutional court to defer to the legislature caused the legislature to defer to the moral majority of society in formulating an appropriate remedy for same-sex marriage. This submission was based on the majority judgment of the constitutional court which emphasised the necessity of public debates on the sacred and secular to satisfy the concerns of religious groups and traditional leaders. The constitutional court, however, ignored the reality that public sentiments are predominantly against the recognition of homosexuality. Parliament allowed the public participation process to take on the form of a forum for hate speech directed against the recognition of same-sex marriage and an overall outburst

⁸ At par 3.5.2.2.

⁹ At par 3.5.2.1.

¹⁰ At par 3.5.1.1.

¹¹ At par 3.5.1.2.

¹² At pars 5.3.2 and 5.3.3.

against homosexuality. In instances where hate speech is allowed in public affairs, democracy is endangered and totalitarianism encouraged.¹³

The fact that a separate marital institution was formulated for same-sex couples was the result of hatred expressed during the public participation process. In essence, the religious beliefs and moral sentiments of the majority of society determined the constitutional rights of same-sex couples. It can therefore be concluded that the legislature supported the majoritarian 'desire for theocracy' and 'absolute heteronomy'; tactics associated with the totalitarian regime of apartheid.¹⁴

I argued in Chapter 5 that the Civil Union Act is a 'separate and *unequal*' Act which confers a second-class marital status upon same-sex couples and further produces new forms of marginalisation in its context and application and accordingly fails to comply with the guiding principles as set out by the constitutional court in *Fourie*.¹⁵ It was recommended in Chapter 5 of this study that same-sex couples and heterosexual couples must be provided with one common institution to formalise their relationships. It was indicated that this can only be achieved by the amendment of the Marriage Act and declaration of unconstitutionality of the Civil Union Act.¹⁶ Only after the eradication of this structural inequality will it be possible for the secular and sacred to mutually co-exist in our constitutional realm.

The second question that was raised in this study related to the legal consequences of same-sex life partners who fall outside the ambit of the Civil Union Act.

In Chapter 4 of this study it was indicated that the Civil Union Act did not displace the pre-existing rights extended to same-sex life partners by

¹³ Arendt *The origins of totalitarianism* (1967) 268.

¹⁴ Barnard 'Totalitarianism, (same-sex) marriage and democratic politics in post-apartheid South Africa' (2007) 23 *South African Journal on Human Rights* 500 at 510.

¹⁵ At par 5.2.3.

¹⁶ At par 5.2.3.

legislation and judicial developments.¹⁷ It was further indicated that the concept of a 'same-sex life partnership' has not been defined by our courts in a comprehensive manner with the result that it is uncertain when same-sex life partners will qualify for certain spousal benefits. It was established that the most telling example of uncertainty is created by the required presence of a reciprocal duty of support or the voluntary assumption of a contractual duty of support between same-sex life partners in some cases.¹⁸

It was submitted that in order to qualify for spousal benefits the presence of two criteria is essential namely, a *consortium omnis vitae*¹⁹ and the intention of creating a *permanent*²⁰ same-sex life partnership.²¹ Whether a permanent same-sex life partnership is in existence is a question of fact which must be determined in light of the intention of the partners as established by the facts and circumstances of each case. South African law, therefore, confers legal consequences on same-sex life partnerships which mimic characteristics associated with civil marriage although the life partnerships are not solemnised and registered under the Civil Union Act.

In Chapter 5 of this study it was pointed out that the constitutional court judgment in *Volks NO v Robinson*²² will most probably have an impact on future claims by permanent same-sex life partners. In this case, the constitutional court reassessed the objective model of choice and confirmed that certain rights and duties which are attached by law to marriage need not be extended to non-marital life partners since they have chosen not to make their relationship official.²³ It was emphasised that this approach assesses the availability of 'choice' by merely focusing on the presence or absence of legal impediments to marriage. In this instance it is assumed that 'choices' are made by free, autonomous individuals.²⁴

¹⁷ At par 4.3.4.1.

¹⁸ At par 4.3.

¹⁹ At par 4.4.1.

²⁰ At par 4.4.2.

²¹ At par 4.4.

²² 2005 5 BCLR 446 (CC).

²³ At par 5.2.1.

²⁴ At par 5.2.1.4.

Chapter 5 emphasised the social and economic reality of many same-sex couples who are not in a position to ‘choose’ to formalise their relationship by entering into a civil union. I argued that in view of ongoing homophobia in our society it will be unwise to force same-sex life partners to formalise their relationships. Research has shown that the extent of homophobia experienced by homosexuals must not be disregarded or underestimated because such homophobia renders the option to enter into a civil union for many gays and lesbians illusory.²⁵

Importantly, I argued that continued protection and recognition of permanent same-sex life partnerships are further supported by the notion of substantive equality.²⁶ It was indicated that a substantive approach to equality dictates an examination of the actual social and historical treatment of groups in order to establish whether the Constitution’s commitment to equality is being upheld. The concept of substantive equality further encompasses a conception of ‘remedial equality’ which permits preferential treatment of groups disadvantaged by past discrimination. Section 9(2) of the Constitution, therefore, imposes a positive obligation on the government to enact certain measures to ensure that gays and lesbians fully and equally enjoy all rights and freedoms. I concluded that the retention of spousal benefits for same-sex life partners by means of judicial and certain statutory provisions qualifies as a measure which is designed to advance the social and economic standing of gays and lesbians in our society in order to achieve substantive equality within the context of section 9(2) of the Constitution.²⁷

In Chapter 5 I emphasised that substantive equality requires ‘transformatory’ change as opposed to an inclusionary approach.²⁸ It was explained that an inclusionary approach merely entails inclusion into the *status quo* and expands social recognition but fails to take cognisance of the structural conditions that initially created systemic inequalities. A transformatory approach, on the other hand, addresses the structural inequalities by

²⁵ At par 5.2.2.

²⁶ At par 5.2.3.

²⁷ At par 5.2.3.

²⁸ At par 5.2.3.

‘restructuring the underlying generative framework’. It was, therefore, indicated that the latter approach is indispensable in order to dismantle the current generative framework that governs family relations, which is marriage, in order to create a framework that acknowledges a variety of family forms, including same-sex life partnerships.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*²⁹ the constitutional court emphasised that the right to equality does not encompass the elimination of all differences but entails ‘equal concern and respect across difference’. The right to equality requires the acknowledgement of human variability, that is, plurality. I therefore concluded that the objective model of choice creates intolerance for the plurality of our society and enhances the heteronormative framework that was responsible for initial marginalisation of those members of society who expressed same-sex desire.³⁰

²⁹ 1999 1 SA 6 (CC).

³⁰ De Vos ‘From heteronormativity to full sexual orientation?: Equality and sexual freedom in Laurie Ackermann’s constitutional jurisprudence’ (2008) *Acta Juridica* 254 at 255.

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