From individual protection to recognition of relationships: same-sex couples and the South African experience of sexual orientation reform

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1 INTRODUCTION

This article explores the nature of legal discourse about equality, in particular homosexual equality, and illustrates how this discourse has traversed through sites that may be labelled condemnation, compassion, condonation and celebration.[1] Much of the discussion focuses on the progress that has been made to bring same-sex relationships into the realm of legal regulation. In South Africa, legal discourse about equality for gays and lesbians at the first three sites has been largely successful and contention remains at the site of celebration.

The paths to freedom for gay men, lesbians and transsexuals have both intersected and diverged at different times as each of them have pursued their own interests through legal challenges. This has produced curious counterpoints, in which transsexuals first had a civil identity[2] while gay sexual expression was criminalised.[3] The issues of the gay male community were not necessarily those of the lesbian community. After all, lesbianism had never been illegal in South Africa. Then, when transsexuals lost their civil status,[4] gay sexual expression was decriminalised.[5] Transsexuals once again regained legal recognition[6] while gays and lesbians pursued the goal of equal treatment of their relationships in almost everything up to the recognition of same-sex

1 I adopt Bruce Mac Dougall's categories here to illustrate the emerging South African constitutional jurisprudence around these sites. See: 'The Celebration of Same-Sex Marriage' *Ottawa LR* (2000-2001) Vol. 32:2 235. In so doing, I confine myself to legal discourse and legal results, occurring mostly at the levels of the courts. Admittedly, this is a limited aspect of the social reality for gays and lesbians, but it is a significant aspect. Although the use of the word 'compassion' might appear patronising, it is intended in the present context to signify a new consciousness and empathy towards same-sex relationships.

2 See Births, Marriages and Deaths Registration Act 81 of 1963 (as amended in 1974) which permitted persons who had undergone a sex-change operation to register their new sex on their birth entry.

3 Sexual Offences Act 23 of 1957 s20A

4 In 1992 the Births and Deaths Registration Act was promulgated which omitted the provision permitting alteration of a change of sex on the register of births.

5 In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC)

6 Alteration of Sex Description and Sex Status Act 49 of 2003. From 1993 until 2004 when the Act came into operation, there was no provision in the law for persons who had undergone sexual reassignment surgery to change their sex description to reflect their new sex.

marriage. Now, at a point when government has passed the Civil Union Act[7] to provide for the legal recognition of civil partnerships for same-sex couples, there remains a tide of opposition to it.

The article will situate the discourse on sexual orientation within the larger process of achieving equality for gays and lesbians. First, I examine the legal position of gays, lesbians and transsexuals in the pre-constitutional era to identify the 'unreformed' position. Second, I discuss how the discourse about equality and dignity rights for gays and lesbians in South Africa, particularly at the level of litigation, has moved from condemnation to the site of compassion and condonation. Lesbians and gays have demanded the rights to form legally protected families, to receive benefits equal to their heterosexual counterparts, and, more recently, they have demanded the right to marry. Such demands have been given expression in a number of cases, leading to far-reaching judgments affirming that the equality and non-discrimination guarantees in the South African Constitution clearly require treating gays and lesbians as full citizens with the full enjoyment of rights enjoyed by all citizens. In addition, there has been a growing legislative trend of providing benefits to non-spousal (especially same-sex) partners.

I argue that the South African constitutional jurisprudence, although acknowledging that family forms have changed, continues to consider the married heterosexual couple as the threshold according to which same-sex relationships are recognised. Implicit in these judgments is the conception of the family as an entity which is built around a core unit, the married couple. This heterosexual unit continues to be considered as presumptively appropriate and it retains viability as the essential family connection. 'In fact, arguments that other sexual affiliations, such as same-sex relationships, deserve the same privileges afforded to marriage, far from challenging the privileged status of marriage, reinforce it by inscribing onto it the attributes of normalcy, desirability and privilege'.[8]

Finally, I ask whether the establishment of a civil union for gays and lesbians constitutes true celebration and, hence, full equality.

2 THE 'UNREFORMED POSITION' – THE POSITION BEFORE 1994

'Issues of sexuality have generally been unproblematic because for a good part of our history, we have understood them on the basis of "natural" biological processes of human development'.[9] Commentaries on the development of sexuality have thus revolved around 'normal' and 'natural' patterns of sexual behaviour.[10] In addition, the power of the heterosexual norm has

7 Act 17 of 2006

8 Fineman M 'Masking dependency: The political role of family rhetoric' (1995) *Virginia LR* 2181, 2198

9 Gelsthorpe L 'Introduction: Sexuality repositioned' in Brooks-Gordon B et al (ed) *Sexuality repositioned* 2004 1, 11

10 *Ibid.*

been central to the construction of the sexual 'other', of homosexuality.[11]

But in the South African context, the apartheid social and legal system did not protect minority sexual inclinations, that is, sexual preferences of gays, lesbians and transsexuals. Because their sexual orientation differed from the norm, gays, lesbians and transsexuals were condemned, excluded and even punished by the law in the criminal, civil and family law spheres.

Homosexual conduct formed the basis of a variety of criminal offences. The early Roman criminal law expressly prohibited 'unnatural practices' between men.[12] In the Roman-Dutch common law a large number of sexual acts between adults, whether between men or between a man and a woman, were criminal, if not directed towards procreation.[13] But criminalisation of homosexual sodomy was probably the most prominent manifestation of the law's approach to condemnation of homosexuality. Another was the category of 'unnatural offences' often used to punish homosexual conduct which did not involve sodomy.[14] In *S v V*[15] the court held that mutual masturbation between two men is criminal as an 'unnatural offence'.

While lesbian sexual activity did not attract the same criminal status as male homosexual conduct, in 1988 Parliament extended the existing prohibition on 'immoral or indecent' acts between men and boys under 19[16] to those between women and girls under 19.[17]

Moreover, the statutory provision contained in section 20A of the Sexual Offences Act[18] made criminal any 'male person who committed with another male person at a party any act which was calculated to stimulate sexual passion or to give sexual gratification. In the *National Coalition* case[19] it was said that in the case of male homosexuality 'the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm'.[20] According to Cameron,[21] the criminal prohibitions of sex between men, as well as the differential age of consent for gay men and women have had a severely negative effect on the lives of these people. He points to the widespread disapproval and revulsion that judges

11 Weeks J 'The rights and wrongs of sexuality' in *Sexuality repositioned* (fn 9 above) 19, 22. Some states in the US, for example, outlawed oral sex because it was seen as unnatural.
12 On the pre 1994 position of gays and lesbians, see Cameron E 'Sexual orientation and the Constitution: A test case for human rights' (1993) *SALJ* Vol. 110 450, 453.
13 *Ibid*. See further *R v Gough and Narroway* 1926 CPD 159, 161.
14 PMA Hunt *South African Criminal Law and Procedure II: Common-Law Crimes* 2 ed (1982) by JRL Milton (revised reprint 1990) 267
15 1967 (2) SA 17 (E) at 18C–D
16 See (fn 3 above) s 14 (1) (b).
17 *Ibid* s 14 (3) (b), as substituted by s 5 of the Immorality Amendment Act 2 of 1988
18 See (fn 16 above). See *S v H* 1995 (1) SA 120 (C) where the accused who engaged in a voluntary sexual relationship with another man was convicted of the offence of sodomy and sentenced to twelve months imprisonment wholly suspended. On review, however, the sentence was altered to one of a caution and discharge. See also *S v Kampher* 1997 (4) SA 460 (C) where the constitutionality of the crime was questioned. The prohibition was only declared unconstitutional and invalid in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC). See further part 3 on the discussion of this case.
19 *Ibid*.
20 *Ibid* para 108 (per Sachs J).
21 See (fn 12 above) 455.

in the past displayed towards gays which took the form of regarding homosexual conduct as immoral and depraved.[22] It is no surprise, therefore, that homosexual domestic relationships have been explicitly excluded from the ambit of family law regulation, employment and insurance benefits.

The exclusive common law definition of marriage as the 'voluntary union for life of one man and one woman to the exclusion of all others …'[23] dominated the legal and moral climate pre-dating the interim Constitution. South African courts were challenged from time to time to reconsider the nature of marriage. Some of these challenges related to the *monogamous* aspect of marriage which was considered to be inconsistent with different cultural and religious practices.[24] Other issues, relating to the *heterosexual* aspect of marriage, focused on the rule that persons of the same sex were not permitted to marry each other. This rule arises in a related context, namely, the marriage of a transsexual who has undergone sexual reassignment surgery (a sex-change operation).

Although human sexual orientation and gender identification represent distinct phenomena, they are intricately intertwined in medical theory and social consequence and share many common elements, including social stigma and perceptions of disability and disadvantage. These parallel elements have resulted in curious counterpoints in South African legislative developments in the sphere of sexual reassignment surgery and the legal effects thereof.

