CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 60/04

MINISTER OF HOME AFFAIRS	First Applicant
DIRECTOR-GENERAL OF HOME AFFAIRS	Second Applicant
versus	
MARIÉ ADRIAANA FOURIE	First Respondent
CECELIA JOHANNA BONTHUYS	Second Respondent
with	
DOCTORS FOR LIFE INTERNATIONAL	First amicus curiae
JOHN JACKSON SMYTH	Second amicus curiae
THE MARRIAGE ALLIANCE OF SOUTH AFRICA	Third amicus curiae

Case CCT 10/05

LESBIAN AND GAY EQUALITY PROJECT AND EIGHTEEN OTHERS	Applicants
versus	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL OF HOME AFFAIRS	Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent

Heard on : 17 May 2005

Decided on : 1 December 2005

JUDGMENT

SACHS J:

INTRODUCTION

[1] Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They are both women.

[2] Ms Marié Adriaana Fourie and Ms Cecelia Johanna Bonthuys are the applicants in the first of two cases[1] that were set down for hearing on the same day in this Court. Their complaint has been that the law excludes them from publicly celebrating their love and commitment to each other in marriage. Far from enabling them to regularise their union, it shuts them out, unfairly and unconstitutionally, they claim.

[1] *Minister of Home Affairs and Another v Fourie and Another, with Doctors For Life International (first amicus curiae), John Jackson Smyth (second amicus curiae) and Marriage Alliance of South Africa (third amicus curiae)* CCT 60/04.

[3] They contend that the exclusion comes from the common law definition which states that marriage in South Africa is "a union of one man with one woman, to the exclusion, while it lasts, of all others."[2] The common law is not self-enforcing, and in order for such a union to be formalised and have legal effect, the provisions of the Marriage Act[3] have to be invoked. This, as contended for in the second case,[4] is where the further level of exclusion operates. The Marriage Act provides that a minister of religion who is designated as a marriage officer may follow the marriage formula usually observed by the religion concerned.[5] In terms of section 30(1) other marriage officers must put to each of the parties the following question:

> "'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful *wife* (*or husband*)?', and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: 'I declare that A.B. and C.D. here present have been lawfully married.'" (My emphasis.)

The reference to wife (or husband) is said to exclude same-sex couples. It was not disputed by any of the parties that neither the common law nor statute provide for any

[2] As articulated by Innes CJ in *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 at 61. In other cases the exclusion is said to be "for life". See for example *Hyde v Hyde and Woodmansee* 1866 LR 1 P and D 130 at 133; *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 309 and *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1019. Given the high degree of divorce this would seem to be a misnomer.

[3] Act 25 of 1961.

[4] *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others* CCT 10/05.

[5] Section 30(1) states in this regard:

> "[A]ny marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister . . . ."

legal mechanism in terms of which Ms Fourie and Ms Bonthuys and other same-sex couples could marry.

[4] In the pre-democratic era same-sex unions were not only denied any form of legal protection, they were regarded as immoral and their consummation by men could attract imprisonment.[6] Since the interim Constitution came into force in 1994, however, the Bill of Rights has dramatically altered the situation. Section 9(1) of the Constitution now reads:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

Section 9(3) of the Constitution expressly prohibits unfair discrimination on the grounds of sexual orientation. It reads:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth." (My emphasis.)

[5] The matter before us accordingly raises the question: does the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amount to denial of equal protection of the law and unfair discrimination by the

---

[6] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC). (The *Sodomy* case.)

state against them because of their sexual orientation? And if it does, what is the appropriate remedy that this Court should order?

I. HISTORY OF THE LITIGATION

The first challenge: the common law definition of marriage (the Fourie case)

[6] Pursuant to their desire to marry and thereby acquire the status, benefits and responsibilities which traditionally flow from marriage between heterosexual couples, the applicants went to the Pretoria High Court. They asked for an order declaring that the law recognises their right to marry, and a mandamus ordering the Minister of Home Affairs and the Director-General to register their marriage in terms of the Marriage Act.[7] It will be noted that they did not mount a challenge either to the common law definition of marriage or to the constitutionality of section 30(1) of the Marriage Act.

[7] Roux J in the High Court[8] attempted to 'wring out' of the parties a clear description of the constitutional issue in the matter. The applicants articulated the issue as follows:

> "Whether the common law has so developed that it can be amended so as to recognise marriages of persons of the same sex as legally valid marriages in terms of the Marriage Act, 25 of 1961 provided that such marriages comply with the formality requisites set out in the Act."

[7] They also sought to have their marriage registered in terms of the Identification Act 68 of 1997.

[8] *Fourie and Another v Minister of Home Affairs and Another (The Lesbian and Gay Equality Project intervening as amicus curiae)*, Case No 17280/02, handed down on 18 October 2002. Unreported.

Roux J concluded that the marriage formula in section 30(1) of the Marriage Act, which contemplates marriage between a male and a female and no other, is peremptory. Consequently the applicants could not be married as required by the law. To compel the Minister of Home Affairs to register the "marriage" between the applicants, he added, would constitute a request to do what is unlawful. An omission to challenge the constitutionality of the provisions of the Marriage Act accordingly constituted an obstacle to granting the relief sought. On this basis he dismissed the application.

[8] The applicants then applied to the Pretoria High Court for leave to appeal to this Court, alternatively, to the Supreme Court of Appeal (SCA) against his judgment. Roux J having in the interim retired, the application was heard by Mynhardt J, who refused to grant a positive certificate, but[9] did grant them leave to appeal to the SCA. The applicants then approached the Constitutional Court for leave to appeal directly to it against the judgment and order of the High Court.

[9] This Court refused the application on the ground that the interests of justice required that the appeal first be heard by the SCA. Moseneke J[10] said that in their papers the applicants did not seek a declaration that any of the provisions of the legislation dealing with solemnising or recording of marriages was inconsistent with the Constitution, or if any was, what the appropriate relief would be in that regard.

[9] In terms of Rule 18 of the Constitutional Court Rules as they then were, which provided that the Court hearing the matter had to state whether it thought the application should be heard by this Court.

[10] *Fourie and Another v Minister of Home Affairs and Another* 2003 (5) SA 301 (CC); 2003 (10) BCLR 1092 (CC). [*Fourie* (CC).]

The applicants also omitted to address all the consequences that would flow from the recognition of such a union or how it should be dissolved. The appeal was likely to raise complex and important questions of the legal conformity of our common law and statutory rules of marriage in the light of our Constitution and its resultant jurisprudence. Moseneke J pointed out that

> "[m]arriage and its legal consequences sit at the heart of the common law of persons, family and succession and of the statutory scheme of the Marriage Act. Moreover marriage touches on many other aspects of law, including labour law, insurance and tax. These issues are of importance not only to the applicants and the gay and lesbian community but also to society at large."[11]

[10] Although considerations of saving costs and of an early and definitive decision of the disputed issues were in themselves weighty, they should not oust the important need for the common law, read in the light of the applicable statutes, to develop coherently and harmoniously within our constitutional context. The judgment emphasised that the views of the SCA on the matters that arose were of considerable importance. The nature of the dispute raised by the appeal was, as the High Court had correctly held in issuing a negative rule 18(2) certificate, pre-eminently suited to be considered first by the SCA. The application for leave to appeal directly to this Court was accordingly refused.

[11] Id at para 12.

[11] The result was that the applicants pursued their appeal in the SCA.[12] They did so on the same basis on which they had litigated in the Pretoria High Court, namely, that the common law needed to be developed, without linking this to a challenge to the Marriage Act.

[12] The SCA upheld the appeal in part. Two separate judgments were delivered. All five judges held that the exclusion of same-sex couples from the common law definition of marriage constituted unfair discrimination against them. The reasons for coming to this conclusion diverged in certain significant respects, however, resulting in different approaches being taken as to the order to be made.

[13] Writing for the majority, Cameron JA[13] held that the Constitution grants powers to the Constitutional Court, the SCA and the High Courts to develop the common law, taking into account the interests of justice.[14] The Bill of Rights provides[15] that when applying a provision of the Bill of Rights to a natural or juristic person a court, in order to give effect to a right in the Bill, "must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right" though it may develop the rules of the common law to limit the right in accordance with the limitations provision in section 36(1). It also provides that when developing the

---

[12] *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA); 2005 (3) BCLR 241 (SCA). [*Fourie* (SCA).]

[13] His judgment was concurred in by Mthiyane and Van Heerden JJA and Ponnan AJA.

[14] Section 173 of the Constitution.

[15] Section 8(3).

common law the Court must promote the spirit, purport and objects of the Bill of Rights.[16] Taken together, these provisions create an imperative normative setting that obliges courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. Doing so is not a choice. Where the common law is deficient, the courts are under a general obligation to develop it appropriately. This provided the background to the task in the appeal.

[14] Cameron JA went on to state that developing the common law involves a creative and declaratory function in which the court puts the final touch on the process of incremental legal development that the Constitution has already ordained. The task of applying the values in the Bill of Rights to the common law thus requires the courts to put its faith in both the values themselves, as well as in the people whose duly elected representatives created a visionary and inclusive constitutional structure that offered acceptance and justice across diversity to all. He said that South Africans and their elected representatives have for the greater part accepted the sometimes far-reaching decisions in regard to sexual orientation and other constitutional rights over the past ten years. It is not presumptuous to believe that they will accept also the further incremental development of the common law that the Constitution requires in this case.

[15] Cameron JA pointed out that our equality jurisprudence had taken great strides in respect of gays and lesbians in the last decade. The cases articulate far-reaching

[16] Section 39(2).

doctrines of dignity, equality and inclusive moral citizenship. They establish that: gays and lesbians are a permanent minority in society who have suffered patterns of disadvantage and are consequently exclusively reliant on the Bill of Rights for their protection; the impact of discrimination on them has been severe, affecting their dignity, personhood and identity at many levels; family as contemplated by the Constitution can be constituted in different ways and legal conceptions of the family and what constitutes family life should change as social practices and traditions change; permanent same-sex partners are entitled to found their relationships in a manner that accords with their sexual orientation and such relationships should not be subject to unfair discrimination; and same-sex life partners are "as capable as heterosexual spouses of expressing and sharing love in its manifold form." Cameron JA continued:

> "'The sting of the past and continuing discrimination against both gays and lesbians' lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they 'do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.' This 'denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity' namely that 'all persons have the same inherent worth and dignity', whatever their other differences may be."[17]

[16] He added that the capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic

[17] *Fourie* (SCA) above n 12 at para 13.

obligations. It offers a social and legal shrine for love and commitment and for a future shared with another human being to the exclusion of all others.

[17] Legislative developments, he continued, have ameliorated but not eliminated the disadvantages same-sex couples suffer. More deeply, the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggests not only that their relationships and commitments and loving bonds are inferior, but that they themselves can never be fully part of the community of moral equals that the Constitution promises to create for all. The applicants' wish was not to deprive others of any rights. It was to gain access for themselves, without limiting that enjoyed by others.[18]

[18] The majority judgment went on to state that the Marriage Act prescribes a verbal formula that must be uttered if the legal consequences of the lawful marriage are to follow. The legislature prescribed this formula, and its words cannot be substituted by 'updating' interpretation.[19] If the Court, and not Parliament, is to make a constitutionally necessary change to such a formula, that must be done not by interpretation but by the constitutional remedy of 'reading-in'. The applicants' legal advisors, however, had overlooked the question of the Marriage Act.

---

[18] Quoting Marshall CJ in the Massachusetts Supreme Judicial Court, he held that to deny them access to marriage, "works a deep and scarring hardship on a very real segment of the community for no rational reason". Id at para 18.

[19] See para 32 below.

[19] This did not, however, constitute a complete obstacle to granting them some portion of the relief they sought. The Marriage Act permits the Minister to approve variant marriage formulae for ministers of religion and others holding a 'responsible position' within religious denominations. Cameron JA noted that there are currently many religious societies that approve same-sex marriages. Even without amendment to the statute, the Minister is now at liberty to approve religious formulae that encompass same-sex marriages.

[20] Cameron JA stated that it is important to emphasise that neither the Court's decision, nor the ministerial grant of such a formula, in any way impinges on religious freedom. The extension of the common law definition of marriage does not compel any religious denomination or minister of religion to approve or perform same-sex marriages.

[21] Turning to the appropriate remedy, he stated that once the court concludes that the Bill of Rights requires the development of the common law, it is not engaging in a legislative process. Nor in fulfilling that function is the court intruding on the legislative domain. In his view, successful litigants should be awarded relief; the order of the SCA developing the common law trenched on no statutory provision, and deference to Parliament did not require that the order be suspended; and the applicants should be awarded the benefit of an order regarding the common law of marriage that would take effect immediately. Cameron JA indicated that when the Minister approved appropriate religious formulae, the development of the common law would

take practical effect. Religious orders whose use of such formulae are approved, will at their option be able to perform gay and lesbian marriages. But, he concluded, gay and lesbian couples seeking to have a purely secular marriage would have to await the outcome of proceedings which were launched in the Johannesburg High Court in July 2004, designed to secure comprehensive relief challenging the provisions of the Marriage Act and other statutes.

[22] Cameron JA accordingly limited his order to declaring that in terms of sections 8(3), 39(2) and 173 of the Constitution, the common law concept of marriage is developed to embrace same-sex partners as follows: "Marriage is the union between two persons to the exclusion of all others for life."

[23] In his minority judgment, Farlam JA dealt broadly with the history of the institution of marriage in our law. He emphasised that during the classical Roman law period marriage was a purely private institution which did not involve the state. No religious or ecclesiastical rite was essential, even after Christianity became the official religion of the Roman Empire in 313 AD. All that was required for the existence of a marriage was reciprocally expressed consent of parties. After the disintegration of the Roman Empire in the West, when the Church began to control marriage, parties were encouraged to declare their consent before a priest and to receive a blessing. Such marriages were regarded as "regular" marriages. There were also so-called "irregular" marriages which were based on the consent of the parties alone. Parties to "irregular"

marriages were often subjected to ecclesiastical and secular penalties, but their marriages were nonetheless as valid as the "regular" ones.

[24] The present Marriage Act consolidated the laws governing the formalities of marriage and the appointment of marriage officers, and repealed some 47 Union and pre-Union statutes from the Marriage Order in Council of 7 September 1838 onwards. A study of the provisions of the Marriage Act makes it clear that it builds on the foundations laid by the Council of Trent in 1563 and by the States of Holland in 1580. It is solely concerned with marriage as a secular institution. Many may see a religious dimension to marriage, but this is not something that the law is concerned with.

[25] Farlam JA then went on to hold that

> "[i]t will be recalled that s 9(1) of the Constitution provides that everyone has the right to equal protection and benefit of the law, while s 9(3) lists among the proscribed grounds of discrimination sexual orientation. Homosexual persons are not permitted in terms of the common-law definition to marry each other, however strong their yearning to establish a conjugal society of the kind described. As a result they are debarred from enjoying the protection and benefit of the law on the ground of their sexual orientation. This clearly constitutes discrimination within the meaning of s 9 of the Constitution."[20]

[26] He added that the effect of the common law prohibition of same-sex marriages was clearly unfair because it prevented parties to same-sex permanent relationships, who are as capable as heterosexual spouses of establishing a consortium omnis vitae,

[20] *Fourie* (SCA) above n 12 at para 86.

of constituting a family and of establishing, enjoying and benefiting from family life, from entering into a legally protected relationship from which substantial benefits conferred and recognised by the law flowed.[21] He went on to say that the common law definition of marriage not only gave rise to an infringement of the appellants' constitutional right not to be the victims of unfair discrimination in terms of section 9 of the Constitution but also to their right to human dignity in terms of section 10.[22]

[27] Farlam JA was of the view that the omission to challenge the marriage formula in the Marriage Act did not constitute a basis for denying the applicants relief. The finding by Roux J that the parties cannot be married as required by the law was wrong. The applicants' true case was that they intended to enter into a marriage with each other and that they sought a declaration that such marriage, when entered into in accordance with the formalities in the Marriage Act, would be valid and registerable under the Marriage Act and the Identification Act.

[28] The judgment observes that counsel for the applicants had referred to the Discussion Paper 104 published by the South African Law Reform Commission (SALRC), which is devoted to the topic of Domestic Partnerships. The Paper contains proposals prepared by the SALRC aimed at harmonising family law with the provisions of the Bill of Rights and the constitutional values of equality and dignity. The SALRC considers as unconstitutional the fact that there is currently no legal

[21] Id at para 93.

[22] Id at para 94.

recognition of same-sex relationships. It proposes that same-sex relationships should be acknowledged by the law and identifies three alternative ways of effecting legal recognition to such relationships, viz (a) opening up the common law definition of marriage to same-sex couples by inserting a definition to that effect in the Marriage Act; (b) separating the civil and religious elements of marriage, by amending the Marriage Act to the extent that it will only regulate the civil aspect of marriage, namely the requirements and the consequences prescribed by law and by providing in it for civil marriage of both same- and opposite-sex couples; and (c) providing what is called a 'marriage-like alternative' according same-sex couples (and possibly opposite sex couples) the opportunity of concluding civil unions with the same legal consequences as marriage.[23]

[29] Farlam JA stated that only the first option is available to the courts, but only if it can be regarded as an incremental step. In the year 2004, and in the present circumstances the development of the common law cannot be regarded as a fundamental change. He said that Parliament has over the years since 1994 enacted numerous provisions giving recognition, in some cases expressly and in others impliedly, to same-sex partnerships. These enactments evidence an awareness on the part of Parliament of the changing nature of the concept of the family in our society. He added that until recently the principle of legal equality between the spouses had not been enshrined in our law. The rules forming part of our matrimonial relations

[23] *Fourie* (SCA) above n 12 at para 110.

which put the husband in a superior position and the wife in an inferior one are no longer part of our law.[24]

[30] In respect of the contention that applicants are debarred from seeking relief because they did not challenge the constitutional validity of section 30(1) of the Marriage Act, he held that there is no section in the Marriage Act that expressly approves the common law definition of marriage. Section 30(1), according to Farlam JA, cannot be regarded as placing what may be called a 'legislative imprimatur' on that definition. What has happened is that the marriage formula contained in the Act was framed on the assumption that the common law definition of marriage was correct, which it was in 1838[25] and in 1961. He found that the formula can be changed by a process of innovative and 'updating' statutory interpretation by reading "wife (or husband)" in this provision as "spouse".

[31] Farlam JA therefore supported an order declaring that the intended marriage between the applicants, provided that it complies with the formalities set out in the Marriage Act, would be capable of being recognised as a legally valid marriage. He

[24] He pointed out that the law could thus not easily accommodate same-sex unions because, unless the partners thereto agreed as to who was to be the "husband" and who the "wife", these rules could not readily be applied to their union. Sections 29 and 30 of the General Law Fourth Amendment Act 132 of 1993, however, abolished the husband's marital power over his wife's person and property in respect of all marriages to which it applied, and also his power flowing from his position as head of the family. The only common law rule which makes it necessary to be able to identify the husband and which still forms part of our law of matrimonial law, is the rule which provides that the proprietary consequences of a marriage are determined, where prospective spouses have different domiciles, by the law of the domicile of the husband at the time of the marriage. All other rules apply equally to spouses. Farlam JA stated that he does not believe that the impossibility of applying this rule to same-sex unions would give rise to insoluble problems. The existence of this problem, he held, would not constitute a reason for refusing to extend the definition in the way that the SCA had been asked to do.

[25] The Marriage Order in Council. See para 24 above.

would suspend the declaration of invalidity of the common law for two years, however, to enable Parliament to enact legislation to ensure the applicants' rights to equality and human dignity are not unjustifiably infringed. Furthermore, the declaration would fall away only if such legislation was timeously enacted.

[32] To summarise: both judgments were in agreement that the SCA could and should rule that the common law definition discriminated unfairly against same-sex couples. The majority judgment by Cameron JA held, however, that although the common law definition should be developed so as to embrace same-sex couples, the Marriage Act could not be read in such a way as to include them. In the result, the only way the parties could marry would be under the auspices of a religious body that recognised same-sex marriages, and whose marriage formula was approved by the Minister of Home Affairs. The right of same-sex couples to celebrate a secular marriage would have to await a challenge to the Marriage Act. The minority judgment of Farlam JA, on the other hand, held both that the common law should be developed and that the Marriage Act could and should be read there and then in updated form so as to permit same-sex couples to pronounce the vows. In his view, however, the development of the common law to bring it into line with the Constitution should be suspended to enable Parliament to enact appropriate legislation. In support of an order of suspension he pointed out that the SALRC had indicated that there were three possible legislative responses to the unconstitutionality, and, in his view, it should be Parliament and not the judiciary that should choose.[26]

[26] Above n 12 at para 142.

Appeal and cross-appeal

[33] None of the parties to the litigation were satisfied with the outcome. The state noted an appeal on several grounds, revolving mainly around the proposition that it was not appropriate for the judiciary to bring about what it regarded as a momentous change to the institution of marriage, something, it contended, that should be left to Parliament. The applicants for their part were unhappy because although the newly developed definition of the common law included them in its terms, they were still prevented from getting married by the phrasing of the marriage vows in the Marriage Act. The only possible route enabling them to marry under the Act was a tenuous one, namely, to find a sympathetic religious denomination with an inclusive marriage vow that was approved by the Minister of Home Affairs. In their application to cross-appeal they accordingly supported the reasoning of Farlam JA regarding updating the Marriage Act, while objecting to his suspension of the development of the common law. At the same time they supported Cameron JA's finding that immediate relief should be granted to them, but objected to his decision that the Marriage Act barred them from taking the vows except in the limited circumstances to which he referred. The overall result was that the state has sought leave to appeal against the SCA's decision on the basis that it went too far, while the applicants have sought leave to cross-appeal on the grounds that it did not go far enough. It was common cause that the application in the *Fourie* matter by the state for leave to appeal and by the applicants for leave to cross-appeal, raise questions of considerable constitutional

significance and social importance. It is in the interests of justice that they both be granted.

The second challenge: section 30(1) of the Marriage Act as well as the common law definition (the Equality Project case)

[34] In the meantime, accepting the need to challenge the Marriage Act as well as the common law, the Lesbian and Gay Equality Project (the Equality Project) and eighteen others had launched an application in the Johannesburg High Court[27] for the following relief:

> "1. Declaring that the common law definition of marriage and the prescribed marriage formula in section 30(1) of the Marriage Act 25 of 1961 ('the Marriage Act') are unconstitutional in that they violate the rights of lesbian and gay people to:
>
> 1.1. equality in terms of section 9 of the Constitution of the Republic of South Africa, 1996 ('the Constitution');
>
> 1.2. dignity in terms of section 10 of the Constitution; and
>
> 1.3. privacy in terms of section 14 of the Constitution;
>
> 2. Declaring that the common law definition of marriage is henceforth to be read as follows:
>
> *'Marriage is the lawful and voluntary union of two persons to the exclusion of all others while it lasts'*;
>
> 3. Declaring that the words *'or spouse'* are to be read into the prescribed marriage formula in section 30(1) of the Marriage Act immediately after the words *'or husband'*;
>
> 4. Ordering those of the respondents who oppose this application to pay the applicants' costs of suit; and
>
> 5. Granting the applicants such further and/or alternative relief as this Court deems appropriate in the circumstances."

[27] On 8 July 2004.

The case was originally due to be heard in the High Court in October this year, but was eventually set down for January next year. The Equality Project then applied for direct access to this Court to enable their challenge to the statute as well as to the common law definition of marriage to be heard together with the appeal and the cross-appeal relating to the SCA judgment in the *Fourie* case.

[35] The Minister of Home Affairs, the Director-General of Home Affairs and the Minister of Justice and Constitutional Development (I refer to them collectively as the state), opposed the application on the ground that direct access was not in the interests of justice.[28] The state agreed with the SCA that the primary issue was whether same-sex partners should be granted access to the existing common law institution of marriage, but disputed the finding that same-sex couples were entitled to such access. The state submitted that the SCA had misdirected itself in concluding that the common law definition of marriage violates the constitutional rights of lesbian and gay people to equality. Instead, it contended that it was the lack of legal recognition of their same-sex family relationships and the absence of legal consequences, which violated their rights, and not the exclusion from the institution of marriage.

[36] The state accordingly acknowledged that partners to same-sex relationships suffer discriminatory effects and violations of dignity and privacy and that such violations should be removed. It contended, however, that granting same-sex couples

[28] As contemplated by section 167(6) of the Constitution, which reads:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court–
> (a) to bring a matter directly to the Constitutional Court; or
> (b) to appeal directly to the Constitutional Court from any other court."

access to common law marriage is not the answer, constitutionally or otherwise. Appropriate relief from the discriminatory consequences, invasions of privacy and dignity involves

> "an exercise of coherent, all embracing law making, which may have to overtake and undo existing Constitutional Court decisions. It may therefore be counterproductive for the [Constitutional Court] to make far-reaching revision of the common law by redefining marriage in this case."

It followed, the state contended, that the Equality Project was incorrect in seeking an order from this Court declaring the common law definition of marriage and the prescribed marriage formula in section 30(1) of the Marriage Act to be unconstitutional. Any previous concession on behalf of government that the exclusion of same-sex couples from marriage was unconstitutional, was retracted. Should the Court find, however, that the exclusion was unconstitutional, the state argued in the alternative that any order of invalidity should be suspended to enable Parliament, after extensive public debate, to deal with the matter through appropriate legislation. The relief sought, the state contended, went beyond the powers of the Court.

Amici curiae

[37] Prior to the hearing, applications were made by Doctors For Life International and its legal representative Mr John Smyth, to be admitted as amici curiae. They sought to lead further evidence and to make written submissions, while Mr Smyth in addition requested leave to make oral submissions. Their application to adduce

further evidence was refused, but they were granted leave to make written submissions and Mr Smyth was authorised to address the Court orally.

[38] Application to be admitted as amicus curiae was also made by the Marriage Alliance of South Africa, supported on affidavit by Cardinal Wilfred Napier. The application, which included a request for the right to make both written and oral representations, was granted.

The application for direct access in the Equality Project matter

[39] The application by the Equality Project for direct access to this Court was resisted by the state, and requires special consideration. This Court has frequently stated that as a general rule it should not act as a court of first and final instance in relation to constitutional matters that may be heard in other courts.[29] In *Mkontwana*[30] Yacoob J emphasised that the importance and complexities of the issues raised in an application for direct access would weigh heavily against this Court being a court of first and final instance.[31] Not only is the jurisprudence of this Court greatly enriched by being able to draw on the considered opinion of another court. Proper evidential foundations, where appropriate, can be laid. Issues, both in relation to substantive law

---

[29] Section 167(4) of the Constitution sets out the circumstances where this Court alone may hear certain matters. Other constitutional matters may first be heard in a high court [section 169(a)(i)] and on appeal in the SCA [section 168(3)].

[30] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu Natal Law Society and Msunduzi Municipality as amici curiae)* 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

[31] Id at para 11.

and appropriate orders to be made, are crystallised out for focused research and attention. There is no doubt, therefore, that a judgment by the High Court on the application made to it by the Equality Project would be of great assistance.

[40] At the same time it has to be borne in mind that the hearing in the High Court would only take place next year. The broad question of the right of same-sex couples to marry is already before us in the *Fourie* matter. It was first considered in the High Court and then in a comprehensive judgment of the SCA. Although the challenge to section 30(1) of the Marriage Act as such was not before the SCA, the SCA devoted considerable attention to interpreting its terms and evaluating its significance in relation to the common law. Furthermore, there has been no suggestion that evidence of significance to the outcome would or could have been led in the High Court in the *Equality Project* matter. The issues are matters of law which fall to be determined in a social context that has already frequently been dealt with by this Court.

[41] In *Bhe*[32] this Court was confronted with a not dissimilar situation. When considering separate applications for orders of constitutional invalidity made by the Cape High Court and the Pretoria High Court respectively,[33] it was asked also to consider an application by the South African Human Rights Commission and the

[32] *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as amicus curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

[33] Both courts found certain sections of the Black Administration Act 38 of 1927, and the Intestate Succession Act 81 of 1987, as well as a regulation of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R200) published in Government Gazette No. 10601, to be unconstitutional.

Women's Legal Centre Trust[34] for direct access seeking relief that was wider than that granted in the Cape and Pretoria High Courts. In granting direct access Langa DCJ said:

> "The submissions sought to be made by the applicants relate to substantive issues that were already before the Court. The direct access application, however, quite helpfully broadens the scope of the constitutional investigation, given the need to deal effectively with the unwelcome consequences of the Act in the shortest possible time. The application further adds fresh insights on difficult issues, including the question of the appropriate remedy.
>
> From the description of the two applicants, it is clear that they are both eminently qualified to be part of the debate on the issues before the Court. By reason of the above considerations, this Court concluded that it was in the interests of justice that the application for direct access should be granted."[35]

[42] In the present matter, the appeal from the SCA decision in the *Fourie* matter is already before us. The direct access application fills a gap in the *Fourie* case referred to by the High Court, this Court and the SCA. The common law in relation to marriage has been overtaken by statute in a great number of respects. To deal with it as if the Marriage Act did not exist would be highly artificial and abstract. The overlap between the issues raised and their strong interconnectedness requires them to be dealt with in an integrated and comprehensive fashion. There would be grave disadvantages to all concerned if the issues raised were to be decided in a piecemeal way.

---

[34] Acting in their own interest as well as in the public interest.

[35] Above n 32 at paras 33-4.

[43] In opposing direct access the state did not contend that the High Court should first pronounce on the matter, but rather fired the first salvos of its new approach to the substantive issues raised. Its contentions will be dealt with in the course of this judgment, and it will suffer no prejudice from having the two matters consolidated. On the contrary, like all the parties it will gain from having the pieces of the puzzle placed together as would happen if the application for direct access is granted.

[44] In essence the enquiry into the common law definition of marriage and the constitutional validity of section 30(1) of the Marriage Act is the same. Are gay and lesbian people unfairly discriminated against because they are prevented from achieving the status and benefits coupled with responsibilities which heterosexual couples acquire from marriage? If they are, both the common law definition as well as section 30(1) must have the effect of limiting the rights contained in section 9 of the Constitution. If not, both will be good. It must be emphasised that it is not possible for one of the two provisions concerning marriage that are under attack in this case to be consistent with the Constitution, and for the other to be constitutionally invalid. In the circumstances, a refusal to consider both together would amount to no more than technical nicety. In the circumstances of this case, therefore, it is clearly in the interests of justice that the application for direct access be granted and that the *Fourie* and the *Equality Project* matters be heard together.[36]

[36] At the hearing counsel for the Minister of Home Affairs raised a preliminary challenge to the competence on the papers before it of the SCA to develop the common law. He pointed to the fact that in their notice of motion the applicants had merely asked for a declarator that stated that they had a right to marry, and that went on to require the responsible officials to marry them. In their founding affidavits, however, the applicants clearly referred to the need to develop the common law so as to enable same-sex couples to marry. The case brought by the applicants concerning the common law, and the one launched by the Equality Project challenging the statute as well, are being dealt with together in this Court. The state suffered no prejudice as a result of the way the

II. THE ISSUES

[45] At the hearing two broad and interrelated questions were raised: The first was whether or not the failure by the common law and the Marriage Act to provide the means whereby same-sex couples can marry, constitutes unfair discrimination against them. If the answer was that it does, the second question arose, namely, what the appropriate remedy for the unconstitutionality should be. These are the central issues in this matter, and I will start with the first.