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22 *Ibid* 457, (fn 55 and 56 below). Cameron makes reference to numerous cases (*R v Gough and Narroway* 1926 CPD 159 at 163; *R v Curtis* 1926 CPD 385 at 387; *R v Baxter & Another* 1928 AD 430 at 431; *Baptie v S* 1963 (1) PH H96 (N); *S v M* 1990 (2) SACR 509 (E) 514b–c and *S v K* 1973 (1) SA 87 (RA) at 90C–D) demonstrating the prevailing attitudes of discrimination and ridicule on homosexuality. He lists various factors (at 456–461) that have contributed to gays and lesbians being in a uniquely vulnerable position as far as legal protection is concerned: (a) Disapproval and disgust: he compares social attitudes towards racism, sexism and homophobia and concludes that it has become widely acknowledged that racism and sexism are irrational and unacceptable, unlike homophobia which still triggers expressions of social and moralistic revulsion; (b) Minority: unlike other disadvantaged groups, such as women and blacks, gays and lesbians are, by definition, a minority; (c) Deviance: stemming from their minority, gays and lesbians are necessarily deviant in that their sexual orientation differs from the norm; (d) Invisibility or non-obviousness: unlike race and gender the fact that it is not possible to determine a person's sexual orientation by observation has led to the assertion that there is no 'defining characteristic' of homosexuality. Cameron argues that there is in fact a defining characteristic erotic attraction to the same sex but it is not discernible or externally visible in the same way that race and gender usually are. According to him, invisibility in this way itself leads to vulnerability to the effects of stigma and discrimination; (e) Choice and immutability: invisibility encourages the belief that there is an element of choice in sexual orientation which has led to the rejection of gays and lesbians. Cameron points to varied literature indicating that sexual orientation is generally immutable and may be the product of physiological or genetic factors. He submits that it is wrong to suggest that the law should protect lifestyles only where they involve no element of choice; (f) Sex and sexuality: the distinctiveness of gays and lesbians lies in their sexuality and there is still a great deal of embarrassment surrounding homosexuality.

23 Formulated in the well-known English case of *Hyde v Hyde and Woodman* see (1866) LR 1 P&D.

24 Although not directly relevant to the present context, such challenges paved the way for a change in public policy on the exclusive nature of the marriage relationship. As far as customary marriages are concerned, they were not recognised as valid marriages until the coming into operation of the Recognition of Customary Marriages Act 120 of 1998. The most striking feature of both customary and religious marriages is the polygynous nature thereof whereby the husband is permitted to take more than one wife. With respect to Muslim religious marriages, the position of the courts, as set out in *Seedat's Executors v The Master (Natal)* 1917 AD 302, confirmed in *Ismail v Ismail* 1983 (1) SA 1006 (A) was that these marriages were *contra bonos mores* and hence invalid because they permitted polygamy.

The legislature, in an attempt to keep abreast with medical developments permitting sex change operations, in 1974 amended the Births, Marriages and Deaths Registration Act[25] by inserting section 7B into the Act. This section permitted the alteration, in the birth register, of the description of the sex of a person who had undergone a change of sex. This Act was replaced by the Births and Deaths Registration Act[26] of 1992, and section 7B disappeared. However, even while section 7B was still in force, it had no effect on the marriage of a person who had undergone sexual reassignment surgery.

In *W v W*[27] the court refused to entertain a divorce action where one of the parties to the marriage was a transsexual. Following the English case of *Corbett v Corbett*[28], the court held that a person who had undergone a sex-change operation did not change her biological sex, and could not, therefore, marry someone of her original sex (irrespective of her physical appearance or gender role in society)[29]. Similarly, in *Simms v Simms*[30], where the husband sought to have his marriage annulled on the ground that his wife, who had undergone sexual reassignment surgery prior to the marriage, was at all times male, the court declared the marriage null and void. Then, in 1993, section 33 was inserted into the Act to once again provide for post-operative transsexuals to change their sex description on their birth registers; however, this provision had a very limited application.[31]

It is noteworthy that during this time, when the Interim Constitution was already drafted, one could have challenged the law's refusal to recognise that sexual reassignment surgery brings about a change of sex on the argument that sexual reassignment relates to sexual orientation and that denial of legal recognition of a change of sex therefore constitutes unfair discrimination on the ground of sexual orientation.

> 'An alternative constitutional argument which does not challenge, but rather relies on, the law's refusal to recognise that sexual reassignment brings about a change of sex, is that if the prohibition of unfair discrimination on the ground of sexual orientation affords homosexual couples the right to marry,[32] it, by necessary implication, also permits a person who has undergone a sex change to marry someone of his or her former sex because such a marriage would also be between persons of the same sex.'[33]

The injustice caused by the law's refusal to attach consequences to sexual reassignment surgery was rectified when the Alteration of Sex Description

25 Act 81 of 1963
26 Act 51 of 1992
27 1976 (2) SA 308 (W)
28 [1971] P 83, [1970] 2 All ER 33
29 (Fn 27 above) at 314
30 1981 (4) SA 186 (D)
31 It was only applicable to those persons who were, at the time of promulgation of the amendment, undergoing a sex change operation i.e. its application was limited only to persons who had either begun or were in the process of the operation; it did not apply after 1993. This meant that from 1993 until 2004 when the Alteration of Sex Description and Sex Status Act came into operation, there was no provision in the law for post-operative transsexuals to change their sex description on their birth registers. They remained members of their original sex.
32 See further part 4 on the present position regarding marriage rights of same-sex couples.
33 See Boberg's *Law of persons and the family* 2 ed (1999) 215.

and Sex Status Act[34] came into operation in 2004. In terms of this Act, any person who has undergone sexual reassignment surgery may apply to the Director-General of Home Affairs for the alteration of the sex description which appears in the register of births. Once the person's sex description has been so altered on the birth register, he or she is deemed for all purposes to be a member of his or her new sex. It follows from this that such a person will now be entitled to enter into a valid marriage with a person of his or her former sex.

Because marriage between persons of the same-sex was completely forbidden, it followed that all the benefits and legal advantages that followed from the marital status were also beyond the reach of homosexual couples. The following are some of those benefits and advantages:[35]

(a) Rights and responsibilities in respect of children reared by a homosexual couple were virtually unheard of, given the moral and legal climate pre-dating the Interim Constitution. Until *Van Rooyen v Van Rooyen*[36] there were no reported South African cases in which homosexual parents sought to retain custody of or have access to their children. The case concerned a dispute about access between a divorced couple where the wife (the non-custodial parent) was engaged in a lesbian relationship. In defining the mother's rights to access, the court recognised that her right to live and practise her sexuality had to be respected and protected, but held that the children's best interests would not be served by allowing them to be exposed to her sexual relationship with another woman. Her right to access was granted under extremely strict conditions. This judgment was handed down before the advent of the Interim Constitution. However, when the same family placement was again challenged (six years later), in *Van Rooyen v Van Rooyen*[37], Bertelsmann J criticised the earlier judgment in regard to access to the children as being 'constitutionally untenable' holding that it is in conflict with the equality clause in the Constitution to describe a homosexual orientation as abnormal. In his view, there existed no justification to regard a lesbian home as less suitable than one in which another sexual orientation prevails. The court ordered that the one child (a 17-year-old girl) should stay with her mother until the family advocate had fully investigated the circumstances regarding her custody and deleted the restrictive conditions applying to the mother's access to her son.

Where homosexuals had not had children by heterosexual intercourse, they had no parenting options. Gay and lesbian couples could not adopt children jointly[38]; they could only do so as single individuals.[39] Craig Lind[40] argues

34 Act 49 of 2003

35 See generally Singh D 'The refusal to recognise same-sex marriages-a Pandora's box of inequalities'(1999) 32 *De Jure* 29 39–41.

36 1994 (2) SA 325 (W)

37 [2001] 2 All SA 37 (T)

38 Child Care Act 74 of 1983 s 17(a). Only married couples could adopt jointly. In addition, the spouse of a parent was permitted to adopt that parent's child by another person. This effectively excluded gays and lesbians from adopting the children of their partners.

39 *Ibid* s 17(b)

40 Lind C 'Sexual orientation, family law and the transitional constitution' (1995) 112 *SALJ* 481 489

that while homosexual sexual conduct was illegal, it was unlikely that children's courts would have approved attempts of homosexual persons to adopt a child, even singly. Further, he adds that regulations governing foster care[41] were also drafted to favour married (hence heterosexual) foster carers over homosexual fostering.[42] With respect to parenting by artificial insemination, there were likewise substantial obstacles preventing *de facto* homosexual partners from enjoying a legal relationship with their children.[43]

(b) Rules of intestate succession clearly exclude gay or lesbian partners from their ambit. In the absence of a will, the beneficiaries are, in the first instance, a spouse or descendants, or both. Should there be no spouse or descendants, the estate devolves upon either the parent/s or other more distant blood relatives.

(c) Institutional insurance schemes, such as group life insurance, did not generally cover same-sex partners.