Does the law deny equal protection to and discriminate unfairly against same-sex couples by not including them in the provisions of the Marriage Act?

[46] Counsel for the Minister of Justice argued that the Constitution did not protect the right to marry. It merely guaranteed to same-sex couples the right to establish their own forms of family life without interference from the state. This was a negative liberty, not to be equated with a right to be assimilated into the institution of marriage, which in terms of its historic genesis and evolution, was heterosexual by nature. International law recognised and protected marriage as so understood. Same-sex couples accordingly had no constitutional right to enter into or manipulate that institution. If their form of family life suffered from particular disadvantages, then these should be dealt with by appropriate legal remedies in response to each of the identified problems, not by entry into the global set of rights and entitlements

---

issues were formally presented at the outset of the *Fourie* application. Its preliminary objection cannot be sustained.

established by marriage. Marriage law appropriately confined itself to marriage, it was contended, and not to all forms of family relationship.

[47] The initial proposition of the state's argument is undoubtedly correct inasmuch as the Bill of Rights does not expressly include a right to marry. It does not follow, however, that the Constitution does nothing to protect that right, and with it, the concomitant right to be treated equally and with dignity in the exercise of that right. Explaining why the right to marry had not been expressly included in the text of the Constitution as produced by the Constitutional Assembly, this Court in the *First Certification* case[37] pointed out that families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that Constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms.[38] This avoids questions that relate to the history, culture and special circumstances of each society.[39] At the same time, the provisions of the constitutional text would clearly prohibit any arbitrary state interference with the right to marry or to establish and raise a family.[40] The text enshrined the values of human dignity, equality and freedom.[41] However these words might come to be interpreted in the future, the judgment said, it was evident that laws

[37] *Certification of the Constitution of the Republic of South Africa, 1996, In Re: Ex parte Chairperson of the Constitutional Assembly 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

[38] Id at para 99.

[39] Id

[40] Id at para 100.

[41] Id

or executive action resulting in enforced marriages, or oppressive prohibitions on marriage or the choice of spouses, would not survive constitutional challenge.[42]

[48] The way the words dignity, equality and privacy later came to be interpreted by this Court showed that they in fact turned out to be central to the way in which the exclusion of same-sex couples from marriage came to be evaluated. In a long line of cases, most of which were concerned with persons unable to get married because of their sexual orientation, this Court highlighted the significance for our equality jurisprudence of the concepts and values of human dignity, equality and freedom. It is these cases that must serve as the compass that guides analysis in the present matter, rather than the references made in argument to North American polemical literature or to religious texts.

[49] Although the *Sodomy* case, which was the first in the series, did not deal with access to marriage as such, it highlighted the seriously negative impact that societal discrimination on the ground of sexual orientation has had, and continues to have, on gays and same-sex partnerships. It concluded that gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage.[43]

---

[42] Id

[43] The *Sodomy* case above n 6 at paras 20-7.

[50] This Court stated later in the *Home Affairs* case[44] dealing with same-sex immigrant partners that although the main focus of the *Sodomy* judgment was on the criminalisation of sodomy and on other proscriptions of erotic expression between men, the conclusions regarding the minority status of gays and the patterns of discrimination to which they had been and continued to be subjected were also applicable to lesbians. The sting of past and continuing discrimination against both gays and lesbians was the clear message that it conveyed, namely, that they, whether viewed as individuals or in their same-sex relationships, did not have the inherent dignity and were not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurred at a deeply intimate level of human existence and relationality. It denied to gays and lesbians that which was foundational to our Constitution and the concepts of equality and dignity, which at that point were closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerated into a denial of humanity and led to inhuman treatment by the rest of society in many other ways. This was deeply demeaning and frequently had the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays. The Court went on to hold that it had recognised that the more vulnerable the group adversely affected by the discrimination, the more likely the discrimination would be

[44] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC). (The *Home Affairs* case.) At para 42.

held to be unfair.[45] Vulnerability in turn depended to a very significant extent on past patterns of disadvantage, stereotyping and the like.[46]

[51] The issue in the *Home Affairs* case was the discriminatory impact of a provision of immigration law that gave special protection to foreigners married to South Africans, while ignoring same-sex life partners. The case accordingly has very direct relevance to the present one. The pertinent question was the impact on same-sex life partners of being excluded from the relevant provisions. The judgment pointed out that under South African common law a marriage creates a physical, moral and spiritual community of life, a consortium omnis vitae described as

> ". . . an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage. . . . These embrace intangibles, such as loyalty and sympathetic care and affection, concern . . . as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in a support-generating business. . . ."[47]

[52] It was important to emphasise, the Court continued, that over the past decades an accelerating process of transformation had taken place in family relationships, as well as in societal and legal concepts regarding the family and what it comprises. The Court cited Sinclair and Heaton for the proposition that

[45] Id at para 44.

[46] Id

[47] Id at para 46, where Ackermann J quoted Erasmus J in *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) at 9G.

> ". . . the current period of rapid change seems to 'strike at the most basic assumptions' underlying marriage and the family.
>
> . . .
>
> Itself a country where considerable political and socio-economic movement has been and is taking place, South Africa occupies a distinctive position in the context of developments in the legal relationship between family members and between the State and the family. Its heterogeneous society is 'fissured by differences of language, religion, race, cultural habit, historical experience and self-definition' and, consequently, reflects widely varying expectations about marriage, family life and the position of women in society."[48] (Footnotes omitted.)

The impact of the exclusion of lesbians and gays by the provision in question was to reinforce harmful and hurtful stereotypes.[49] Underlying these stereotypes, the Court continued, lay misconceptions derived from the fact that the sexual orientation of lesbians and gays was such that they had an erotic and emotional affinity for persons of the same sex.[50] This resulted in classifying lesbians and gays as exclusively sexual beings, reduced to one-dimensional creatures "defined by their sex and sexuality."[51]

[53] The judgment sums up what it calls the facts concerning gays and lesbians as follows:

---

[48] *Home Affairs* above n 44 at para 47.

[49] Id at para 49.

[50] Id

[51] The judgment cites Timothy E Lin "Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases":

> "[T]here is the story of lesbians and gays that centres on their sexuality. Whether because of disgust, confusion, or ignorance about homosexuality, lesbian and gay sexuality dominates the discourse of not only same-sex adoption, but all lesbian and gay issues. The classification of lesbians and gays as 'exclusively sexual beings' stands in stark contrast to the perception of heterosexual parents as 'people who, along with many other activities in their lives, occasionally engage in sex.' Through this narrative, lesbians and gays are reduced to one-dimensional creatures, defined by their sex and sexuality." (Footnote omitted.) *Home Affairs* above n 44 at para 49.

> "(i) Gays and lesbians have a constitutionally entrenched right to dignity and equality;
> (ii) sexual orientation is a ground expressly listed in s 9(3) of the Constitution and under s 9(5) discrimination on it is unfair unless the contrary is established;
> (iii) prior criminal proscription of private and consensual sexual expression between gays, arising from their sexual orientation and which had been directed at gay men, has been struck down as unconstitutional;
> (iv) gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, eros and charity;
> (v) they are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household;
> (vi) they are individually able to adopt children and in the case of lesbians to bear them;
> (vii) in short, they have the same ability to establish a *consortium omnis vitae*;
> (viii) finally, . . . they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses."[52]

[54] The provision in question stated in effect that persons in same-sex relationships were not entitled to the benefit extended to married spouses in order to protect their family and family life. This was so notwithstanding that the family and family life were in all significant respects indistinguishable from those of spouses and in human terms as important to gay and lesbian same-sex partners as they were to spouses.

> "The message and impact are clear. Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent

[52] *Home Affairs* above n 44 at para 53.

> humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians."[53]

The judgment adds that protecting the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership.[54]

[55] Having pronounced unambiguously on the issues before it, the judgment goes on to say that it expressly leaves open two questions, the first relating to the position of unmarried partners in permanent heterosexual relationships, and the second "whether, or to what extent, the law ought to give formal institutional recognition to same-sex partnerships".[55] In other words, it stopped short of considering whether some form of global or umbrella institutional recognition should be given to same-sex partnerships, an issue which had not been raised in that matter and was not before it, but which is before us.

[56] In *Satchwell*,[56] the issue was whether the non-inclusion of same-sex partners in a statute providing pension rights to the surviving spouses of Judges was

---

[53] Id at para 54.

[54] Id at para 55.

[55] Id at para 60.

[56] *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

discriminatory. Madala J pointed out that marriage was a matter of profound importance to the parties, and indeed to their families, and was of great social value and significance.[57] Historically, however, our law had only recognised marriages between heterosexual spouses, and this narrowness of focus had excluded many relationships which created similar obligations and had a similar social value.[58] Inasmuch as the provisions in question afforded benefits to spouses but not to same-sex partners who had established a permanent life relationship similar in other respects to marriage, including accepting the duty to support one another, such provisions, he held, constituted unfair discrimination.[59]

[57] In *Du Toit*,[60] the issue flowed from a provision in child care legislation which confined the right to adopt children jointly to married couples. Holding that the exclusion of same-sex life partners conflicted both with the best interests of the child and the right to dignity of same-sex couples, Skweyiya AJ emphasised that family life as contemplated by the Constitution could be provided in different ways, and that legal conceptions of the family and what constituted family life should change as social practices and traditions changed.[61] He pointed out further that it was a matter of our history, and that of many countries, that same-sex relationships had been the

---

[57] Id at para 22.

[58] Id

[59] Id at para 23.

[60] *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC).

[61] Id at para 19.

subject of unfair discrimination in the past.[62] The Constitution required that unfairly discriminatory treatment cease. It was significant that there had been a number of recent cases, statutes and government consultation documents in South Africa which broadened the scopes of 'family', 'spouse' and 'domestic relationship' to include same-sex life partners.[63] These legislative and jurisprudential developments indicated the growing recognition afforded to same-sex relationships.[64]

[58] Similar reasoning was followed in *J*,[65] which concerned the parental rights of permanent same-sex life partners in cases where one of the partners was artificially inseminated. Confirming an order to read in the words "permanent same-sex life partner" after the word "husband" wherever it appeared in the relevant section, Goldstone J made the following observation which is relevant to the present matter:

> "Comprehensive legislation regularising relationships between gay and lesbian persons is necessary. It is unsatisfactory for the Courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation."[66]

The right to be different

---

[62] Id at para 32.

[63] Id

[64] Id

[65] *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC).

[66] Id at para 23.

[59] This Court has thus in five consecutive decisions highlighted at least four unambiguous features of the context in which the prohibition against unfair discrimination on grounds of sexual orientation must be analysed. The first is that 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.[67] The second is the existence of an imperative constitutional need to acknowledge the long history in our country and abroad of marginalisation and persecution of gays and lesbians, that is, of persons who had the same general characteristics as the rest of the population, save for the fact that their sexual orientation was such that they expressed erotic desire and affinity for individuals of their own sex, and were socially defined as homosexual. The third is that 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. Finally, 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 by all for all. Small gestures in favour of

[67] See further the Introduction by myself to Eekelaar and Nhlapo (eds) *The Changing Family: Family Forms and Family Law* (Juta, Cape Town, 1998) at xi:

> "[A]s far as family law is concerned, we in South Africa have it all. We have every kind of family: extended families, nuclear families, one-parent families, same-sex families, and in relation to each one of these there are [controversies, difficulties] and cases coming before the courts or due to come before the courts. This is the result of ancient history and recent history. I am not proposing to go through the few hundred thousand years ever since Lucy [the African common ancestor of all humanity], but one can say that family law in South Africa or the problems of family law are the product of the way our subcontinent was peopled, the way we were colonised, the way the colonists were subsequently colonised, the way we were separated and the way we came together again. Our families are suffused with history, as family law is suffused with history, culture, belief and personality. For researchers it's a paradise, for judges a purgatory."

equality, however meaningful, are not enough. In the memorable words of Mahomed J:

> "In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."[68]

[60] A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality.[69] Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference

---

[68] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262.

[69] *Sodomy* case above n 6 at para 129.

brings to any society.[70] The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are.[71] The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.[72] Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.

[70] Id

[71] Minow argues that equality for those deemed different is precluded by five unstated and unacceptable assumptions namely that: difference is intrinsic not a comparison; the norm need not be stated; the observer can see without a perspective; other perspectives are irrelevant; and the status quo is natural, uncoerced and good. Her focus was principally on disability rights, but the critique would seem to apply to the manner in which gay and lesbian conduct has been characterised. Minow *Making all the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, Ithaca and London, 1990) at 53-74.

[72] See the *Sodomy* case above n 6 at para 135.

[61] As was said by this Court in *Christian Education*[73] there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different".[74] In each case, space has been found for members of communities to depart from a majoritarian norm. The point was made in *Christian Education* that these provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern. For present purposes it needs to be added that acknowledgement of the diversity that flows from different forms of sexual orientation will provide an extra and distinctive thread to the national tapestry. The strength of the nation envisaged by the Constitution comes from its capacity to embrace all its members with dignity and respect. In the words of the Preamble, South Africa belongs to all who live in it, united in diversity. What is at stake in this case, then, is how to respond to legal arrangements of great social significance under which same-sex couples are made to feel like outsiders who do not fully belong in the universe of equals.

[73] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) 1051 (CC) at para 24.

[74] Id at para 24. See too *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 146-7, and the *Sodomy* case above n 6 at paras 107 and 134-5.

[62] These may seem purely abstract statements. Yet the impact of the legal void in which same-sex couples are compelled to live is real, intense and extensive. To appreciate this it is necessary to look precisely at what it is that the law offers to heterosexual couples, and, conversely, at what it denies to same-sex couples. Such scrutiny establishes that the consequences of the total exclusion of same-sex couples from the solemnities and consequences of marriage are far from academic, as the following section shows.

The significance of marriage and the impact of exclusion from it

[63] It is true that marriage, as presently constructed under common law, constitutes a highly personal and private contract between a man and a woman in which the parties undertake to live together, and to support one another. Yet the words 'I do' bring the most intense private and voluntary commitment into the most public, law-governed and state-regulated domain.[75]

[64] Though freely entered into by the parties, marriage must be undertaken in a public and formal way and once concluded it must be registered. Formalities for the celebration of a marriage are strictly set out in the Marriage Act. A marriage must be conducted by a marriage officer, to whom objections may be directed. If objections to the marriage are lodged, the marriage officer must satisfy herself or himself that there are no legal obstacles to the marriage. Those wishing to get married must produce copies of their identity documents, or alternatively make affidavits in the prescribed

[75] The summary that follows below is reproduced (without footnotes) from the judgment of Mokgoro and O'Regan JJ in *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at paras 112-8.

form. Marriages must take place in a church or other religious building, or in a public office or home, and the doors must be open. Both parties must be present as well as at least two competent witnesses. A particular formula for the ceremony is provided in the Marriage Act, but other formulae, such as religious rites, may be approved by the Minister. Once the marriage has been solemnised, both spouses, at least two competent witnesses, and the marriage officer must sign the marriage register. A copy of the register must then be transmitted to the Department of Home Affairs to be officially recorded. These formalities make certain that it is known to the broader community precisely who gets married and when they get married. Certainty is important for the broader community in the light of the wide range of legal implications that marriage creates. Marriage is thus taken seriously not only by the parties, their families and society, but by the state.

[65] One of the most important invariable consequences of marriage is the reciprocal duty of support. It is an integral part of the marriage contract and has immense value not only to the partners themselves but to their families and also to the broader community. The duty of support gives rise to the special rule that spouses, even those married out of community of property, can bind one another to third parties in relation to the provision of household necessaries which include food, clothing, and medical services. The law sees the spouses as life partners and jointly and severally responsible for the maintenance of their common home. This obligation may not be excluded by antenuptial contract. Another invariable legal consequence of the marriage is the right of both parties to occupy the joint matrimonial home. This

obligation is clearly based on the premise that spouses will live together. The party who owns the home may not exclude or evict the other party from the home. Limited exceptions to this rule have been created under the Domestic Violence Act.[76]

[66] The way in which the marriage affects the property regime of the parties to the marriage is variable at common law. The ordinary common law regime is one of community of property including profit and loss in terms of which the parties to a marriage share one joint estate which they manage jointly. Historically, of course, our common law provided that the power to manage the estate ('the marital power') vested in the husband. This rule was altered by statutory intervention in 1984. Major transactions affecting the joint estate must now be carried out with the concurrence of both parties.[77]

[67] Marriage also produces certain invariable consequences in relation to children. Children born during a marriage are presumed to be children of the husband. Both parents have an ineluctable duty to support their children (and children have a reciprocal duty to support their parents). The duty to support children arises whether the children are born of parents who are married or not.

[68] The law also attaches a range of other consequences to marriage – for example, insolvency law provides that where one spouse is sequestrated, the estate of the other

[76] Act 116 of 1998. Interestingly, the Act is unusual in modern statutes in that it not only extends its provisions to life partners generally, but expressly includes same-sex partnerships within its ambit. See section 1(b).

[77] Section 15 of the Matrimonial Property Act 88 of 1984.

spouse also vests in the Master in certain circumstances, the law of evidence creates certain rules relating to evidence by spouses against or for one another,[78] and the law of delict recognises damages claims based on the duty of support.

[69] It should be added that formalisation of marriages provides for valuable public documentation. The parties are identified, the dates of celebration and dissolution are stipulated, and all the multifarious and socially important steps which the public administration is required to make in connection with children and forward planning, are facilitated. Furthermore, the commitment of the parties to fulfil their responsibilities is solemnly and publicly undertaken. This is particularly important in imposing clear legal duties on the party who is in the stronger position economically. Marriage stabilises relationships by protecting the vulnerable partner and introducing equity and security into the relationship.

[70] Marriage law thus goes well beyond its earlier purpose in the common law of legitimising sexual relations and securing succession of legitimate heirs to family property. And it is much more than a mere piece of paper.[79] As the SALRC Paper comments, the rights and obligations associated with marriage are vast. Besides other important purposes served by marriage, as an institution it was (at the time the SALRC Paper was produced) the only source of socio-economic benefits such as the

[78] *Volks* above n 75 at para 117.

[79] Id, see judgment of Skweyiya J at paras 53 and 59, and judgment of Ngcobo J at para 93.

right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights.[80]

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

[72] It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. To begin with, they are not entitled to celebrate their commitment to each other in a joyous public event recognised by the law. They are obliged to live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in

[80] In this respect it should be borne in mind that since the abolition of the patriarchal powers once vested by the common law in the husband, spouses enjoy equality in marriage. Same-sex marriages therefore would not be required to replicate between the partners the formerly unequal or divergently stereotyped roles of husband and wife in marriage. The achievement of heterosexual equality thus removed a potentially serious barrier to homosexual equality. In all material respects, then, sexual orientation survives as a neutral factor as far as the conjugal family law interests are concerned. See also the judgment of Farlam JA, *Fourie* (SCA) above n 12 at para 122.

our culture. It may be that, as the literature suggests,[81] many same-sex couples would abjure mimicking or subordinating themselves to heterosexual norms. Others might wish to avoid what they consider the routinisation and commercialisation of their most intimate and personal relationships, and accordingly not seek marriage or its equivalence.[82] Yet what is in issue is not the decision to be taken, but the choice that is available. 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

---

[81] For example De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* Roederer and Moellendorf (eds) (Juta, Cape Town, 2004) at 349-50, raises the question of why the state should provide special legal recognition to only those relationships which conform to a heterosexual stereotype, thereby further marginalising and oppressing those whose relationships are less traditional in form. See also Cheshire Calhoun *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (Oxford University Press, Cape Town, 2000) at 113, who points out that the argument that same-sex marriage rights depend on the view that the state ought to promote one normative ideal for intimacies, plays directly into queer theorists' and lesbian feminists' worst fears:

> "Queer theorists worry that pursuing marriage rights is assimilationist, because it rests on the view that it would be better for gay and lesbian relationships to be as much like traditional heterosexual intimate relationships as possible. To pursue marriage rights is to reject the value of pursuing possibly more liberating, if less conventional, sexual, affectional, care-taking, and economic intimate arrangements. Feminists worry that pursuing marriage rights will have the effect of endorsing gender-structured heterosexual marriage . . . ."

[82] The literature suggests, however, that most gay people in South Africa dream of getting married. See Gevisser "Mandela's stepchildren: homosexual identity in post-apartheid South Africa" in *Different Rainbows* Peter Drucker (ed) (Gay Men's Press, London, 2000) at 135. For many the dream is attenuated by present reality. See Ruth Morgan and Saskia Wieringa *Tommy Boys, Lesbian Men and Ancestral Wives: Female same-sex practices in Africa* (Jacana, Johannesburg, 2005) at 321. Writing about gay identity in a black township on the outskirts of Ermelo, Reid "'A man is a man completely and a wife is a wife completely': Gender classification and performance amongst 'ladies' and 'gents' in Ermelo, Mpumalanga" in *Men Behaving Differently* Graeme Reid and Liz Walker (eds) (Double Storey, Cape Town, 2005) write that

> "[s]ame-sex engagement and marriage ceremonies which take place in the region are events where traditions are both evoked and reinvented. They constitute significant social occasions where the performance of gender is enacted in a particular, ritualised way. These events are also topics for seemingly endless speculation, rumour, gossip and fantasy." (At 221.)

He goes on to write that that while Bhuti (one of his informants) may have fantasised about a white wedding and honeymoon, Zakhi aspired towards a more traditionally African engagement and wedding ceremony, which includes lobola negotiations between the families and an umhlambiso engagement followed by a white wedding.

> "Marriage signals a pinnacle of social acceptance and equality before the law. The fact that individuals are getting married in spite of the law suggests that social acceptance and the quest for respectability is a primary motivating factor."

One organiser complained that in gay weddings there was far too much emphasis placed on superficial things such as rings, food and especially clothing at the expense of more substantial issues such as the quality of the relationship. (At 223.)

and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.[83]

[73] Equally important as far as family law is concerned, is the right of same-sex couples to fall back upon state regulation when things go wrong in their relationship. Bipolar by its very nature, the law of marriage is invoked both at moments of blissful creation and at times of sad cessation. There is nothing to suggest that same-sex couples are any less affected than are heterosexual ones by the emotional and material consequences of a rupture of their union. The need for comprehensive judicial regulation of their separation or divorce, or of devolution of property, or rights to maintenance or continuation of tenancy after death, is no different. Again, what requires legal attention concerns both status and practical regulation.

[74] The law should not turn its back on any persons requiring legal support in times of family breakdown. It should certainly not do so on a discriminatory basis; the antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a

---

[83] The literature also indicates that the gay and lesbian experience in South Africa is extremely varied. Thus in the Introduction to *Sex and Politics in South Africa* Hoad, Martin and Reid (ed) (Double Storey, Cape Town, 2005), Hoad writes:

> "Letties, moffies, stabanes, skesanas, injongas . . . make their own history but under conditions that are not of their making. Our list of identifying terms is far from comprehensive and each item on that list indicates a different configuration of identity, desire, practice, possibility, held together by the phrase 'sexual orientation' in the South African Constitution – the meaning of which is continually being revised by the South African courts."

He adds that significant legislative victories have been won, also affecting the meaning of the phrase. (At 19.)

half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, and the third with varying degrees of denial, shame or embarrassment. Similarly, the fact that the law today embodies conventional majoritarian views in no way mitigates its discriminatory impact. It is precisely those groups that cannot count on popular support and strong representation in the legislature that have a claim to vindicate their fundamental rights through application of the Bill of Rights.

Equal protection and unfair discrimination

[75] It is convenient at this stage to restate the relevant provisions of the Constitution. Section 9(1) provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

It is clear that the exclusion of same-sex couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes a denial to them of their right to equal protection and benefit of the law.

[76] It is equally evident that same-sex couples are not afforded equal protection not because of oversight, but because of the legacy of severe historic prejudice against them. Their omission from the benefits of marriage law is a direct consequence of prolonged discrimination based on the fact that their sexual orientation is different

from the norm. This result is in direct conflict with section 9(3) of the Constitution, which states:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[77] Some minorities are visible, and suffer discrimination on the basis of presumed characteristics of the group with which they are identified. Other minorities are rendered invisible inasmuch as the law refuses them the right to express themselves as a group with characteristics different from the norm.[84] In the present matter, the unfair discrimination against same-sex couples does not flow from any express exclusion in the Marriage Act. The problem is that the Marriage Act simply makes no provision for them to have their unions recognised and protected in the same way as it does for those of heterosexual couples. It is as if they did not exist as far as the law is concerned. They are implicitly defined out of contemplation as subjects of the law.

[78] Sections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment or stigmatisation. They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by

[84] De Vos recounts the joke that an African-American does not have to come home and say: "Mommy, Daddy, there's something I've got to tell you – I'm black." Above n 81 at 339.

the law. Their love that was once forced to be clandestine, may now dare openly to speak its name. The world in which they live and in which the Constitution functions, has evolved from repudiating expressions of their desire to accepting the reality of their presence, and the integrity, in its own terms, of their intimate life. Accordingly, taking account of the decisions of this Court, and bearing in mind the symbolic and practical impact that exclusion from marriage has on same-sex couples, there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree. The effect has been wounding and the scars are evident in our society to this day. By both drawing on and reinforcing discriminatory social practices, the law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples. Although considerable progress has been made in specific cases through constitutional interpretation, and, as will be seen, by means of legislative intervention, the default position of gays and lesbians is still one of exclusion and marginalisation. The common law and section 30(1) of the Marriage Act continue to deny to same-sex couples equal protection and benefit of the law, in conflict with section 9(1) of the Constitution, and taken together result in same-sex couples being subjected to unfair discrimination by the state in conflict with section 9(3) of the Constitution.

[79] At the very least, then, the applicants in both matters are entitled to a declaration to the effect that same-sex couples are denied equal protection of the law under section 9(1), and subjected to unfair discrimination under section 9(3) of the

Constitution, to the extent that the law makes no provision for them to achieve the dignity, status, benefits and responsibilities available to heterosexual couples through marriage. The question that then has been posed is whether the traditional law of marriage is itself constitutionally defective, or whether the solution must necessarily be found outside of it.

Marriage and recognition of same-sex unions

[80] I will now deal with the contention that respect for the traditional institution of marriage requires that any recognition of same-sex unions must be accomplished outside of the law of marriage. The applicants submitted that as a matter of simple logic flowing from the above analysis, the Marriage Act is inconsistent with the Constitution and must be declared to be invalid to the extent that it makes no provision for same-sex couples to enjoy the status, entitlements and responsibilities which it accords to heterosexual couples. The state and amici, however, argued that the fault in not furnishing same-sex couples with the possibility of regularising and giving legal effect to their unions, lay outside the Marriage Act itself. Instead, they contended, it stemmed from the failure of the law to provide an appropriate remedial mechanism that was alternative and supplementary to the Marriage Act.

[81] There is an immediate answer to this proposition. A law that creates institutions which enable heterosexual couples to declare their public commitment to each other and achieve the status, entitlements and responsibilities that flow from marriage, but does not provide any mechanism for same-sex couples to achieve the

same, discriminates unfairly against same-sex couples. It gives to the one and not to the other. The instruments created by the legal system exclude from their reach persons entitled to be protected by them. It is those instruments that stand to be identified as being inconsistent with the Constitution, and not 'the law' as an abstraction. The law must be measured in the context of what is provided for by the legal system as a whole. In this respect, exclusion by silence and omission is as effective in law and practice as if effected by express language. Same-sex unions continue in fact to be treated with the same degree of repudiation that the state until two decades ago reserved for interracial unions; the statutory format might be different, but the effect is the same. The negative impact is not only symbolic but also practical, and each aspect has to be responded to. Thus, it would not be sufficient merely to deal with all the practical consequences of exclusion from marriage. It would also have to accord to same-sex couples a public and private status equal to that which heterosexual couples achieve from being married.

[82] The conclusion is that when evaluated in the context of the legal regime as a whole, the common law definition and section 30(1) are under-inclusive and unconstitutional to the extent that they make no appropriate provision for gay and lesbian people to celebrate their unions in the same way that they enable heterosexual couples to do.

[83] The matter does not end there, however. The state and the amici contend that even if the Marriage Act and common law are under-inclusive, the remedy is not to be

found in tampering with them but in providing an appropriate alternative. Thus, they argue, given that there is discrimination against same-sex couples, and accepting that the results may be harsh and need to be corrected, the remedy does not lie in radically altering the law of marriage, which by its very nature and as it has evolved historically is concerned with heterosexual relationships. The answer, they say, is to provide appropriate alternative forms of recognition to same-sex family relationships. Several alternative arguments in support of this proposition were advanced by the state and the amici. What they have in common is an objection to any remedial measures being assimilated into the traditional institution of marriage, or permitting the unions of same-sex couples to be referred to as marriages. They submit that whatever remedy the state adopts cannot include altering the definition of marriage as contained in the common law and as expressed in section 30(1) of the Marriage Act.

[84] Four main propositions were advanced in support of the proposition that whatever remedy is adopted, it must acknowledge the need to leave traditional marriage intact. There was some overlap between the arguments but for convenience they may be identified as: the procreation rationale; the need to respect religion contention; the recognition given by international law to heterosexual marriage argument; and the necessity to have recourse to diverse family law systems contained in section 15 of the Constitution submission. I consider each in turn.

The procreation argument

[85] The Marriage Alliance, with the support of Cardinal Napier, contended that an essential, constitutive and definitional characteristic of marriage is its procreative potential. The affidavit by Cardinal Napier asserts that marriage institutionalises and symbolises, as it has done across millennia and societies, the inherently procreative relationship between a man and a woman, and it should be protected as such. Lacking such procreative potential same-sex unions could never be regarded as marriages, whatever other form of legal recognition could be given to them.

[86] This very argument was considered in *Home Affairs*. The Court held in that matter that however persuasive procreative potential might be in the context of a particular religious world-view, from a legal and constitutional point of view, it is not a defining characteristic of conjugal relationships. To hold otherwise would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations or the capacity to conceive. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. It is even demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.[85]

[85] Per Ackermann J in *Home Affairs* above n 44 at para 51.

[87] It is clear, then, that the procreation argument cannot defeat the claim of same-sex couples to be accorded the same degree of dignity, concern and respect that is shown to heterosexual couples. More particularly, it cannot prevail in the face of the claim of same-sex couples to be accorded the status, entitlements, and responsibilities which heterosexual couples receive through marriage. It cannot be an insuperable bar to the claims advanced by the applicants.