(d) Dependant's actions for compensation are widely recognised in our law. Prior to 1994, same-sex partners were not considered as 'dependants' for the purposes of compensatory rewards. The Medical Schemes Act[44] defined dependant as 'spouse', the Military Pensions Act[45] referred to 'wife' (or 'child'), and the Compensation for Occupational Injuries and Diseases Act[46] included as a dependant a 'widow/widower married to an employee by civil law, indigenous law or customary law, as well as any person with whom the employee was, in the opinion of the commissioner, at the time of the accident, living as *husband and wife*'.

Even after 1994, it was held[47] that a stable, long standing homosexual relationship did not establish a duty of support for the purposes of an action for loss of support in terms of the Road Accident Fund Act.[48] In addition to the statutory exclusions, the common law dependant's action for loss of support arising from the death of a breadwinner was also denied to a surviving partner in a same-sex permanent life partnership.[49]

(e) Section 25(5) of the Aliens Control Act[50] facilitated the immigration of spouses to enable them to live with their South African counterparts. The benefits of this provision, however, were not available to gay and lesbian

41 GN R2612 GG 10546 of 12 December 1986, issued under s 60 of the Child Care Act 74 of 1983

42 (Fn 40 above) 489. He refers to the regulation requiring that a person applying to become a foster parent must submit his or her name *and the name of his or her spouse* (my italics) to the commissioner.

43 *Ibid* 490 (fn 50-52) and text thereto. See also (fn 103 below) and accompanying text on the provisions of section 5 of the Children's Status Act 82 of 1987. However, this section was declared unconstitutional in *J v Director General, Department of Home Affairs* 2003 5 BCLR 463 (CC).

44 Act 72 of 1967 s 1(a). However, see further on *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T) where a partner in a same-sex life partnership was held to be a dependant for the purposes of the police medical scheme.

45 Act 84 of 1976 s 1(1)

46 Act 130 of 1993 s 1(c)

47 See *Du Plessis v Motorvoertuigongelukkefond* 2002 (4) SA 596 (T).

48 Act 56 of 1996

49 But see further on *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) where the court extended the common law action for damages for loss of support to a same-sex permanent life partner.

50 Act 96 of 1991

partners even though they may have been in a relationship for a long period of time.[51]

(f) The Prevention of Family Violence Act[52] created a statutory interdict by means of which a perpetrator could be prohibited from committing domestic violence. One of the criticisms relating to this act dealt with its very limited scope in that it did not extend protection to gay couples. This was fortunately rectified in the Domestic Violence Act of 1998.

It is evident that prior to the 1990s, there were virtually no legal rights or provisions that could be invoked by lesbians and gay men. The legal situation in South Africa changed considerably with the coming into effect of non-discrimination provisions in section 8 of the Interim Constitution of 1993 and section 9 of the final Constitution.[53] What follows is a consideration of the progress that has been made to bring same-sex relationships into the realms of legal regulation.

3 OVERVIEW OF THE MAIN JUDICIAL AND LEGISLATIVE STEPS IN THE PROCESS OF LEGAL RECOGNITION OF HOMOSEXUALITY: FROM CONDEMNATION TOWARDS COMPASSION AND CONDONATION

> '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 the 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.'[54]

South Africa became the first country ever to include sexual orientation in its anti-discriminatory provisions.[55] Unfair discrimination based on marital status is also prohibited. These provisions have led to the legal rights of lesbians and gay men becoming the subject of considerable judicial, political and legislative activity.

Generally speaking, legal issues relating to sexual orientation have arisen in two contexts:

- The prohibition of discrimination, primarily to ensure that *individual* lesbians and gay men are not discriminated against; and
- The recognition of same-sex *relationships*, and the extension to homosexual partners of the benefits and rights that are accorded to heterosexual partners.

Several judicial decisions dealing with legal challenges against allegedly dis-

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51 But see *National Coalition of gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) in which s 25(5) was declared invalid. See also Silver B 'Till deportation do us part: The extension of spousal recognition to same-sex relationships' (1996) 12 *SAJHR* 575.

52 Act 133 of 1993 which was subsequently replaced by the Domestic Violence Act 116 of 1998

53 Constitution of the Republic of South Africa Act 108 of 1996, hereinafter referred to as the Constitution

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

55 S 9(3) of the Constitution

criminatory laws have clarified the legal position of lesbians and gay men, served as a focus for the ongoing political debate about homosexuality and, in some instances, provided a framework for legislative reforms. These reforms have evidenced a move away from 'condemnation' towards homosexuality to 'compassion and condonation'. The past few years have also featured an increasing demand, sanctioned by the highest court in the land, for extending the institution of civil marriage to same-sex couples. This demand was met in November 2006.

South Africa has been no different from most countries which go through a standard sequence of legislative steps recognising homosexuality.[56] The first steps are taken within the criminal law: permitting homosexual acts between male adults and then removing age and other distinctions between same-sex and opposite-sex sexual activity. The next steps are taken by the civil law: prohibiting discrimination in employment, and in the provision of goods, housing and other services. The final steps are taken by family law, extending laws applicable to heterosexual couples to homosexual couples, recognising the parental relationship between homosexual parents and their own, or their partners' children, and finally providing for marriage rights.

The Constitutional Court, acting on the equality clause of the Constitution, unanimously overturned 'sodomy laws' in the country in *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*[57]. In a sweeping decision, it held that the common law offence of sodomy and the provisions of section 20A of the Sexual Offences Act (the laws criminalising consensual homosexual conduct) violated not only the equality right but the protection of privacy and dignity. The court reaffirmed its earlier equality jurisprudence[58] which had, by now, embodied a rejection of the notion of 'formal equality', in favour of a 'substantive' understanding of equality. De Vos[59], referring to paragraph 22 of the judgment, says that substantive equality takes into account the structural inequalities in our society and endorses the view that the experience of subordination lies behind the vision of equality. He continues by saying that the right to equality is conceptualised as a right to be different from the stated or unstated norm without suffering adverse consequences because of such difference.[60]

As pointed out earlier, sexual orientation is a listed ground of discrimination; discrimination is therefore automatically presumed. In addressing the unfairness of the discrimination brought about by the law governing sodomy,

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56 See Hale B 'Homosexual rights' *Child and family law quarterly* June (2004) 125 who discusses progress in English law towards removing *discrimination* against gay and lesbian people. The steps that are followed are taken from the text (read with footnote 1) at 125.

57 1999 (1) SA 6 (CC). In this groundbreaking judgment, many of the foundational principles on sexual orientation discrimination were laid.

58 As formulated in *Harksen v Lane* 1998 (1) SA 300 (CC), and confirmed in *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC) and *President of the Republic of South Africa & Another v Hugo* 1997(4) SA 1 (CC). This was based on the tiers of enquiry to be traversed to determine whether a challenge involving the fundamental right to equality is justified or not.

59 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *SAJHR* 179 184

60 *Ibid* 185

Ackermann J emphasised that 'it is the impact of the discrimination on the complainant or the members of the affected group that is the determining factor'.[61] He continued by saying that the desire for equality is not a striving for the elimination of all differences but requires an understanding of 'the other' in society. Discriminatory prohibitions on sexual relations between men reinforce existing societal prejudices and increase the negative effects of such prejudices.[62] The point has been put with eloquence in a Canadian case:

> 'It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet as soon as we say---a 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 of a different sexual orientation are less worthy.'[63]

This theme of equality as including a respect for difference was also endorsed by Sachs J who wrote a concurring judgment. He stressed that equality should not be confused with uniformity on the contrary, 'equality means equal concern and respect across difference'.[64] He added that the success of the constitutional endeavour will depend on how successfully we are able to reconcile sameness and difference. Both Ackermann J and Sachs J affirmed that the law governing sodomy violated, not only the right to equality, but also the rights to privacy and dignity. Section 14 of the Constitution guarantees to everyone the right to privacy. Homosexual relationships are undoubtedly an aspect of private life. This long ago enabled the European Court to rule against the criminalisation of homosexual acts between consenting adults in private in *Dudgeon v United Kingdom*.[65] Ackermann J followed this reasoning in holding that 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.[66] Sachs J correctly highlighted that the act is punished for symbolic reasons rather than because of its proven harm.[67] Proof of this is that consensual anal penetration of a female is not criminalised. Therefore, it is not the act itself that is punished, but the particular persons who perform it.

The constitutional protection of dignity reinforces the value and worth of all individuals as members of society. In the view of Ackermann J the existence

61 (Fn 57 above}) para 19

62 *Ibid* paras 22 and 23

63 *Vriend v Alberta* [1998] 3 LRC 483 518 (per Cory J), quoted in the sodomy judgment at para 22. In Canada, although sexual orientation is not expressly included as a prohibited ground of discrimination, the Supreme Court has held that it is a ground analogous to those listed in s 15(1) of the Canadian Charter.