Respect for religion arguments

[88] The two amici submitted a number of arguments from an avowedly religious point of view in support of the view that by its origins and nature, the institution of marriage simply cannot sustain the intrusion of same-sex unions. The corollary is that such unions can never be regarded as marriages, or even marriage-like or equivalent to marriages. To disrupt and radically alter an institution of centuries-old significance to many religions, would accordingly infringe the Constitution by violating religious freedom in a most substantial way.

[89] Their arguments raise important issues concerning the relationship foreshadowed by the Constitution between the sacred and the secular. They underline the fact that in the open and democratic society contemplated by the Constitution, although the rights of non-believers and minority faiths must be fully respected, the religious beliefs held by the great majority of South Africans must be taken seriously. As this Court pointed out in *Christian Education*, freedom of religion goes beyond protecting the

inviolability of the individual conscience.[86] For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. Such belief affects the believer's view of society and founds a distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries. For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation.[87]

[90] Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes.[88] They command ethical behaviour from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse

[86] *Christian Education* above n 73 at para 36.

[87] Id at para 37.

[88] Id at para 33.

and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a people's temper and culture, and for many believers a significant part of their way of life.[89] Religious organisations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.

[91] Furthermore, in relation to the extensive national debates concerning rights for homosexuals, it needs to be acknowledged that though religious strife may have produced its own forms of intolerance, and religion may have been used in this country to justify the most egregious forms of racial discrimination, it would be wrong and unhelpful to dismiss opposition to homosexuality on religious grounds simply as an expression of bigotry to be equated to racism. As Ackermann J said in the *Sodomy* case:

> "The issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would not wish to have the physical expression of sexual orientation differing from their own proscribed by the law."[90]

[89] Id at para 33 referring to the comments in this Court in *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) at paras 49 and 52. See also *S v Lawrence; S v Negal; S v Solberg* above n 74 at paras 146-7; *Sodomy* above n 6 at paras 107 and 134-5.

[90] *Sodomy* above n 6 at para 38.

[92] It is also necessary, however, to highlight his qualification:

> "It is nevertheless equally important to point out that such views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation."[91]

It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies.

[93] One respects the sincerity with which Mr Smyth cited passages in the Old and New Testaments in support of his argument that what he referred to as a change in the definition of marriage would discriminate against persons who believed that marriage was a heterosexual institution ordained of God, and who regarded their marriage vows as sacred. Yet for the purpose of legal analysis, such appreciation would not imply accepting that those sources may appropriately be relied upon by a court. Whether or not the Biblical texts support his beliefs would certainly not be a question which this Court could entertain. From a constitutional point of view, what matters is for the

[91] Id

Court to ensure that he be protected in his right to regard his marriage as sacramental,[92] to belong to a religious community that celebrates its marriages according to its own doctrinal tenets,[93] and to be free to express his views in an appropriate manner both in public and in Court.[94] Further than that the Court could not be expected to go.

[94] In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream.[95] It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian

[92] See section 15 of the Constitution.

[93] See section 31(1) of the Constitution.

[94] See section 16 of the Constitution.

[95] See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) where this Court ordered that the conduct of SA Airways in not employing the applicant as a steward because of his HIV positive status amounted to unfair discrimination. Ngcobo J said: "People living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systematic disadvantage and discrimination." (Footnotes omitted.) At para 28. As the US Supreme Court has pointed out in the context of religious speech, the support of the great majority for a policy does not lessen the offence to or isolation of the objectors; at best it narrows their number, at worst it increases their sense of isolation and affront. See *Lee v Weisman* 505 US 577 (1992) at 594. Quoted with approval in *Santa Fe Independent School District v Doe* 530 US 290 (2000) at 301-2.

positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.

[95] The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner.[96] The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.

[96] The need for co-existence and respect for diversity of belief is in fact expressly recognised by the Marriage Act. The Act in terms permits religious leaders to be designated as marriage officers, religious buildings to be used for the solemnisation of marriages, the marriage formula usually observed by a religious denomination to be employed and its religious marriage rites to be followed. It is not only permissible to

---

[96] In the 2002 René Cassin lecture published in *Recognising Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* Douglas Farrow (ed), Canadian Chief Justice Beverley McLachlin points out that the law faces the seemingly paradoxical task of asserting its own ultimate authority while carving out a space within itself in which individuals and communities can manifest alternate, and often competing, sets of ultimate commitments. (At 16.) She refers to the tension between the rule of law and the claims of religion as a dialectic of normative commitments:

> "What is good, true, and just in religion will not always comport with the law's view of the matter, nor will society at large always properly respect conscientious adherence to alternate authorities and divergent normative, or ethical commitments. Where this is so, two comprehensive worldviews collide. It is at this point that the question of law's treatment of religion becomes truly exigent. The authority of each is internally unassailable. What is more, both lay some claim to the whole of human experience. . . . This clash of forces demands a resolution from the courts. The reality of litigation means that cases must be resolved. The dialectic must reach synthesis." (At 21-2.)

She then goes on to show how the Canadian Charter of Rights and Freedoms provides the courts with a context for reconciling the competing world views. (At 28-33.) For a critique of what is referred to as triumphalistic secular fundamentalism that seeks to impose secular dogma on the whole of society, see Benson "Considering Secularism" in *Recognising Religion in a Secular Society* id at 95.

solemnise marriages in these ways. All such marriages are recognised and given legal force by the state. Legal consequences flow from them as from a civil marriage celebrated before a magistrate or other state marriage officer. The state interest in marriage ceremonies performed by religious leaders is protected by empowering the Minister of Home Affairs to designate the ministers of religion concerned and to approve of the marriage formula being followed.

[97] State accommodation of religious belief goes further. Section 31 provides:

> "Certain marriage officers may refuse to solemnize certain marriages.—Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organization to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization."[97]

The effect of this provision is that no minister of religion could be compelled to solemnise a same-sex marriage if such a marriage would not conform to the doctrines of the religion concerned. There is nothing in the matters before us that either directly or indirectly trenches in any way on this strong protection of the right of religious communities not to be obliged to celebrate marriages not conforming to their tenets.

---

[97] Similarly section 34 provides:

> "Religious rules and regulations.—Nothing in this Act contained shall prevent—
> (a) the making by any religious denomination or organization of such rules or regulations in connection with the religious blessing of marriages as may be in conformity with the religious views of such denomination or organization or the exercise of church discipline in any such case; or
> (b) the acceptance by any person of any fee charged by such religious denomination or organization for the blessing of any marriage,
> provided the exercise of such authority is not in conflict with the civil rights and duties of any person."

[98] It is clear from the above that acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected.[98] The two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity.

The international law argument

[99] Considerable stress was placed by the state on the contention that international law recognises and protects heterosexual marriage only. As such, the state contended, it could not be regarded as unfair discrimination to exclude same-sex couples from the institution of marriage. The remedy to the plight of same-sex couples should therefore be found outside of rather than inside marriage. Thus, reference was made to article 16 of the 1948 Universal Declaration of Human Rights (UDHR) which states:

---

[98] See too *Sodomy* above n 6 at para 137:

> "The fact that the State may not impose orthodoxies of belief systems on the whole of society has two consequences. The first is that gays and lesbians cannot be forced to conform to heterosexual norms; they can now break out of their invisibility and live as full and free citizens of South Africa. The second is that those persons who for reasons of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs. Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the State to turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole of society."

It should be added that, conversely, the Constitution does not allow the state to impose an orthodoxy of secular beliefs on the whole of society, including religious organisations conducting religious activities as protected by the Constitution.

> "16(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
> 16(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
> 16(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Similar provisions from a number of different instruments were referred to, as was a decision of the United Nations Human Rights Committee to the effect that a New Zealand law denying marriage licences to same-sex couples does not violate the International Covenant on Civil and Political Rights[99] (ICCPR). Support for the argument was sought from the provision in our Constitution requiring that customary international law be recognised as part of the law in the Republic[100] and that when interpreting the Bill of Rights a court must consider international law.[101]

[100] The reference to "men and women" is descriptive of an assumed reality, rather than prescriptive of a normative structure for all time. Its terms make it clear that the principal thrust of the instruments is to forbid child marriages, remove racial, religious

---

[99] In *Joslin v New Zealand* (Communication No 902/1999) (17 July 2002), the Committee stated:

> "The treaty obligation of States . . . is to recognise as marriage only the union between a man and a woman wishing to be married to each other."

[100] Section 232 of the Constitution states that:

> "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

[101] Section 39(1)(b) of the Constitution states that:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
> . . .
> (b) must consider international law . . ."

or nationality impediments to marriage, ensure that marriage is freely entered into and guarantee equal rights before, during and after marriage.

[101] The statement in Article 16(3) of the UDHR that the family is the natural and fundamental group unit in society, entitled to protection by the state, has in itself no inherently definitional implications. Thus, it certainly does not confine itself to the nuclear monogamous family as contemplated by our common law. Nor need it by its nature be restricted intrinsically, inexorably and forever to heterosexual family units. There is nothing in the international law instruments to suggest that the family which is the fundamental unit of society must be constituted according to any particular model. Indeed, even if the purpose of the instruments was expressly to accord protection to a certain type of family formation, this would not have implied that all other modes of establishing families should for all time lack legal protection.

[102] Indeed, rights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning. The horizon of rights is as limitless as the hopes and expectations of humanity. What was regarded by the law as just yesterday is condemned as unjust today. When the Universal Declaration was adopted, colonialism and racial discrimination were seen as natural phenomena, embodied in the laws of the so-called civilised nations, and blessed by as many religious leaders as

they were denounced.[102] Patriarchy, at least as old as most marriage systems, defended as being based on biological fact and which was supported by many a religious leader, is no longer accepted as the norm, at least in large parts of the world. Severe chastisement of women and children was tolerated by family law and international legal instruments then, but is today considered intolerable.[103] Similarly, though many of the values of family life have remained constant, both the family and the law relating to the family have been utterly transformed.

[103] The decision of the United Nations Human Rights Committee is clearly distinguishable. The Committee held that there was no provision in the ICCPR which forbade discrimination on sexual orientation. This is a far cry from declaring that the ICCPR forbids the recognition of same-sex marriages and seals off same-sex couples from participating in marriage or establishing families. Even more directly to the point, in contradistinction to the ICCPR, our Constitution explicitly proclaims the anti-discriminatory right which was held to lack support from the text of the ICCPR. Indeed, discrimination on the grounds of sexual orientation is expressly stated by our Constitution to be presumptively unfair.

---

[102] Similarly, the rights to a fair trial, workers' rights, language rights and the rights of migrants and minorities, to mention but a few, have all expanded enormously since then. Though the language of the instruments proclaiming these rights might be the same, the significance and impact of the words used is vastly different. Free speech rights and rights of movement have advanced in equal measure. Punishments that had been regarded as self-evidently necessary for centuries are now forbidden as barbarous.

[103] The list of changes is endless. The fact that environmental rights and disability rights were not expressly mentioned in the Declaration did not mean that they were to be treated as excluded from, or somehow hostile, to the specified rights. What was considered free, fair, dignified or equal then, is a far cry from what would be accepted as such today.

[104] It would be a strange reading of the Constitution that utilised the principles of international human rights law to take away a guaranteed right. This would be the more so when the right concerned was openly, expressly and consciously adopted by the Constitutional Assembly as an integral part of the first of all rights mentioned in the Bill of Rights, namely, the right to equality.

[105] I conclude that while it is true that international law expressly protects heterosexual marriage it is not true that it does so in a way that necessarily excludes equal recognition being given now or in the future to the right of same-sex couples to enjoy the status, entitlements, and responsibilities accorded by marriage to heterosexual couples.

The family law pluralism argument

[106] Much reliance was placed by the state and the amici on section 15(3) of the Constitution which, after guaranteeing freedom of religion, conscience and belief, and providing for the circumstances in which religion may be observed in state institutions, states:

> "(a) This section does not prevent legislation recognising—
>
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
>
> (ii) *systems of personal and family law under any tradition*, or adhered to by persons professing a particular religion.
>
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution." (My emphasis.)

It was submitted that these provisions presupposed special legislation governing separate systems of family law to deal with different family situations. This, it was contended, had a double effect. In the first place it entailed acknowledgement that it would be the legislature and not the courts that would be responsible for creating a legal regime to respond to the needs of same-sex couples. Secondly, the ability to cater for same-sex couples through legislation adopted under section 15(3) showed that the Constitution envisaged their rights being protected through special laws which would not interfere with the hallowed institution of marriage.

[107] Section 15(3) is undoubtedly an important provision of the Constitution, the full significance of which remains as yet undeveloped. Consistent with the theme of diversity in unity, it establishes that there is no hegemonic model of marriage inexorably and automatically applicable to all South Africans. Dealing with the disparagement to which Muslim marriages were subjected in the past, Moseneke J said in *Daniels*:[104]

> "[The] 'persisting invalidity of Muslim marriages' is, of course, a constitutional anachronism. It belongs to our dim past. It originates from deep-rooted prejudice on matters of race, religion and culture. True to their worldview, Judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different. They exalted their own and demeaned and excluded everything else. Inherent in this disposition, says Mahomed CJ, is 'inequality, arbitrariness, intolerance and inequity'.
>
> These stereotypical and stunted notions of marriage and family must now succumb to the newfound and restored values of our society, its institutions and diverse people.

[104] *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC).

> They must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships. Our Constitution guarantees not only dignity and equality, but also freedom of religion and belief. What is more, section 15(3) of the Constitution foreshadows and authorises legislation that recognises marriages concluded under any tradition or a system of religious, personal or family law. Such legislation is yet to be passed in regard to Islamic marriages."[105] (Footnotes omitted.)

[108] The special provisions of section 15(3) are anchored in a section of the Constitution dedicated to protecting freedom of religion, belief and opinion. In this sense they acknowledge the right to be different in terms of the principles governing family life. The provision is manifestly designed to allow Parliament to adopt legislation, if it so wishes, recognising, say, African traditional marriages, or Islamic or Hindu marriages, as part of the law of the land, different in character from, but equal in status to general marriage law. Furthermore, subject to the important qualification of being consistent with the Constitution, such legislation could allow for a degree of legal pluralism under which particular consequences of such marriages would be accepted as part of the law of the land. The section "does not prevent" legislation recognising marriages or systems of family or personal law established by religion or tradition. It is not peremptory or even directive, but permissive. It certainly does not give automatic recognition to systems of personal or family law not accorded legal status by the common law, customary law or statute. Whether or not it could be extended to same-sex marriages, which might not easily be slotted into the concept of marriage or systems of personal or family law "under any tradition", it

[105] Id at paras 74-5.

certainly does not project itself as the one and only legal portal to the recognition of same-sex unions.

[109] Thus section 15(3) is indicative of constitutional sensitivity in favour of acknowledging diversity in matters of marriage. It does not, however, in itself provide a gateway, let alone a compulsory path, to enable same-sex couples to enjoy the status, entitlements and responsibilities which marriage accords to heterosexual couples. At most, for present purposes, section 15(3) offers constitutional guidance of a philosophical kind pointing in the direction of acknowledging a degree of autonomy for different systems of family law. Yet while it reinforces a general constitutional propensity to favour diversity, it does not in itself provide the remedy claimed for it by the state and the amici, let alone constitute a bar to the claims of the applicants.