64 (Fn 57 above) para 132

65 (1982) 4 EHRR 149. Sexual activity is, as the court said, 'a most intimate aspect of private life'. But to regard homosexual relationships as a narrow privacy issue is to deny to them the full enjoyment which other relationships take for granted. Opposite-sex couples can walk hand in hand or arm in arm or even engage in closer intimacies in public; until recently same-sex couples could not.

66 (Fn 57 above) para 32. Interestingly, it was the possibility of harm to both the individual and the society as a whole which prevented Justice Mwaikaso in a Botswana Appeal Court in 2003 (see Bojosi KN'An opportunity missed for gay rights in Botswana: *Utjiwa Kanane v The State*' *SAJHR* (2004) 20 466) from declaring unconstitutional provisions of the Botswana Penal Code penalising unnatural acts and indecent practices between males.

67 *Ibid* para 108

of a law which punishes a form of sexual expression for gay men degrades and devalues them in our broader society and is therefore an invasion of their dignity.[68] Taking this further, Sachs J described dignity as the concept that links equality and privacy. He distinguished between the use of dignity in the context of the equality clause and the protection of the right to dignity in terms of section 10; in the former, the focus is on the impact of a measure on a historically vulnerable group which is discriminated against because of certain personal characteristics – the inequality of treatment both leads to and is proved by the indignity. By contrast, section 10 contemplates a much wider range of situations, 'these would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity'.[69] As has been pointed out, both Ackermann J and Sachs J made it plain that the dignity right is not to be collapsed into the equality right, and stressed that dignity in terms of section 10 has a much wider scope than the dignity concept which is used to determine unfairness. This perhaps points to the validity of the distinction made by Susie Cowen[70] between dignity as a right and dignity as a value.[71] This judgment was the first in the sequence of steps to end discrimination based on sexual orientation.

Prohibition of discrimination in employment arrived in the case of *Langemaat v Minister of Safety and Security*[72]. In this case a lesbian police captain sought to have her partner included in her medical aid scheme.[73] In finding in her favour, the court, per Roux J, held that a dependant is someone who relies upon another for maintenance. Taking into account the times and society in which we live, Roux J held that he could not ignore the knowledge and experiences of many same-sex couples who have lived together for years. They must surely, in his opinion, owe a duty of support to each other. He correctly pointed out that 'the stability and permanence of their relationships is no different from that … of married couples … both types of unions are deserving of respect and protection'.[74] He added that it was time that the law began according protection to same-sex unions. The effect of the scheme's rules and regulations was to exclude many *de facto* dependants of members of the police force. This, in his view, amounted to discrimination against the dependants, as well as members of the police force who would have to find alterna-

68 *Ibid* para 28

69 *Ibid* para 124, quoted in Carpenter G 'The right not to be discriminated against on the ground of sexual orientation: *National Coalition for Gay and Lesbian Equality v Minister of Justice*' *THRHR* 2002 (65) 50 55

70 'Can dignity guide our equality jurisprudence?' 2001 *SAJHR* 34

71 Carpenter (fn 69 above) 56

72 1998 (3) SA 312 (T). Although the outcome of this decision was welcomed by many, others were critical of the reasons for the judgment: See van der Walt G 'Gay rights and medical aid schemes *Langemaat* v Minister of Safety and Security [1998] 2 All SA 259 (T)'1998 *Obiter* 193; Louw '*Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T): A Gay and Lesbian Victory but a Constitutional Travesty' 1999 *SAJHR* 393 and Havenga 'Same-sex unions, the Bill of Rights and Medical Aid Schemes *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T)'1998 *THRHR* 722.

73 Which allowed only the legal spouse, widow or widower and the child of a member of the police force to be registered as the member's dependant.

74 (Fn 72 above) 316 G. Note that this statement made in the context of same-sex relationships probably marked one of the initial breaks with the past traditional conception of family as consisting of a married couple.

tive means to pay for the medical care of their dependants. He declared the position unconstitutional and ordered the chairperson of the police medical scheme to reconsider the application for registration of the applicant's lesbian partner as her dependant.

The Medical Schemes Act[75] came into operation soon after the judgment. In terms of this Act, a medical scheme may not be registered if its rules unfairly discriminate against anyone on one or more grounds, including sexual orientation.[76] Kerry Williams[77] argues that there is still scope, however, within the Medical Schemes Act for introducing criteria to establish the existence of a same-sex partnership before a partner is admitted as a dependant. Unlike married heterosexuals who, by virtue of their marriage, are automatically registered with a medical aid scheme, same-sex partners are treated differently. She submits that the judgment in *Langemaat* does not directly prevent medical aid schemes generally from creating their own criteria for same-sex partnerships.[78] There is merit in her submission.

The provisions of the Aliens Control Act[79] sparked a number of cases in which the meaning of 'family' and the right to 'family life' arose. The case of *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs*[80] led the way. In this first decision addressing the partnership rights of gays and lesbians, the Constitutional Court overturned the provisions of this Act which restricted immigration benefits (including the right to accord residency to a foreign partner) to 'spouses' while denying it to same-sex partners.[81] The court held that this denial reinforced harmful stereotypes of gays and lesbians, invading their constitutional right to dignity by conveying a message that same-sex relationships lacked the same validity as heterosexual ones.[82] It also held that the denial discriminated against gays and lesbians on the grounds of sexual orientation and marital status. In the words of Ackermann J,

> 'the pre-requisite of marriage before the benefit is available points to that element of the discrimination concerned with marital status, while the fact that no such benefit is available to gays and lesbians engaged in the only form of conjugal relationship open to them in harmony with their sexual orientation represents discrimination on the ground of sexual orientation.'[83]

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75 Act 131 of 1998. This Act repealed the Medical Schemes Act 72 of 1967

76 S 24 (2) (e)

77 'Legalising same-sex marriage in South Africa' (2004) 20 *SAJHR* 32 56

78 *Ibid*, specifically (fn 122)

79 Act 96of 1991

80 2000 (2) SA 1 (CC). On this case see also Motara 'Making the Bill of Rights a reality for gay and lesbian couples *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*' (2000) 16 *SAJHR* 344; Louw 'Gay and lesbian partner immigration and the redefining of family *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*' (2000) 16 *SAJHR* 313; Chetty 'Sexual orientation as a constitutional right *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 SA 39 (CC)' 2001 (64) *THRHR* 657; Carpenter (fn 69 above) 56; and Sloth-Nielsen and Van Heerden (fn 54 above) 131.

81 S 25(5) of the Act expressly permitted granting exemptions regarding immigration permits to foreign spouses and dependant children of permanent South African residents.

82 The court went on to dismiss some of these stereotypes, specifically those relating to children and the one based on the fact that same-sex couples cannot procreate. Procreation, as Ackermann J put it, is not a defining characteristic of conjugal relationships.

83 (Fn 80 above) para 40

The court expressed its reluctance to strike down the section in its entirety, and instead read in after the word 'spouse', the following words: 'or partner in a same-sex partnership'. The deciding factor regarding the unfairness of the discrimination was the impact of the discrimination on gay and lesbian partnerships. The court accepted that an enquiry into past disadvantage was important because it revealed the vulnerability of the group. In concluding that the impact of section 25(5) was to reinforce harmful stereotypes of gays and lesbians, the court, 'however' acknowledged that there has been a change in societal and legal concepts regarding the family and what it comprises.[84]

The attitude of the court regarding the protection of the traditional institution of marriage deserves mention. An important issue canvassed was the relationship between family and marriage, and the extent to which gay and lesbian couples can be considered as constituting family. The court concluded that the values of family life that are protected by section 25(5) are equally to be found in same-sex relationships. In short, gays and lesbians are able to establish a *consortium omnis vitae* and are capable of establishing a family and benefiting from family life.[85] The focus by the court on this aspect of *consortium* sends out a strong message that only those relationships that are sufficiently similar to marriage will qualify for recognition. De Vos[86] correctly points out that the court seems to support a rather narrow conception of which intimate relations should qualify for protection, even while it professes to endorse a more open-ended view and claims that is broadening access to 'the family'. As will be illustrated further, this trend seems to filter through the later judgments as well.

In *Farr v Mutual and Federal Insurance Company Ltd*[87] the court held that two gay men living together in a domestic relationship constituted a family. A motor insurance policy excluded liability by the insurer for bodily injury to 'a member of the policy holder's family normally resident with him. In interpreting the exclusion clause, the court held that, having regard to the purposes of the exclusion clause, namely, to restrict the potential liability of the insurer by excluding the category of persons more likely to travel in his motor vehi-

84 See generally Motara (fn 80 above) 348. Louw (fn 80 above) 319, argues further that negative social attitudes diminished significantly as a result of the enactment of the equality provision in the interim Constitution. In other words, changes in the law, whether legislative or judicial, impact on society. By the time of the *Sodomy* judgment, gay and lesbian stereotyping was on the decrease. Although this judgment probably had less direct impact on gays and lesbians, it laid a solid foundation on which further developments have been based.

85 (Fn 80 above) para 53. According to the court, to determine which relationships are worthy of protection, one should first determine the exact nature of family life that is usually protected through the common law recognition of marriage and the concept of *consortium*. The court provided a list of factors that might determine whether the intimate relations of same-sex couples are sufficiently similar to that of the idealised heterosexual marriage. They serve as guidelines to establish when a permanent same-sex partnership exists.

86 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *SAJHR* 179 197

87 2000 (3) SA 684 (C). See also *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) where the Constitutional Court recognised that the family is a social institution of vital importance and that 'families come in many shapes and sizes'. The court ruled in this case that the right to dignity encompasses and protects the rights of individuals to enter into and sustain permanent intimate relationships. In other words, the right to family life is protected by the right to dignity.

cle with the insured, a functional approach (by examining what a family did rather than what a family was) had to be adopted. On this approach, the applicant's same-sex partner was held to be a member of the applicant's family within the meaning of the exclusion. The consequence of the exclusion, however, meant that the insurer was not liable to indemnify the applicant for the injuries his same-sex life partner sustained. As in the previous decisions, the court took into account the degree of permanency and the manner in which the partners live together and concluded that *it resembled a marriage between a husband and wife*.[88]

The trend towards the recognition of same-sex relationships continued in *Satchwell v President of the Republic of South Africa*[89]. In this case, High Court judge Kathleen Satchwell successfully challenged provisions of the Judges' Remuneration and Conditions of Employment Act[90] and the corresponding Regulations that prevented her same-sex partner from receiving the equivalent pension and other benefits regarding transport, travelling and subsistence provided to spouses of judges. She argued that the provisions constituted unfair discrimination on the basis of marital status and sexual orientation. Kgomo J, sitting in the High Court,[91] agreed that the offending sections of the Act and Regulations were unconstitutional and ordered that the words 'or partner in a permanent same-sex life partnership' be added after the word 'spouse'. He relied heavily on the constitutional right to dignity in coming to his finding. Sloth-Nielsen and van Heerden[92] have observed that when discussing the parameters which may be utilised to determine who the *bona fide* beneficiaries of the amended dispensation should be, the High Court cited and relied upon exactly the same list of factors formulated by the Constitutional Court in the *National Coalition* case,[93] thus opening itself to the same criticisms as has been articulated above.

In the Constitutional Court, respondents' counsel (correctly, in the court's view) accepted that same-sex partners are entitled to found their relationships compatibly with their sexual orientation, and added that the restrictive legal meaning of the word 'spouse' subjects such relationships to unfair discrimination. Madala J, on behalf of a unanimous court, confirmed the High Court order declaring the specific provisions unconstitutional, but emphasised that the wording of that order omitted an important requirement of a reciprocal duty of support. He said that the discrimination in issue here is between spouses and same-sex partners in a permanent life relationship *similar in other respects to marriage* (my emphasis). In his view, the equality right

88 My emphasis. Louw J articulated the position as follows: '… while society might not necessarily approve of homosexual relationships, it does recognise that where such a relationship has a degree of permanency and the manner in which the partners live together *resembles for all intents and purposes a marriage between a husband and wife,* they could be considered members of a family *as would be a husband and wife*'. (My emphasis)

89 2002 (6) SA 1 (CC)

90 Act 88 of 1989. This Act has been replaced in it's entirety by the Judges' Remuneration and Conditions of Employment Act 42 of 2001 with effect from 22 November 2001.

91 2001(12) BCLR 1284 (T)

92 (Fn 54 above) 132

93 See para 26 of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (fn 80 above).

could only be used to protect those same-sex relationships where a reciprocal duty of support had been undertaken since the 'Constitution could not impose obligations towards partners where those partners themselves had failed to undertake such obligations'.[94] The setting of a new standard for the evaluation of lasting relationships once again indicates the court's continued drive to align same-sex relationships with marriage in the absence of formal recognition.

Goldblatt[95] raises some interesting questions regarding the added requirement of a duty of support. Firstly, she notes that the circumstances of the present case seem similar to those in the *Home Affairs* case. Both cases involved access to the same privileges afforded to spouses, but resulted in different orders.[96] A right to an immigration permit, in her view, is no different from a financial benefit (the pension) which both flow from the relationship between spouses or same-sex partners. Secondly, the implications of the judgment suggest that there must be an agreement between the partners to support each other. In the absence of an agreement then, there is no legal duty of support that flows from the relationship between the partners. This, she concludes, is unfortunate since it offers less legal assistance to same-sex partners than to other family members who have traditionally been recognised by our law, such as spouses, and parents and children.[97] She correctly points out that the 'Constitutional Court's emphasis on the acknowledgement and protection of new family forms should have led it to conclude that a permanent same-sex life partnership creates a legal duty of support in the same way that marriage does'.[98] And finally, she asks what will same-sex partners have to show so as to establish the existence of a duty of support. Proof of a permanent life partnership would in most cases entail demonstrating the existence of a reciprocal duty of support. In this respect, she points out that the judgment creates a measure of uncertainty for same-sex partners. However, it can be considered generally as a positive step closer to formal recognition of same-sex relationships.

The positive spirit of the ruling in the *Satchwell* case was echoed in an unreported ruling in *Muir v Mutual and Federal Pension Fund*[99]. This case arose when insurers Mutual and Federal refused to pay the lesbian partner of a deceased employee the full benefit arising from the dead woman's pension. Ordinarily, full benefit was payable to dependants, and though Mutual and Federal conceded that Muir was a dependant, they only paid her half of the pension benefit, while distributing the other half to the dead woman's other family members. In a preliminary hearing, handed down on May 13 2002, the Pension Funds Adjudicator indicated that Mutual and Federal had erred

94 (Fn 89 above) para 24
95 '*Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC)' 2003 *SAJHR* 118 121.
96 In the *Home Affairs* case, the court merely ordered that the words 'or partner in a permanent same-sex life partnership' be read after the word 'spouse' (without the added requirement of a duty of support).
97 (Fn 95 above) 122
98 *Ibid*.
99 In the Tribunal of the Pension Funds Adjudicator Case No: PFA/WE/2932/SM May 13 2002

in paying Muir only half of the benefit. In its final determination, the Pension Funds Adjudicator confirmed the interim ruling. This ruling confirms that pension law in South Africa is now very clear on the protection of same-sex relationships regarding pension.

A further step along the road towards formal recognition of same-sex relationships was taken in *Du Toit v Minister of Welfare and Population Development*[100] where the Constitutional Court, in confirming an order of the High Court, declared certain provisions of the Child Care Act[101] and the Guardianship Act[102] unconstitutional. The applicants, a lesbian couple, jointly wanted to adopt two children, but could not do so because only married couples could adopt children jointly in terms of the Child Care Act. Consequently, the second applicant alone became the children's adoptive parent. They subsequently challenged the constitutionality of the relevant provisions on the ground that their failure to make provision for same-sex life partners as adoptive parents violates same-sex life partners' right to equality and their right to dignity, and does not give paramountcy to the best interests of the child. The court found that the impugned sections unjustifiably limited the right not to be unfairly discriminated against on the ground of sexual orientation, and the right to dignity. It further found that the situation that was created by only one partner to the same-sex union having a legal relationship with the adopted child was manifestly not in the best interests of those children whose rights their care givers sought to enforce and protect. The court read words into the Acts to bring same-sex life partners within the ambit of the sections.

The outcome of this decision is that same-sex life partners may jointly adopt children. One same-sex life partner may furthermore adopt the other's child without the legal rights and obligations between the parent and the child being terminated. In both instances, the same-sex life partners are the child's joint guardians after the adoption. The effect of this case is that it not simply secures rights of adoption, but also recognises the 'relationship' (long-term, and committed relationships) of gay and lesbian couples even though the judgment does not explicitly 'legalise' same-sex relationships.

Same-sex life partners also received recognition as parents in *J v Director General, Department of Home Affairs*.[103] In this case, one of the lesbian partners in a permanent life partnership gave birth to twins who had been conceived as a result of *in vitro* fertilisation of the other partner's ova with donor sperm. The women wanted to be registered as the parents of the twins, with the birth mother being indicated as their 'mother' and her partner as their 'parent'. The department refused to register the children's birth in this manner arguing that because there was no legal marriage none of them could claim fatherhood of the twins. The women approached the High Court for an order directing the Director-General to do so. They also challenged the

100 2002 10 BCLR 1006 (CC), 2003 (2) SA 198 (CC)
101 Act 74 of 1983, specifically s 17(a), 17(c) and 20(1)
102 Act 192 of 1993, s 1(2)
103 2003 5 BCLR 463 (CC). See Cronje DSP & J Heaton *South African family law* 2 ed (2004) 233; Cronje & Heaton *Casebook on South African Family Law* 2 ed (2004) 400

constitutionality of section 5 of the Children's Status Act[104] which provided that children born as a result of artificial insemination are legitimate if the birth mother is married, but not if she is single (or a partner in a same-sex life partnership). Magid J, in the High Court, ordered the registration of the children's birth reflecting the birth mother as the children's 'mother' and her lesbian life partner as the 'parent'. Further, the claim of the birth mother's lesbian life partner to be recognised as a natural parent and guardian of the children was also granted. Finally, the court declared the provisions of section 5 of the Children's Status Act unconstitutional on the basis of 'marital status and probably sexual orientation'. In respect of the children, it found that the provisions amounted to discrimination on the listed grounds of social origin and birth.