Justification

[110] Having accepted that the need to accord an appropriate degree of respect to traditional concepts of marriage does not as a matter of law constitute a bar to vindicating the constitutional rights of same-sex couples, a further question arises: has justification in terms of section 36 of the Constitution been shown to exist for the violation of the equality and dignity rights of these couples?[106] The state made the

[106] Section 36 of the Constitution states:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;

bald submission in its written submissions that there was justification, without advancing considerations different from those it had referred to in relation to unfair discrimination. Mr Smyth on the other hand, devoted considerable attention to the argument that justification existed for the discrimination even if it impacted harshly on same-sex couples. His key argument was that the purpose of the limitation on the rights of same-sex couples was to maintain marriage as an acknowledged pillar of society, and to protect the religious beliefs and convictions of many South Africans. The Marriage Alliance similarly contended that any discrimination to which same-sex couples were subjected was justified on the ground that the exclusion of same-sex couples from marriage was designed to protect and ensure the existence and vitality of marriage as an important social institution. There are accordingly two interrelated propositions advanced as justification that need to be considered. The first is that the inclusion of same-sex couples would undermine the institution of marriage. The second is that this inclusion would intrude upon and offend against strong religious susceptibilities of certain sections of the public.

[111] The first proposition was dealt with by Ackermann J in *Home Affairs*.[107] Referring to possible justification in relation to exclusion of same-sex life partners from benefits accorded to married couples under immigration law, he stated:

> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

See *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at paras 53-4; 1997 (11) BCLR 1489 (CC) at paras 52-3.

[107] Above n 44 at para 59.

> "There is no interest on the other side that enters the balancing process [for justification]. It is true . . . that the protection of family and family life in conventional spousal relationships is an important governmental objective, but the extent to which this could be done would in no way be limited or affected if same-sex life partners were appropriately included under the protection of [the section]."[108]

The same considerations would apply in relation to enabling same-sex couples to enjoy the status and benefits coupled with responsibilities that marriage law affords to heterosexual couples. Granting access to same-sex couples would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to the tenets of their religion.

[112] The second proposition is based on the assertion derived from particular religious beliefs that permitting same-sex couples into the institution of marriage would devalue that institution. Whatever its origin, objectively speaking this argument is in fact profoundly demeaning to same-sex couples, and inconsistent with the constitutional requirement that everyone be treated with equal concern and respect.

[113] However strongly and sincerely-held the beliefs underlying the second proposition might be, these beliefs cannot through the medium of state-law be imposed upon the whole of society and in a way that denies the fundamental rights of those negatively affected. The express or implied assertion that bringing same-sex couples under the umbrella of marriage law would taint those already within its

[108] Id

protection can only be based on a prejudgement, or prejudice against homosexuality. This is exactly what section 9 of the Constitution guards against. It might well be that negative presuppositions about homosexuality are still widely entertained in certain sectors of our society. The ubiquity of a prejudice cannot support its legitimacy. As Ngcobo J said in *Hoffmann*:

> "Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted. Our constitutional democracy has ushered in a new era – it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly. SAA, as a state organ that has a constitutional duty to uphold the Constitution, may not avoid its constitutional duty by bowing to prejudice and stereotyping."[109] (Footnote omitted.)

I conclude therefore that the arguments tendered in support of justification cannot be upheld. The factors advanced might have some relevance in the search for effective ways to provide an appropriate remedy that enjoys the widest public support, for the violation of the rights involved. They cannot serve to justify their continuation.

Conclusion

[114] I conclude that the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an

[109] *Hoffmann* above n 95 at para 37. The Court ordered SA Airways to employ the applicant, who was HIV positive, as a steward for as long as his immune system was strong enough for him to carry on working efficiently. See too *Home Affairs* above n 44 at paras 58-60.

unjustifiable violation of their right to equal protection of the law under section 9(1), and not to be discriminated against unfairly in terms of section 9(3) of the Constitution. Furthermore, and for the reasons given in *Home Affairs*, such failure represents an unjustifiable violation of their right to dignity in terms of section 10 of the Constitution.[110] As this Court said in that matter, the rights of dignity and equality are closely related.[111] The exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society.

III. REMEDY

[115] A notable and significant development in our statute law in recent years has been the extent of express and implied recognition that the legislature has accorded to same-sex partnerships. Yet as Ackermann J pointed out in *Home Affairs*, there is still no appropriate recognition in our law of same-sex life partnership, as a relationship, to meet the legal and other needs of its partners.[112] Since *Home Affairs* was decided a number of other statutes have been adopted, the ambit of which clearly include same-sex life partnerships. In some cases there is express reference to the inclusion of same-sex relationships, in others the term ‘life partner’ or ‘partner’ is used.[113] They

[110] I do not find it necessary to consider whether it in addition constitutes a violation of their right to privacy in terms of section 14 of the Constitution. See the discussion on privacy in the *Sodomy* case above n 6 at paras 28-57, 65-7 of the judgment of Ackermann J and paras 108-19 of my judgment in that matter.

[111] *Home Affairs* above n 44 at para 31.

[112] Id at paras 28-9.

[113] See *Volks* above n 75 at footnote 171 of the judgment of Sachs J. There are four statutes of particular relevance to the present matter. The first two deal with issues which traditionally have been directly connected with marriage law and both expressly refer to same-sex relationships. Thus the Domestic Violence Act 116 of 1998 defines a domestic relationship as a relationship between a complainant and a respondent who are of the same or opposite sex and who live/lived together in a relationship in the nature of marriage, although they are not married to each other. The Estate Duty Act 45 of 1955 provides that a “spouse” in relation to any deceased person, includes a person who at the time of the death of such deceased person was the partner of such person in

cover such socially important areas as domestic violence, estate duty, employment equity, and legislation to promote equality.

[116] While this legislative trend is significant in evincing Parliament's commitment to its constitutional obligation to remove discrimination on the ground of sexual orientation, and while these statutes are consistent with the judgment of this Court in *Home Affairs*, the advances continue to be episodic rather than global. Thus, however valuable they may be in dealing with particular aspects of discrimination, and however much their cumulative effect contributes towards changing the overall legal climate, they fall short of what this Court called for in *J*,[114] namely that comprehensive legislation regularising relationships between gay and lesbian persons was necessary; and that it was unsatisfactory for the courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation.

[117] At the heart of legal disabilities afflicting same-sex life partnerships today, then, is the lack of general recognition by the law of their relationships. The problem does not in fact arise from anything constitutionally offensive in what the common

---

a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent. The second two are concerned with the need to achieve equality. The Employment Equity Act 55 of 1998 provides that the definition of "family responsibility" includes "responsibility of the employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support." Similarly, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 provides that "family responsibility" means "responsibility in relation to a complainant's spouse, partner, dependant, child or other members of his or her family in respect of whom the member is liable for care and support." It goes on to state that "'marital status' includes the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in a relationship."

[114] Above n 65 at para 23.

law definition of marriage actually contains. Nor has there been any suggestion that the formula in the Marriage Act intrinsically violates the Constitution as far as it goes. Indeed, there is no reason why heterosexual couples should not be able to take each other as husband and wife. The problem is not what is included in the common law definition and the Act, but what is left out. The silent obliteration of same-sex couples from the reach of the law, together with the utilisation of gender-specific language in the marriage vow, presupposes that only heterosexual couples are contemplated. The formula makes no allowance for an equivalent public declaration being made by same-sex couples, with all the legal and cultural consequences that would flow from it.

[118] As I have already concluded, the common law and section 30(1) of the Marriage Act are inconsistent with sections 9(1) and 9(3) and 10 of the Constitution to the extent that they make no provision for same-sex couples to enjoy the status, entitlements and responsibilities it accords to heterosexual couples. In terms of section 172(1)(a) of the Constitution, this Court must that declare any law inconsistent with the Constitution is invalid to that extent. Under section 172(1)(b) it is then open to the Court to make any order that is just and equitable. Such order may include suspending the declaration of invalidity to give the legislature time to cure the defect.

[119] Before considering what order would be just and equitable, it is important to note that the SCA decision in *Fourie* that has been appealed against, has been overtaken and to a considerable extent superseded by our decision to hear the *Equality*

Project case at the same hearing. The challenges to the common law definition and to the Marriage Act now fall to be considered together and in a comprehensive rather than piecemeal way. This enables the Court to develop a less attenuated remedy than was available to the SCA. The challenge now mounted by the Equality Project to the Marriage Act means that the question of whether and how to develop the common law need no longer be answered narrowly as an independent and abstract matter separately from how to respond to the defects of the Marriage Act.

[120] It is clear that just as the Marriage Act denies equal protection and subjects same-sex couples to unfair discrimination by excluding them from its ambit, so and to the same extent does the common law definition of marriage fall short of constitutional requirements. It is necessary, therefore, to make a declaration to the effect that the common law definition of marriage is inconsistent with the Constitution and invalid to the extent that it fails to provide to same-sex couples the status and benefits coupled with responsibilities which it accords to heterosexual couples. The question then arises whether, having made such declaration, the Court itself should develop the common law so as to remedy the consequences of the common law's under-inclusive character.

[121] The state submitted categorically that the Court did not have the power itself to cure any substantial and non-incremental defect in the common law definition, arguing that only the legislature had the competence to do so. Given the approach I have adopted, it is unnecessary to decide whether this Court has the power to develop

the common law in an incremental fashion only. This Court has already held that if a common law provision is inconsistent with the Constitution then when appropriately challenged it will be declared invalid and struck down. This is what happened in the *Sodomy* case, where this Court abolished the common law crime of sodomy. The Court emphasised that in striking down the common law offence of sodomy it was not developing the common law but exercising a power under section 172(1)(a).[115] This was an example of the direct application of the Bill of Rights which led to the conclusion that the very core of the offence was constitutionally invalid.[116]

[122] In deciding on the appropriate remedy in the present matter the possibility of altering the common law through legislative action so as to bring it into line with the Bill of Rights becomes highly relevant. Having heard the *Fourie* matter together with the *Equality Project* matter, we can take account of the impact that any correction to the Act, or enactment of a separate statute, would automatically have on the common law. Thus a legislative intervention which had the effect of enabling same-sex couples to enjoy the status, entitlements and responsibilities that heterosexual couples achieve through marriage, would without more override any discriminatory impact flowing from the common law definition standing on its own. Thus corrected, the Marriage Act would then have to be interpreted and applied in a manner consistent with the constitutional requirement that same-sex couples be treated with the same concern and respect as that accorded to heterosexual couples. The effect would be

[115] Per Ackermann J above n 6 at paras 90-1.

[116] Id at para 69.

that formal registration of same-sex unions would automatically extend the common law and statutory legal consequences to same-sex couples that flow to heterosexual couples from marriage.

[123] The Equality Project in fact urged us to adopt the simple corrective statutory strategy of reading in the words "or spouse" after the reference to husband and wife in section 30(1) of the Marriage Act. The state and the amici argued forcibly against this contention. In their view, to accept it would not merely modify a well-established institution to bring it into line with constitutional values. It would completely restructure and possibly even destroy it as an institution. Their argument was three-fold: first, that time should be given for the public to be involved in an issue of such great public interest and importance; second, that it was neither competent nor appropriate for the Court itself to restructure the institution of marriage in such a radical way; and third, that only Parliament had the authority to create such a radical remedy, so that if the Court should declare the Marriage Act to be invalid because of its under-inclusive nature, the declaration of invalidity should be suspended to enable Parliament to correct the defect.

[124] I start with the argument that the Court should not undertake what was said to be a far-reaching and radical change without the general public first having had an opportunity to have its say. Then, I deal with the question of whether in the circumstances it would be just and equitable for the Court to suspend any declaration

of invalidity it might make so as to allow Parliament an opportunity to remedy the defect.

Has the public had an opportunity to have its say?

[125] For the purposes of the present discussion I assume that the extent to which the public has been consulted would be a relevant factor in determining the appropriate remedy to be ordered. Even making that assumption, the contention by the state and the amici to the effect that the matter is not ripe for determination by this Court, cannot be sustained. The stark claim that the public has not had an opportunity to engage with the issue is not borne out by the facts. A recent memorandum by the SALRC on Domestic Partnerships[117] testifies to prolonged and intensive engagement by the SALRC with the public. The memorandum states that developments since *Home Affairs* had led to a patchwork of laws that did not express a coherent set of family law rules. In order to address this problem, the SALRC states that it has approached the reform process in what it considered to be a holistic, systematic, structured and consultative way. The investigation was aimed at harmonising the applicable family law principles with the provisions of the Bill of Rights and, specifically, with the constitutional value of equality. In order to achieve this, a new family law dispensation for domestic partnerships was being designed to supplement the traditional marriage structure.

[117] Memorandum on progress achieved concerning Project 118, made available on 19 May 2005 on request by the Court.

[126] The memorandum summarises the extensive work it has done in pursuance of achieving that harmonisation. In October 2001 the SALRC had published an Issue Paper in the form of a questionnaire.[118] One hundred and forty-five respondents had responded to the SALRC's invitation and submitted written comments. Submissions had been received from various organisations as well as ordinary members of the public. After these submissions had been considered and comparative research done,[119] the SALRC had formed various models for the reform of domestic partnerships.

[127] The memorandum points out that during August 2003 the SALRC had published a Discussion Paper for information and comment, which included six options for reform. The first three options had aimed to afford same-sex couples the same rights currently afforded to opposite-sex partners in marriage and in this regard the constitutionality of the chosen option was the main consideration. These were the three options referred to by Farlam JA.[120] As will be seen, the SALRC decided to replace them with a single new proposal.[121]

[128] Interest groups and members of the public were invited to submit comments on the proposed options. A series of eight workshops were held to discuss the proposals

---

[118] Issue Paper no. 17 (Project 118).

[119] The models researched varied from civil marriage (The Netherlands and Belgium), no special legal status for domestic partners (UK), de facto recognition (Australia) and civil unions (Vermont). The fact that none of the models researched emanated in a constitutional dispensation such as the South African one with specific protection of sexual orientation in an equality clause, indicated the need for a uniquely South African solution.

[120] *Fourie* (SCA) above n 12 at paras 110-1. See paras 28-31 above.

[121] At para 141 below.

made in the Paper. By the closing date for submissions on the Discussion Paper[122] a total of 230 submissions and 50 worksheets had been received.

[129] It is clear from the above summary of the work done by the SALRC that extensive opportunity has in fact been given for all sides to be canvassed, and over a lengthy period. The SALRC states in the recent memorandum that it feels after considerable research[123] it has reached a position to produce draft legislation. This it is ready to submit to Parliament as soon as it has had the opportunity to take cognisance of the judgment of this Court in the present matter.[124]

[130] The memorandum adds that the final recommendations of the Project Committee of the SALRC will be included in a report to be submitted by it to the SALRC for consideration. Upon approval of the report by the SALRC, it will be submitted to the Minister of Justice and Constitutional Development to be placed before Parliament at her discretion. The ordinary parliamentary processes will then commence. Attending to the consequential amendments necessitated by this new dispensation would form a secondary part of the investigation. The memorandum

[122] 31 March 2004.

[123] One aspect of the research indicated that although many same-sex couples were in favour of same-sex marriage, others saw it as an oppressive institution that is wrongly presented by a heterosexual society as the norm against which all other relationships should be measured. Many of them might also deliberately choose not to get married because they did not desire the consequences attached to marriage. In this context it was argued that the legislature should respect the autonomy of these partners and make provision for both these groups.

[124] It should be added that the SALRC memorandum noted that this Court's judgment would ultimately assist the SALRC in recommending legislation that might pass constitutional scrutiny and which would put an end to ad hoc applications to enforce rights on a piecemeal basis.

concludes by observing that, depending on the final recommendations, amendments to all legislation may be required.