The Constitutional Court confirmed the declaration of unconstitutionality on the ground of sexual orientation. It ordered the striking out of the word 'married' and reading in the phrase 'or permanent same-sex life partner' in several places in the section having the effect of the section being read so as to provide the same status to children born from artificial insemination to same-sex life partners as to children born to heterosexual married couples. Again, the court's decision, while not explicitly pronouncing on the union, implies an interpretation of a constitutional provision that recognises same-sex equality. But, again, the court's decision is based on the permanency of a life-long partnership. It is ironic that the permanency in this case had much to do with the recognition of parenthood, an issue often used against same-sex couples in debates about marriage.

In *Du Plessis v Road Accident Fund*[105] the Supreme Court of Appeal extended the common law dependant's action to the surviving partner in a same-sex permanent life partnership, similar to a marriage, in circumstances where the deceased had contractually undertaken a duty of support towards the survivor. The appellant and the deceased had lived together continuously for approximately eleven years until the deceased was killed in a motor vehicle accident. Their relationship was in all respects similar to a marriage. Some five years into the relationship, the appellant was medically boarded. From then on, the deceased contributed towards the appellant's financial support and undertook to continue doing so for as long as the appellant needed it. After the deceased's death, which was largely attributable to the negligence of the driver of a vehicle insured by the Road Accident Fund, the appellant instituted a dependant's claim for loss of support against the Fund. He also sought to recover the deceased's burial expenses. By consent, the matter proceeded to trial only on the issue of whether the appellant's right to such compensation was recognised by law.

The court *a quo*[106] dismissed the appellant's claim for support on the grounds that a stable, longstanding relationship of cohabitation between same-sex partners does not give rise to the legally enforceable duty of support neces-

104 Act 82 of 1987
105 2003 11 BCLR 1220 (SCA), 2004 (1) SA 359 (SCA)
106 *Du Plessis v Motorvoertuigongelukkefonds* 2002 (4) SA 596 (T)

sary to found such a claim. To hold otherwise, the court held,[107] would create legal uncertainty and open the floodgates of litigation.

The Supreme Court of Appeal, however, took a different view. In a unanimous judgment delivered by Cloete JA, the court found that the appellant was entitled to compensation for the loss of the deceased's financial support. In coming to this conclusion, the court held that to extend the action in this case 'would be an incremental step to ensure that the common law accords with the dynamic and evolving fabric of our society as reflected in the Constitution, recent legislation and judicial pronouncements'.[108]

This decision represents an important advance towards recognising and protecting persons involved in same-sex partnerships in that it developed the common law dependant's action to accord with the realities of modern family life and social conditions. In this respect, the decision is to be welcomed. At the same time, the court fell short of acknowledging in principle a duty of support in all instances of stable same-sex relationships.[109] The decision was restricted to a relationship which satisfied three specific criteria: (a) the deceased and the surviving same-sex partner must have been in a *permanent* life partnership; (b) their relationship must in all respects be *similar to a legal marriage*; and (c) they must have undertaken a *contractual* duty to support each other.

Steynberg and Mokotong[110] submit that the failure of the court to address and qualify the word 'permanent' results in placing a stricter requirement on same-sex couples than what is expected of married couples. It seems too narrow an interpretation to state that 'permanency' applies mainly in regard to the number of years the couple have lived together.[111] They add that the length of the relationship between same-sex couples should not be the only factor that plays a role in the court's decision whether the relationship was 'permanent'. Proper legal interpretation should be given to the word 'permanent' to embrace other intimate same-sex relationships which might not necessarily have lasted over a long continuous period.[112]

With regard to the relationship being 'similar in other respects to marriage', it is submitted that for the purposes of the dependant's action the issue is not

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107 *Ibid* 598

108 2004 (1) SA 359 (note 105 above) para 37

109 See in this regard Steynberg L & Mokotong M 'The common law duty of support: Developed and extended to include the surviving homosexual partner' 2005 (68) *THRHR* 330 331.

110 *Ibid* 332-334

111 They support their submission by reference to the previous decisions where the courts have also preferred a continuous long period before recognising that those relationships were permanent. For example, in *Langemaat,* the court held that 'parties to a same-sex union, *which has existed for years* in a common home' owe each other a duty of support; in *Satchwell* the same-sex partners had been living together for about 12 years; in *Du Toit* the partners were in a longstanding lesbian relationship for approximately 13 years and in *J v DG, Department of Home Affairs* the partners were in a life partnership for 8 years.

112 Steynberg & Mokotong (fn 108 above) 332. They suggest that the degree of commitment the couple has shown towards each other, the degree of attachment that exists between them, their intention to support each other and (in the context of a similar case as the present what potential the relationship had of becoming 'permanent' had it not been for the untimely death of the breadwinner) are certainly factors that are material in determining the 'permanency' of a relationship.

whether the parties were in a relationship similar to marriage, as the court suggests, but rather whether the type of relationship gave rise to a duty to support each other, whether the deceased did in fact support the dependant and whether the relationship deserved recognition and protection at common law.[113] Even the application of the Maintenance Act[114] extends to a contractual duty of support between persons who are not related to each other by blood or marriage, or a relationship that is not similar to a conventional marriage (for example, a same-sex relationship).

The third factor of the existence of a contractual duty of support between same-sex partners imposed an onerous burden on the surviving partner which a surviving heterosexual spouse does not have to prove. The effect of this requirement made it very difficult for same-sex partners who did not enter into a written contract to prove a legally enforceable duty of support. For these reasons, it is submitted that the criteria in *Du Plessis* were unjustifiably limiting.[115] However, with the recognition of civil unions this third critique now becomes largely redundant.

The outcomes of the above decisions have addressed some of the concerns that lie at the heart of the equality debate surrounding the rights of same-sex partners. But they have not resolved all of them. Even though there has been a shared sense of a movement away from condemnation (based on outdated stereotypes) towards compassion and condonation (based on the acknowledgement of the principle of difference and the integrity of lesbian and gay persons) true celebration in the form of full equality has yet to be achieved. Woolman[116], in tracing the process of transformation in the equality jurisprudence on sexual orientation, correctly points out that the earlier jurisprudence began by rejecting laws that impaired the ability of same-sex partners to live *private* lives within South Africa. Such changes met with little resistance by the state until *Satchwell* which required *public* recognition of the equality and dignity rights of gays and lesbians. A noticeable change began to emerge in the state's attitude to the recognition of relationships in the public context. Woolman[117] cites the example of *Satchwell* where the Constitutional Court had to take the uncomfortable step of invalidating a piece of legislation that refused to extend public benefits to the surviving same-sex life partner of a judicial officer.

Even though the early cases emphasised that not only marriage-like same-sex relationships should be protected, but also other non-traditional forms of relationships, the later judgments make it clear that the extension of fam-

113 *Ibid* 333. This was the approach adopted in *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) in an action by a widow married to the deceased breadwinner in terms of Islamic law where the marriage was not registered as a civil marriage in terms of the Marriage Act 25 of 1961.

114 Act 99 of 1998 which expressly provides that the Act will apply in respect of the legal duty of any person to maintain any other person 'irrespective of the nature of the relationship between those persons giving rise to that duty'

115 (Fn 109 above) 334

116 'Human dignity' in Woolman S et al (eds), *Constitutional Law of South Africa* 2 ed Vol 2 Juta (2006) Chapter 36 65.

117 *Ibid* 66.

ily benefits to same-sex couples will be given only in circumstances where those couples have conducted themselves in ways that replicate the qualities of heterosexual marriage. From the *Home Affairs* judgment to the *Du Plessis* case, references have been made to the *consortium omnis vitae* resulting from common law marriage, thus suggesting that we can only consider the regulation of same-sex relationships when the requirements of different-sex relationships are in evidence.

It follows that marriage remains the focal point for the protection and regulation of same-sex relationships. It is arguable that the most important legal, social and jurisprudential development that gays and lesbians could achieve is that of the right to marry. It comes as no surprise, therefore, that what followed was a revolution of sorts in the form of a demand for the right to same-sex marriage as a means of celebrating their unions.