[131] The memorandum establishes three things. Firstly, there has been extensive public consultation over a number of years. Secondly, a final SALRC report can be placed before Parliament within a relatively short period. Thirdly, the report can be expected to contain a comprehensive proposal intended to provide appropriate relief which is in a format quite different from that which the applicants propose. The matter of the relief to which same-sex couples are entitled would therefore appear to be ready for prompt consideration by Parliament. The orders to be made by this Court should take account of this fact.

Should the order of invalidity be suspended?

[132] Having concluded that the law of marriage as it stands is inconsistent with the Constitution and invalid to the extent outlined above, an appropriate declaration of invalidity needs to be made. The question that arises is whether this Court is obliged to provide immediate relief in the terms sought by the applicants and the Equality Project, or whether it should suspend the order of invalidity to give Parliament a chance to remedy the defect. The test is what is just and equitable, taking account of all the circumstances.

[133] Ordinarily a successful litigant should receive at least some practical relief. This, however, is not an absolute rule. In *Fraser (1)*[125] this Court declared invalid a provision of the Child Care Act[126] to the extent that it dispensed with the father's consent for the adoption of a child born out of marriage in all circumstances. Mahomed DP held that the consent of some fathers would be necessary, but not of all fathers. In deciding to give Parliament an opportunity to correct the defect, the Court took account of the difficulties of distinguishing between meritorious and non-meritorious fathers in these circumstances and "the multifarious and nuanced legislative responses which might be available to the legislature".[127] Mohamed DP went on to point out that the applicant in that matter was not the only person affected by the impugned provision and that proper legislation was required to regulate the rights of parents in relation to the adoption of any children born out of a relationship between them which had not been formalised by marriage.[128] In the meanwhile it would be chaotic and prejudicial to the interests of justice and good government to invalidate any adoption order previously made.[129] What was called for was an order allowing the section to survive pending its correction by Parliament.[130] Regard being had to the complexity and variety of the statutory and policy alternatives which might

[125] *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC). [*Fraser (1)*.]

[126] Act 74 of 1983.

[127] *Fraser (1)* above n 125 at para 50.

[128] Id

[129] Id at para 51.

[130] Id

have to be considered by Parliament, such period should be two years.[131] It should be noted that pending the rectification by Parliament, the successful applicant and persons in his position received no relief from the order.

[134] In *Dawood*[132] provisions in immigration law concerning the granting of certain privileges to spouses and other family members of South Africans were held to be unconstitutional because of lack of guidance to the officials concerned concerning the factors relevant to the refusal of temporary permits. O'Regan J pointed out that:

> "It would be inappropriate for this Court to seek to remedy the inconsistency in the legislation under review. The task of determining what guidance should be given to decision-makers and, in particular, the circumstances in which a permit may justifiably be refused is primarily a task for the Legislature and should be undertaken by it. There is a range of possibilities that the Legislature may adopt to cure the unconstitutionality."[133] (Footnote omitted.)

Her judgment went on, however, to provide temporary guidance to the officials as to how their discretion should be exercised.[134] The result was that a temporary form of relief was fashioned, leaving it to the legislature to determine the final text of the corrective decisions.

[135] What these cases highlight is the need to look at the precise circumstances of each case with a view to determining how best the values of the Constitution can be

[131] Id

[132] *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

[133] Id at para 63.

[134] Id at 70.

promoted by an order that is just and equitable. In the present matter I have considered ordering with immediate effect reading-in of the words “or spouse” after the words “or husband” in section 30(1) of the Marriage Act. This would remedy the invalidity while at the same time leaving Parliament free, if it chose, to amend the law so as to provide an alternative statutory mechanism to enable same-sex couples to enjoy their constitutional rights as outlined in this judgment. For reasons which follow, however, I have come to the conclusion that correction by the Court itself should be delayed for an appropriate period so as to give Parliament itself the opportunity to correct the defect.

[136] This is a matter involving status that requires a remedy that is secure. To achieve security it needs to be firmly located within the broad context of an extended search for emancipation of a section of society that has known protracted and bitter oppression. The circumstances of the present matter call out for enduring and stable legislative appreciation. A temporary remedial measure would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action compliant with the Constitution.

[137] The claim by the applicants in *Fourie* of the right to get married should, in my view, be seen as part of a comprehensive wish to be able to live openly and freely as lesbian women emancipated from all the legal taboos that historically have kept them from enjoying life in the mainstream of society. The right to celebrate their union accordingly signifies far more than a right to enter into a legal arrangement with many

attendant and significant consequences, important though they may be. It represents a major symbolical milestone in their long walk to equality and dignity. The greater and more secure the institutional imprimatur for their union, the more solidly will it and other such unions be rescued from legal oblivion, and the more tranquil and enduring will such unions ultimately turn out to be.

[138] This is a matter that touches on deep public and private sensibilities. I believe that Parliament is well-suited to finding the best ways of ensuring that same-sex couples are brought in from the legal cold. The law may not automatically and of itself eliminate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse. It needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the frontline in this respect. One of its principal functions is to ensure that the values of the Constitution as set out in the Preamble and section 1 permeate every area of the law.

[139] This judgment serves to vindicate the rights of the applicants by declaring the manner in which the law at present fails to meet their equality claims. At the same time, it is my view that it would best serve those equality claims by respecting the separation of powers and giving Parliament an opportunity to deal appropriately with the matter. In this respect it is necessary to bear in mind that there are different ways in which the legislature could legitimately deal with the gap that exists in the law. On

the papers, at least two different legislative pathways have been proposed. Although the constitutional terminus would be the same, the legislative formats adopted for reaching the end-point would be vastly different. This is an area where symbolism and intangible factors play a particularly important role. What might appear to be options of a purely technical character could have quite different resonances for life in public and in private. Parliament should be given the opportunity in the first place to decide how best the equality rights at issue could be achieved. Provided that the basic principles of equality as enshrined in the Constitution are not trimmed in the process, the greater the degree of public acceptance for same-sex unions, the more will the achievement of equality be promoted.

[140] Thus, Parliament could decide that the best way of achieving equality would be to adopt the first option placed before it, namely, the simple reading-in of the words "or spouse" in section 30(1) of the Marriage Act. This would be consistent with the position of the SALRC at the time when the proceedings were initiated, which indicated that it regarded reading-in of suitable words into the Marriage Act as one of three permissible options for public and legislative consideration.[135]

[135] The second option which it adopted at that stage was to abolish secular marriage as a legal institution and replace it with a civil union which would produce effects similar to marriage but be available for both heterosexual and same-sex couples. The third option which it then proposed was to establish a form of registered partnerships for same-sex couples which would operate alongside of and have the same legal status and consequences as marriage for heterosexual couples. It was the availability of these three options that led Farlam JA to decide to suspend the order of invalidity he would have made, so as to allow Parliament to make the choice. He made no pronouncement on their constitutionality. *Fourie* (SCA) above n 12 at paras 139-41.

[141] The second possibility which Parliament could consider is canvassed in the SALRC memorandum.[136] The memorandum makes it clear that as a result of further consultations the SALRC decided to move away from the three options it had originally offered for public debate, and come forward with a single proposal for submission to Parliament. This proposal is comprehensive in character and is based upon Parliament adopting a legislative scheme for marriage and family law based on express acknowledgement of the diverse ways in which conjugal unions have come to be established in South Africa. One of its features is that it would provide for equal status being accorded to all marriages, whatever the system under which they were celebrated.

[142] In developing its new single proposal, the SALRC memorandum referred to the responses it had received to the three options it had formerly placed before the public.[137] It observed that the last round of comments it had received in the course of its consultations on these three options could be divided into two categories. The first category of respondents was strongly and totally opposed to the legal recognition of same-sex relationships and other domestic partnerships on religious and moral grounds. The second category was in favour of the legal recognition of same-sex relationships and other domestic partnerships or accepted that legal recognition was unavoidable.[138] The memorandum adds that submissions received by the SALRC and

---

[136] Above n 117.

[137] Id

[138] Id

those following the workshops were collated and further research emanating from these responses was conducted. Follow-up meetings with specific interest groups were held.[139]

[143] From the inputs received, the memorandum continues, the SALRC felt that it was clear that the challenge facing it would be to reconcile the constitutional right to equality of same and opposite-sex couples on the one hand, with religious and moral objections to the recognition of these relationships on the other. Although no ostensibly valid legal objection was proffered against the merits of legal recognition of same-sex rights, the memorandum observes that the Project Committee[140] of the SALRC nevertheless considered it advisable from a policy viewpoint, not to disregard the strong objections against recognition. The concern for these objections was an important consideration in the Project Committee's striving to accommodate religious sentiments to the extent possible in the development of a further proposal. This proposal would embody a single comprehensive legislative scheme and not set out a range of options for the legislature.[141]

[144] The memorandum states that in terms of this proposal a new generic marriage act (to be called the Reformed Marriage Act) would be enacted to give legal

---

[139] Id

[140] Appointed on request of the SALRC by the Minister of Justice to assist the Commission with its task. The Minister appointed the following persons to the Committee: The Honourable Justice Craig Howie, now President of the SCA (Chairperson), Professor Cora Hoexter, Ms Beth Goldblatt, Professor Ronald Louw and Professor Tshepo Mosikatsana.

[141] Above n 117.

recognition to all marriages, including those of same and opposite-sex couples and irrespective of the religion, race or culture of a couple. However, the current Marriage Act would not be repealed, but renamed only (to be called the Conventional Marriage Act). For the purposes of this Act, the status quo would be retained in all respects and legal recognition in terms of this Act would only be available to opposite-sex couples.[142]

[145] The SALRC memorandum expresses the view that these Acts would aim to give effect to both the right to equality in section 9 of the Constitution and the right to freedom of religion, belief and opinion in section 15 of the Constitution. They would entail no separation of the religious and civil aspects of marriage, and ministers of religion (or religious institutions) would have the choice to decide in terms of which Act they wish to be designated as marriage officers. The state would designate its marriage officers in terms of the Reformed Marriage Act.[143]

[146] The SALRC memorandum adds that the family law dispensation in South Africa would therefore make provision for a marriage act of general application together with a number of additional, specific marriage acts for special interest groups such as couples in customary marriages, Islamic marriages, Hindu marriages and now also opposite-sex specific marriages. Choosing a marriage act, the memorandum

[142] Id

[143] Id

concludes, will be regarded as the couple's personal choice, taking account of the couple's religion, culture and sexual preference.[144]

[147] There are accordingly two firm proposals for legislative action that would appear to be ripe for consideration by Parliament. The simple textual change pleaded for by the Equality Project and the comprehensive legislative project being finalised by the SALRC, do not, however, necessarily exhaust the legislative paths which could be followed to correct the defect. In principle there is no reason why other statutory means should not be found. Given the great public significance of the matter, the deep sensitivities involved and the importance of establishing a firmly-anchored foundation for the achievement of equality in this area, it is appropriate that the legislature be given an opportunity to map out what it considers to be the best way forward. The one unshakeable criterion is that the present exclusion of same-sex couples from enjoying the status and entitlements coupled with the responsibilities that are accorded to heterosexual couples by the common law and the Marriage Act, is constitutionally unsustainable. The defect must be remedied so as to ensure that same-sex couples are not subjected to marginalisation or exclusion by the law, either directly or indirectly.

[148] It would not be appropriate for this Court to attempt at this stage to pronounce on the constitutionality of any particular legislative route that Parliament might choose to follow. At the same time I believe it would be helpful to Parliament to point to

[144] Id

certain guiding principles of special constitutional relevance so as to reduce the risk of endless adjudication ensuing on a matter which both evokes strong and divided opinions on the one hand, and calls for firm and clear resolution on the other.

[149] At the heart of these principles lies the notion that in exercising its legislative discretion Parliament will have to bear in mind that the objective of the new measure must be to promote human dignity, the achievement of equality and the advancement of human rights and freedoms.[145] This means in the first place taking account of the fact that in overcoming the under-inclusiveness of the common law and the Marriage Act, it would be inappropriate to employ a remedy that created equal disadvantage for all. Thus the achievement of equality would not be accomplished by ensuring that if same-sex couples cannot enjoy the status and entitlements coupled with the responsibilities of marriage, the same should apply to heterosexual couples. Levelling down so as to deny access to civil marriage to all would not promote the achievement of the enjoyment of equality. Such parity of exclusion rather than of inclusion would distribute resentment evenly, instead of dissipating it equally for all. The law concerned with family formation and marriage requires equal celebration, not equal marginalisation; it calls for equality of the vineyard and not equality of the graveyard.[146]

---

[145] See section 1(a) of the Constitution.

[146] See Ackermann J in *Home Affairs* above n 44 at para 77. It could have been considerations such as these that encouraged the SALRC to drop the option of replacing civil marriage for heterosexual couples only, with the notion of abolishing civil marriage altogether and replacing it with a civil union available both to heterosexual and same-sex couples. This is a matter which this Court is not obliged to consider at this stage.

[150] The second guiding consideration is that Parliament be sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation. Historically the concept of 'separate but equal' served as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation. The very notion that integration would lead to miscegenation, mongrelisation or contamination, was offensive in concept[147] and wounding in practice. Yet, just as is frequently the case when proposals are made for recognising same-sex unions in desiccated and marginalised forms, proponents of segregation would vehemently deny any intention to cause insult. On the contrary, they would justify the apartness as being a reflection of a natural or divinely ordained state of affairs.[148] Alternatively they would assert that the separation was neutral if

---

[147] Justifying the exclusion of a child whose mother was referred to as a coloured woman from a school for children of European parentage or extraction, de Villiers CJ in *Moller v Keimos School Committee and Another* 1911 AD 635 at 643-4:

> "As a matter of public history we know that the first civilized legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race . . . . Believing, as these whites did, that intimacy with the black or yellow races would lower the whites without raising the supposed inferior races in the scale of civilization, they condemned intermarriage or illicit intercourse between persons of the two races. Unfortunately the practice of many white men has often been inconsistent with that belief . . . . These prepossessions, or, as many might term them, these prejudices, have never died out . . . . We may not from a philosophical or humanitarian point of view be able to approve this prevalent sentiment, but we cannot, as judges who are called upon to construe an Act of Parliament, ignore the reasons which must have induced the legislature to adopt the policy of separate education for European and non-European children."

[148] See *Loving v Virginia* 388 US 1 (1966) at 2-3 Warren CJ states that a Negro woman and a white man were sentenced to a year in jail for their interracial marriage. The trial court judge, however, suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. The trial court judge stated that:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

the facilities provided by the law were substantially the same for both groups.[149] In *S v Pitje*[150] where the appellant, an African candidate attorney employed by the firm Mandela and Tambo, occupied a place at a table in court that was reserved for "European practitioners" and refused to take his place at a table reserved for "non-European practitioners", Steyn CJ upheld the appellant's conviction for contempt of court as it was ". . . clear [from the record] that a practitioner would in every way be as well seated at the one table as at the other, and that he could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table."[151]

[151] The above approach is unthinkable in our constitutional democracy today not simply because the law has changed dramatically, but because our society is

---

In South Africa the Prohibition of Mixed Marriages Act 55 of 1949 prohibiting marriage across the colour line, and repealed only in 1985 was based on similar offensive notions.

[149] Thus in *Minister of Posts and Telegraphs v Rasool* 1934 AD 167, which dealt with a challenge to a post office regulation requiring Europeans and non-Europeans to be attended to at separate counters, Stratford ACJ held that "[i]t would surely seem at first sight that the admission . . . to equality of service destroys at once the idea of partiality or inequality." (At 173.) He went on to say:

> "[A] division of the community on differences of race or language for the purpose of postal service seems, *prima facie*, to be sensible and make for the convenience and comfort of the public as a whole, since appropriate officials conversant with the customs, requirements and language of each section will conceivably serve the respective sections." (At 175.)