4 *FOURIE* AND SAME-SEX MARRIAGE (SITE OF CELEBRATION)

The arguments for and against making marriage a priority for lesbians and gays have been presented extensively. For years, a debate has raged on whether admission to marriage will enhance the 'real' equality of lesbians and gay men.[118] Andrew Sullivan in his reader on same-sex marriage correctly identifies the difficulties that this debate raises:

> 'Marriage is alternately praised and derided as a lynchpin of procreation, love, power, economics, convenience, morality, civil rights. Homosexuality similarly evokes opposing judgments: it is seen as a perversion; a source of identity, love and desire, a freely chosen lifestyle, a fabricated personality, a revolution against the status quo. And when these two contested areas are brought together, this matrix of interpretation is multiplied even more, so that, at times, it may seem as if no one is even speaking about the same thing.'[119]

Despite this confusion of interpretation, it is nevertheless difficult to argue against the basic principle so eloquently articulated by many: that lesbian and gay couples deserve the same rights as heterosexual couples. The main reasons why same-sex couples would want to pursue a right to marry would be: (1) to receive the same benefits exclusively bestowed upon married couples (for example, access to rights, such as inheritance, social security benefits, health insurance and tax advantages); and (2) for the social acceptance and acknowledgement of their humanity that would be accorded their relationships through marriage. In Stoddard's estimation, 'marriage is … the issue most likely to lead ultimately to a world free from discrimination against

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118 See, generally, Eskridge WN 'A history of same-sex marriage' (1993) 79 *Virginia Law Review* 1419; Polikoff ND 'We will get what we ask for: Why legalising gay and lesbian marriage will not "dismantle the legal structure of gender in every marriage"'. (1993) 79 *Virginia Law Review* 1535; Stoddard TB 'Why gay people should seek the right to marry' in Sherman S (ed), *Lesbian and gay marriage* (Philadelphia, 1992); Lind C 'Sexuality and same-sex relationships in law' in Brooks-Gordon B et al (eds), *Sexuality repositioned–diversty and the law* 2004 109; De Vos P 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *SAJHR* 179; Pantazis A 'An argument for the legal recognition of gay and lesbian marriage' (1997) 114 *SALJ* 556; Williams K "I do" or "we wont": Legalising same-sex marriage in South Africa' (2004) 20 *SAJHR* 32.

119 Quoted in Williams K *ibid* 33

lesbians and gay men'.[120] Without doubt, marriage is a profoundly symbolic institution, representing state celebration of particular (heterosexual) relationships. The opening up of the institution of marriage to gays and lesbians would be a form of legal celebration of homosexuality and an indication that gays and lesbians are closer to a position of real legal equality. For the state to be involved in celebration means that what is celebrated is not just acceptable but is in fact good. Celebration, in the present context, means that society not only accepts or condones this group but approves of it. Finally, it will be a logical culmination of the court's developing sexual orientation jurisprudence.

As a step towards, satisfying these objectives, many lesbian and gay couples had in fact 'married', either informally before friends and family to gather as witnesses to the exchange of vows, or traditionally in churches and homes without waiting for society's or the law's sanction. One such couple was Marie Fourie and her partner, Cecilia Bonthuys.

In 2002, the Department of Home Affairs declined to recognise their 'marriage'. The couple lost a Pretoria High Court bid for a review of this decision in October 2002.[121] They sought leave to appeal to the Constitutional Court which was refused owing to their failure to mount a challenge to the constitutionality of section 30(1) of the Marriage Act.[122] They were instead referred to the Supreme Court of Appeal,[123] where the crisp question to be dealt with was whether two adults of the same-sex who loved each other and who had deliberately expressed an exclusive commitment to one another for life ought to be allowed to marry. The court reiterated prior decisions articulating doctrines of dignity, equality and inclusive moral citizenship and held that to deny gays and lesbians access to a conjugal relationship would inflict a deep and scarring hardship on a very real segment of the community for no rational reason.[124] The majority in the Supreme Court of Appeal held that the right of same-sex couples to celebrate a secular marriage would have to await a challenge to the Marriage Act; in the meanwhile the common law definition of marriage[125] should be developed so as to embrace same-sex couples. Marriage, in their view, ought to be defined as a voluntary union of *two persons* to the exclusion of all others while it lasts. The minority judgment held both that the common law should be developed and that the Marriage Act could and should be read there and then in an updated form so as to permit same-sex

120 Stoddard (fn 116 above) 17

121 In the High Court, Roux J turned down their application to have their 'marriage' legalised and registered and ruled that they were, in fact, not married. In dismissing the case, the judge announced that the validity of South African marriage laws is a constitutional question on which he would refrain from exercising his own discretion. He was aware of nothing which had changed the heterosexual understanding of marriage, meaning that the couple were not legally married.

122 This section provides that marriage officers must put to each of the parties the following question: 'Do you AB … call all here present to witness that you take CD as your lawful *wife (or husband)?*' (Emphasis added).

123 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA). In this court, the appellants pursued their application made in the High Court i.e. that the common law should be developed but once again they failed to link this with a challenge to the Marriage Act.

124 *Ibid* para 19

125 See text to (fn 23 above).

couples to pronounce the vows. It held further, however, that the development of the common law to bring it in line with the Constitution should be suspended to enable parliament to enact appropriate legislation. Both parties, being unhappy with the outcome of the decision, lodged appeals to the Constitutional Court.

In the Constitutional Court,[126] the state contended that the failure to provide legal recognition to the unions of same-sex couples was not the fault of the Marriage Act but rather flowed from the failure of the law to provide an adequate and independent means of legal recognition apart from the Act itself. Sachs J replied that the law, as an abstraction, was not to blame, but those instruments which flowed from it and excluded protection to those individuals entitled to it. Sachs J treated the issue in this case as a logical step after a series of rulings by the court striking down various forms of unequal treatment of gays and lesbians. Despite such progress, however, he added that the default position of gays and lesbians is still one of exclusion and marginalisation. In the course of his judgment, he addressed each of the issues usually raised against same-sex marriage[127] and provided thoughtful and well-reasoned responses to them. In particular, he pointed out that an acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as heterosexual couples was in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. Marriage officers, he said, could refuse to marry a same-sex couple if it went against their conscience. He emphasised that the court cannot allow religious disapproval to affect how the government deals with its citizens[128]. Once again, the state's resistance to the public recognition of same-sex rights becomes evident in its attempt to block the recognition of same-sex unions as marriages. In this regard, I agree with Woolman[129] that the same-sex jurisprudence, even though truly transformative, represented a challenge to the *status quo*.

The court was unanimous in finding that both the common law definition of marriage and s 30(1) of the Marriage Act was unconstitutional to the extent that the common law does not permit same-sex couples to enjoy the same status, benefits and responsibilities accorded to heterosexual couples, and section 30(1) omits the words 'or spouse' after the words 'or husband' in the

126 *Minister of Home Affairs v Fourie and Others* 2006 (1) SA 524 (CC). The court was actually ruling on two different cases joined for decision. One, brought by Fourie and her partner, Bonthuys, challenging the common law definition of marriage; and the other case, brought by the Lesbian and Gay Equality Project in the Johannesburg High Court, which had not yet proceeded to trial, but advanced the more ambitious claim that the Marriage Act itself was unconstitutional for excluding same-sex couples. The Constitutional Court granted an extraordinary petition to consider these two cases together.

127 They are: (1) the procreation argument; (2) religious arguments; (3) the international law argument; and (4) family law pluralism argument.

128 It is perhaps worthy to note this, especially in the light of the widespread protests after the judgment by many religious and cultural organisations against the recognition of gay and lesbian marriages. They argued that the recognition of gay and lesbian marriages was fundamentally at odds with the religious beliefs of the overwhelming majority of South Africans and in many instances expressly forbidden in religious texts.

129 See (Fn 116 above).

Act.[130] Although the court was unanimous in the order, it was not unanimous as to the remedy. Writing for all but one member of the court, Sachs J held that the best remedy to the unconstitutional exclusion of gay and lesbian couples from the institution of marriage would be to suspend the declarations of invalidity for 12 months from the date of the judgment in order to allow parliament time to adopt appropriate legislation. He made clear that if parliament failed to act, the court's ruling would automatically go into effect, requiring government officials to allow same-sex couples to marry under existing law by 'reading in' to the Marriage Act appropriate language suggested by the court. One member disagreed with this approach. O'Regan J was of the opinion that the order of invalidity should not be suspended but that the court itself should rather make an immediately effective order developing the common law and read in words into section 30 of the Marriage Act that would with immediate effect permit gays and lesbians to be married by civil marriage officers. O'Regan J defended her standpoint by alluding to the separation of powers envisaged by the Constitution, adding that this doctrine 'cannot … be used to avoid the obligation of a court to provide appropriate relief … to litigants who successfully raise a constitutional complaint'.[131]

The decision in *Fourie* hardly comes as a surprise. In fact, one can describe it as the logical culmination of a long judicial process which began with the landmark *National Coalition* cases (both the *Sodomy* and the *Home Affairs* decisions) which set the tone for rectifying discrimination against gays and lesbians. Most legal scholars will probably not argue with the conclusion arrived at by the court. The judgment, however, raises complex issues around the definition of marriage and yet the most conspicuous omission from the judgment is the absence of the words 'right to marry' or 'right to the institution of marriage' in the context of same-sex couples. Furthermore, in framing the issue, Sachs J identifies that one of the questions asked of the court was whether or not the failure by the common law and Marriage Act to provide for means whereby same-sex couples *can marry*, constitutes unfair discrimination.[132] Nowhere in his judgment does he directly answer this specific question in the affirmative. Instead, the repetitive theme in the judgment is that the violation of the right to equality manifests itself in denying same-sex couples the *benefits, entitlements and responsibilities* (my emphasis) afforded to heterosexual couples via marriage. The judgment, in effect, affords same-sex couples all of the rights *of* the institution of marriage, but it does not grant them the right *to* the institution itself.[133] From this perspective the decision in *Fourie* appears to be problematic.

Furthermore, the court placed much reliance on its previous decisions start-

130 See (fn 120 above).
131 (Fn 124 above) para 170
132 *Ibid* para 45, emphasis added
133 See paras 71, 72, 75 and 114. Sachs J stipulates (in para 72) that 'if heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to *achieve a status and a set of entitlements and responsibilities on a par* with those enjoyed by heterosexual couples'. There is no mention of any right to embrace these entitlements in a same-sex institution referred to as a 'marriage'.

ing from the *Home Affairs* case where it held that gays and lesbians are as capable as heterosexuals of forming a *consortium omnis vitae,* the denominator in terms of which the marriage relationship is described. It has been argued that the equalisation by the court of heterosexual and homosexual relationships without explaining how it equates these concepts certainly reflects a very mechanical view of the marriage relationship.[134] The previous decisions dealt with pension and other benefits, sexual expression and residency rights and not with the unique nature of the marriage relationship. In fact, *Fourie* is the first decision to deal with rights to marriage as an institution in the context of same-sex couples.

The most problematic aspect of the judgment, though, was the remedy. The court, with respect, ought to have been far more sensitive to the fact that the claim by the applicants of the right to get married and celebrate their union demanded far more than a suspended declaration of invalidity. Moreover, the court in the earlier cases exercised its extensive powers in reading in to statutes to cure the unconstitutionality of provisions. The same could have been applied in this case. If the court, as it did, had the power to read in to statutes, then surely it must have the power to read in to the common law. After all, common law is judge-made law. In this respect, the dissent on the order by O'Regan J is to be preferred because it provided an immediate remedy and left no room for uncertainty for those same-sex couples who enter into marriages.

Guided by the outcome, parliament tabled the Civil Union Bill, which made provision for civil unions between same-sex partners. In terms of section 13 of the Bill, the same legal consequences of marriage would apply, with such changes as may be required by the context, to a civil partnership. Marriage in any other law including the common law *but excluding the Marriage Act,* will also be read as referring to a civil partnership.[135] The civil partnership proposed by the Bill has been the subject of much controversy since its introduction. De Vos[136] submitted that although the Bill purported to give effect to the decision of the Constitutional Court ordering an extension of marriage to same-sex couples, it in effect denied them that right. The Bill created a separate institution for same-sex couples which differed from traditional marriage in at least three ways: it would not be called a marriage; marriage officers would have the right to refuse to solemnise it; and it would only be open to same-sex couples.[137] He went on to say that the creation of a 'separate but equal' marriage regime not only failed to respect the dignity of gay men and lesbians, it contradicted the instructions of the Constitutional Court. The State Law Advisor at the time declined to certify the Bill adding that it did not fully implement the guiding principles as set out by the Constitutional Court.[138]

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134 Robinson JA 'The evolution of the concept of marriage in South Africa: The influence of the Bill of Rights in 1994' 2005 Vol 26 (3) *Obiter* 488502

135 S 13(2)(a)

136 'Gays and lesbians now 'separate but equal' *Mail and Guardian* 15 to 21 September (2006) 35

137 *Ibid*.

138 'Concern about Civil Union Bill', 8 September (2006) *Daily News,* 8

The complaint was that the Bill itself was subject to constitutional attack because it failed to amend section 30(1) of the Marriage Act to include same-sex couples within its ambit. Moreover, this move by parliament was considered a huge step backward when examined against the advances made in the earlier cases.

In an effort to address some of the complaints, Parliament, just two months later, passed the Civil Union Act[139] which came into operation on the 30 November 2006. This Act provides for the solemnisation and registration of civil unions, *by way of either a marriage or civil partnership*, between *two persons*. The parties have the choice to elect whether their civil union should be known as a *marriage* (in which case the one is declared 'a lawful spouse' of the other) or a *civil partnership* (whereby the one is declared a 'civil partner' of the other).[140] As in the original Bill, a marriage officer may still object on the ground of conscience, religion and belief to solemnising a civil union *between persons of the same sex*. Section 13 provides as follows:

'13(1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.

13 (2) *With the exception of the Marriage Act and the Customary Marriages Act,* any reference to-

(a) marriage in any other law, including the common law, includes a civil union ... and

(b) husband, wife or spouse in any other law, including the common law, include a civil union partner.'

The passing of the Civil Union Act is to be welcomed in general in that it gives effect to the features highlighted by Sachs J in *Fourie* (see below), namely, that different family forms should be recognised and protected. Even though parties to a civil union can choose to call their union a marriage, section 13(2) of the Act raises many questions. The first asks: Why was the Marriage Act retained and not repealed in its entirety? The second question asks: Why has marriage rights for same-sex couples been regulated in a separate piece of legislation? It is possible that government, in passing this Act, aimed to achieve some kind of a compromise to allay the concerns of the more conservative element of society who are opposed to same-sex marriages.[141] It would appear that the Act is nothing more than an attempt to pacify, not only the conservatives, but also the gay and lesbian movement by affording them the option of calling their union a marriage should they so wish. A compromised solution, in the author's submission, falls short of true celebration and hence, full equality.

139 Act 17 of 2006

140 *Ibid* s 11(1)

141 As in the draft Bill, section 6 of the Act confirms that marriage officers are free to refuse to perform marriages that are not in accordance with their religious beliefs.

5 CONCLUSION

In the pre-democratic era, not only were individual gays and lesbians denied any protection, but their relationships were neither acknowledged nor respected. Criminalisation of same-sex conduct was perhaps the best example of condemnation towards gays and lesbians during this time. The post-apartheid constitution, in contrast, began with the legal protection of 'sexual orientation' as a form of identity. In the great movement towards gay and lesbian equality, the early battles be it decriminalisation[142], or protection from discrimination[143] concerned matters that involved individual rights. Thereafter, a new generation of disputes emerged which concerned relationships rather than individuals and now, with the passing of the Civil Union Act, a new distinct status has been conferred upon gays and lesbians.

Sachs J wrote in *Fourie*[144] that the Constitutional Court, in five consecutive decisions (*Home Affairs, Satchwell, Du Toit, J and Du Plessis*) highlighted at least four features of the context in which the prohibition against unfair discrimination on grounds of sexual orientation must be analysed. They are:

> '(1) South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one; (2) The existence of an imperative constitutional need to acknowledge the long history in our country of marginalisation and persecution of gays and lesbians; (3) Although a number of breakthroughs have been made in particular areas, there is no comprehensive legal regulation of the family law rights of gays and lesbians; and (4) Our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect across difference. Small gestures in favour of equality, however meaningful, are not enough. At the very least, equality affirms that difference should not be the basis for exclusion and stigma. At best, it celebrates the vitality that difference brings to any society.'

Indeed, these judgments have demonstrated the growing concern for, understanding of, and sensitivity towards human diversity in general and to gays and lesbians and their relationships in particular. To that extent, they represent an attitude of compassion and condonation to same-sex identity.

The real difficulty, in my view, is presented at the site of celebration. There is an urgent need for a reassessment of all life partnerships[145] in order to address the many rules constructed around marriage. The existence of separate legislation to accommodate same-sex marriages is no different to the 'separate but equal' principle noted by De Vos.[146] The celebration of homosexuality and lesbianism by allowing them to celebrate in the institution of marriage does not end the discourse about gay and lesbian rights. It is arguable that legal rights and legal discourse is only a limited aspect of the social reality

142 The *Sodomy* judgment (Fn 57 above)
143 *Langemaat* (fn 72 above)
144 (Fn 124 above) at para 59
145 This article has focused on same-sex unions, which constitute only one type of life partnership. Opposite-sex life partnerships and polygynous unions, both of which are characterised by a consortium, have also been the subject of much debate in recent years.
146 See (fn 133 above).

for gays and lesbians, even though it is a significant aspect.[147] Legal victories are thus critical in reinforcing identity, but these victories do not immediately and simultaneously eradicate the persistent threat of homophobia.[148] That is still a battle to overcome.

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147 There are many other issues on questions such as the desirability of aspiring to the institution of marriage which, in itself, is in a state of flux and disarray; and social and political questions surrounding homophobia which are equally important, but fall outside the scope of this paper.

148 Govender V 'Decriminalisation of homosexuality in post-apartheid South Africa: A brief legal case history review from sodomy to marriage' *Agenda* Issue 67 (2006) 146 156

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