De Villiers JA likened division on the ground of race to division on the ground of initial letters of one's name. Only Beyers JA and Gardiner JA confronted the racist social reality involved. Supporting the regulation, Beyers JA held that in the Transvaal Europeans and non-Europeans had never been treated as equal in the eyes of the law. "Afskeiding loop deur ons ganse maatskaplik lewe in die hele Unie". (Separation is to be found in all of social life in the whole of the Union [of South Africa]". My translation.) (At 177.) Gardiner JA, on the other hand, regarded the regulation as invalid:

> "In view of the prevalent feeling as to colour, in view of the numerous statutes treating non-Europeans as belonging to an inferior order of civilisation, any fresh classification on colour lines can, to my mind, be interpreted only as a fresh instance of relegation of Asiatics and natives to a lower order, and this I consider humiliating treatment." (At 190-1.)

[150] 1960 (4) 709 (A).

[151] Id at 710.

completely different. What established the visible or invisible norm then is no longer the point of reference for legal evaluation today. Ignoring the context, once convenient, is no longer permissible in our current constitutional democracy which deals with the real lives as lived by real people today. Our equality jurisprudence accordingly emphasises the importance of the impact that an apparently neutral distinction could have on the dignity and sense of self-worth of the persons affected.

[152] It is precisely sensitivity to context and impact that suggest that equal treatment does not invariably require identical treatment. Thus corrective measures to overcome past and continuing discrimination may justify and may even require differential treatment.[152] Similarly, measures based on objective biological or other constitutionally neutral factors, such as those concerning toilet facilities or gender-specific search procedures, might be both acceptable and desirable.[153] The crucial determinant will always be whether human dignity is enhanced or diminished and the achievement of equality is promoted or undermined by the measure concerned. Differential treatment in itself does not necessarily violate the dignity of those

[152] See *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC).

[153] See *Weatherall v Canada (Attorney General)* [1993] 2 S.C.R 872 at 874 where it was held that it does not follow from the fact that female prison inmates are not subject to cross-gender frisk searches and surveillance that these practices result in discriminatory treatment of male inmates. Equality does not necessarily connote identical treatment; in fact, different treatment may be called for in certain cases to promote equality. Equality, in that context, does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. Given the historical, biological and sociological differences between men and women, it was clear that the effect of cross-gender searching is different and more threatening for women than for men. The important government objectives of inmate rehabilitation and security of the institution are promoted as a result of the humanising effect of having women in these positions. Moreover, Parliament's ideal of achieving employment equity was given a material application by way of this initiative. The proportionality of the means used to the importance of these ends would thus justify any breach of equality.

affected. It is when separation implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status that it becomes constitutionally invidious.

[153] In the present matter, this means that whatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved.[154] In a context of patterns of deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples.

Should there be an interim remedy?

[154] In coming to the conclusion that the declaration of invalidity should be suspended I am not unmindful of the fact that this case started simply with the desire of two people, who happen to be of the same-sex, to get married. The effect of the suspension of the order of invalidity will be to postpone the day when they can go to a registry and publicly say "I do." I have considered whether interim arrangements should be ordered similar to those provided for in *Dawood*.[155] I have come to the conclusion, however, that such an arrangement would not be appropriate in the present

[154] In the landmark case of *Brown v Board of Education* 347 US 483 (1954), the United States Supreme Court overturned the notorious separate but equal doctrine as affirmed in *Plessy v Ferguson* that had authorised segregated facilities for persons classified as Negroes. Chief Justice Warren stated:

> "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though that physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe it does." (At 493.)

[155] Above n 132. When suspending a declaration of invalidity of a provision concerning certain privileges of immigrants married to South Africans, this Court provided in the order for a set of interim guidelines to fill the gap. At paras 64-8.

matter. It is necessary to remember at all times that what is in issue is a question of status. Interim arrangements that would be replaced by subsequent legislative determinations by Parliament would give to any union established in terms of such a provisional scheme a twilight and impermanent character out of keeping with the stability normally associated with marriage. The dignity of the applicants and others in like situation would not be enhanced by the furnishing of what would come to be regarded as a stop-gap mechanism.

[155] Lying at the heart of this case is a wish to bring to an end, or at least diminish, the isolation to which the law has long subjected same-sex couples. It is precisely because marriage plays such a profound role in terms of the way our society regards itself, that the exclusion from the common law and Marriage Act of same-sex couples is so injurious, and that the foundation for the construction of new paradigms needs to be steadily and securely laid. It is appropriate that Parliament be given a free hand, within the framework established by this judgment, to shoulder its responsibilities in this respect.

The period of suspension of invalidity

[156] As I have shown, Parliament has already undertaken a number of legislative initiatives which demonstrate its concern to end discrimination on the ground of sexual orientation.[156] Aided by the extensive research and specific proposals made by the SALRC, there is no reason to believe that Parliament will not be able to fulfil its

[156] See para 115 of this judgment.

responsibilities in the light of this judgment within a relatively short time. As was pointed out in argument, what is in issue is not a fundamental new start in legislation but the culmination of a process that has been underway for many years. In the circumstances it would be appropriate to give Parliament one year from the date of the delivery of this judgment to cure the defect.

What should happen if Parliament fails to cure the defect?

[157] Attention needs to be given to the situation that would arise if Parliament fails timeously to cure the under-inclusiveness of the common law and the Marriage Act. Two equally untenable consequences need to be avoided. The one is that the common law and section 30(1) of the Marriage Act cease to have legal effect. The other unacceptable outcome is that the applicants end up with a declaration that makes it clear that they are being denied their constitutional rights, but with no legal means of giving meaningful effect to the declaration; after three years of litigation Ms Fourie and Ms Bonthuys will have won their case, but be no better off in practice.

[158] What justice and equity would require, then, is both that the law of marriage be kept alive and that same-sex couples be enabled to enjoy the status and benefits coupled with responsibilities that it gives to heterosexual couples. These requirements are not irreconcilable. They could be met by reading into section 30(1) of the Marriage Act the words "or spouse" after the words "or husband", as the Equality Project proposes.

[159] Reading-in of the words "or spouse" has the advantage of being simple and direct. It involves minimal textual alteration. The values of the Constitution would be upheld. The existing institutional mechanisms for the celebration of marriage would remain the same. Budgetary implications would be minimal.[157] The long-standing policy of the law to protect and enhance family life would be sustained and extended.[158] Negative stereotypes would be undermined.[159] Religious institutions would remain undisturbed in their ability to perform marriage ceremonies according to their own tenets, and thus if they wished, to celebrate heterosexual marriages only. The principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience.[160] If Parliament wished to refine or replace the remedy with another legal arrangement that met constitutional standards, it could still have the last word.[161]

---

[157] *Home Affairs* above n 44 at para 74.

[158] Id at paras 74-5.

[159] Id

[160] In *Christian Education* above n 73 at para 35, this Court held that:

> "The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, *the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law*." (My emphasis.)

[161] *Home Affairs* above n 44 at para 76.

[160] Before I conclude this judgment I must stress that it has dealt solely with the issues directly before the Court. I leave open for appropriate future legislative consideration or judicial determination the effect, if any, of this judgment on decisions this Court has made in the past concerning same-sex life partners who did not have the option to marry. Similarly, this judgment does not pre-empt in any way appropriate legislative intervention to regulate the relationships (and in particular, to safeguard the interests of vulnerable parties[162]) of those living in conjugal or non-conjugal family units, whether heterosexual or gay or lesbian, not at present receiving legal protection. As the SALRC has indicated, there are a great range of issues that call for legislative attention. The difficulty of providing a comprehensive legislative response to all the many people with a claim for legal protection cannot, however, be justification for denying an immediate legislative remedy to those who have successfully called for the furnishing of relief as envisaged by the Constitution. Whatever comprehensive legislation governing all domestic partnerships may be envisaged for the future, the applicants have established the existence of clearly identified infringements of their rights, and are entitled to specific appropriate relief.

[161] In keeping with this approach it is necessary that the orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words "or spouse" will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to

[162] See *Volks* above n 75 at paras 67-8.

enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples.

Costs

[162] The applicants in the cross-appeal and the applicants in the application for direct access to this Court, have both been substantially successful. It is appropriate that they should receive their costs, such costs to include the costs of two counsel.

THE ORDER

1. In the matter between the Minister of Home Affairs and the Director-General of Home Affairs and Marié Adriaana Fourie and Cecelia Johanna Bonthuys, CCT 60/04, the following order is made:

a) The application for leave to appeal against the judgment of the Supreme Court of Appeal by the Minister of Home Affairs and the Director-General of Home Affairs is granted.

b) The application for leave to cross-appeal against the judgment of the Supreme Court of Appeal by Marié Adriaana Fourie and Cecelia Johanna Bonthuys is granted.

c) The order of the Supreme Court of Appeal is set aside and replaced by the following order:

(i) The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit

same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.

(ii) The declaration of invalidity is suspended for twelve months from the date of this judgment to allow Parliament to correct the defect.

d) The Minister of Home Affairs and the Director-General of Home Affairs are ordered to pay the costs of the respondents, including the costs of two counsel, in the High Court, the Supreme Court of Appeal and in respect of the appeal heard in the Constitutional Court.

2. In the matter between the Lesbian and Gay Equality Project and Eighteen Others and the Minister of Home Affairs, the Director General of Home Affairs and the Minister of Justice and Constitutional Development, CCT 10/05, the following order is made:

a) The application by the Lesbian and Gay Equality Project and Eighteen Others for direct access is granted.
b) The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.
c) The omission from section 30(1) of the Marriage Act 25 of 1961 after the words “or husband” of the words “or spouse” is declared to be inconsistent with the Constitution, and the Marriage Act is declared to be invalid to the extent of this inconsistency.

d) The declarations of invalidity in paragraphs (b) and (c) are suspended for 12 months from the date of this judgment to allow Parliament to correct the defects.
e) Should Parliament not correct the defects within this period, Section 30(1) of the Marriage Act 25 of 1961 will forthwith be read as including the words "or spouse" after the words "or husband" as they appear in the marriage formula.
f) The Minister and Director-General of Home Affairs and the Minister of Justice and Constitutional Development are ordered to pay the applicants' costs, including the costs of two counsel in the Constitutional Court.

Langa CJ, Moseneke DCJ, Mokgoro J, Ngcobo J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Sachs J.

O'REGAN J:

[163] There is very little in the comprehensive and careful judgment of Sachs J with which I disagree. I agree that the application for direct access should be granted. The issues raised by the Equality Project are inextricably intertwined with the issues raised in the application for leave to appeal and the decision on the application for leave to appeal will inevitably determine many of the issues in the Equality Project

application. In addition, granting direct access will assist the resolution of the issues in the application for leave to appeal. Finally, there are no disputes of fact to be determined that would deter the grant of direct access.

[164] I also agree with Sachs J, for the reasons given by him, as well as for the reasons given in both judgments in the Supreme Court of Appeal, that the common-law definition of marriage in excluding gay and lesbian couples from marriage constitutes unfair discrimination on the grounds of sexual orientation in breach of section 9 of the Constitution. Similarly, and for the same reasons, section 30 of the Marriage Act, 25 of 1961, is in conflict with the same constitutional provision. I need add nothing to the comprehensive judgment of Sachs J on this score.

[165] The difference between his judgment and this, therefore, lies solely in one significant area, namely, that of remedy. How best should these clear constitutional infringements be remedied by this Court? In *S v Bhulwana; S v Gwadiso*[1] this Court held that it is an important principle of the law of constitutional remedies that successful litigants should ordinarily obtain the relief they seek. Without doubt there are exceptions to this rule. A court must consider in each case whether there are other considerations of justice or equity which would warrant an exception to this key precept.[2] In this case, Sachs J concludes that this case does involve considerations which warrant such an exception, and he accordingly proposes an order suspending

[1] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

[2] See *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at paras 26-29 and para 50; also see the judgment of Sachs J at para 133.

the declaration of invalidity for twelve months. The effect of this order is that gay and lesbian couples will not be permitted to marry during this period.

[166] His main reasons for this order are firstly, that there are at least two ways in which the unconstitutionality can be remedied, as recommended by the South African Law Reform Commission; and that given these alternatives, and the important democratic and legitimating role of the legislature in our society, it is appropriate to leave it to Parliament to choose between these courses of action, or any other which might be constitutional. A second and equally important reason that he gives is that, as marriage involves a question of personal status, it would lead to greater stability if such matters were to be regulated by an Act of Parliament rather than the courts.

[167] I am not persuaded that these considerations can weigh heavily in the scales of justice and equity. We are concerned in this case with a rule of the common law developed by the courts, the definition of marriage. The provisions of section 30 of the Marriage Act rest on that definition, the definition does not arise from the provisions of the legislation. As a definition of the common law, the responsibility for it lies, in the first place, with the courts. It is the duty of the courts to ensure that the common law is in conformity with the Constitution, as this Court held in *Carmichele*.[3] This is not to say that both the common law definition and the provisions of the Act could not be altered by appropriate legislative intervention. The question is, however, whether it is appropriate in this case for a court to suspend an order of invalidity, thus

[3] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 33.

denying successful litigants immediate relief, in order to give Parliament an opportunity to enact legislation to do both.

[168] In my view, it is not. It is true that there is a choice for the legislature to make, but on the reasoning of the majority judgment, there is not a wide range of options. If as Sachs J correctly concludes, it is not appropriate to deny gays and lesbians the right to the same status as heterosexual couples, the consequence is that, whatever the legislative choice, it is a narrow one which will affect either directly or indirectly all marriages. The choice as to how regulate to these relationships will always lie with Parliament and will be unaffected by any relief we might grant in this case.

[169] In my view, this Court should develop the common-law rule as suggested by the majority in the Supreme Court of Appeal, and at the same time read in words to section 30 of the Act that would with immediate effect permit gays and lesbians to be married by civil marriage officers (and such religious marriage officers as consider such marriages not to fall outside the tenets of their religion). Such an order would mean simply that there would be gay and lesbian married couples at common law which marriages would have to be regulated by any new marital regime the legislature chooses to adopt. I cannot see that there would be any greater uncertainty or instability relating to the status of gay and lesbian couples than in relation to heterosexual couples. The fact that Parliament faces choices does not, in this case, seem to me to be sufficient for this Court to refuse to develop the common law and, in

an ancillary order, to remedy a statutory provision, reliant on the common law definition, which is also unconstitutional.

[170] The doctrine of the separation of powers is an important one in our Constitution[4] but I cannot see that it can be used to avoid the obligation of a court to provide appropriate relief[5] that is just and equitable[6] to litigants who successfully raise a constitutional complaint. The exceptions to the principle established in *Bhulwana*'s

---

[4] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 60-63, *S v Dodo* 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at para 33, *Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* 2002 (1) SA 1 (CC); 2001 (11) BCLR 1137 (CC) at para 37.

[5] Section 38 of the Constitution:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are–
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

[6] Section 172 of the Constitution:

> "(1) When deciding a constitutional matter within its power, a court–
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including–
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
> (2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
> (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
> (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
> (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

case must arise in other circumstances, where the relief cannot properly be tailored by a court,[7] or where even though a litigant would otherwise be successful, other interests or matters would preclude an order in his or her favour,[8] or where an order would otherwise produce such disorder or administrative difficulties that the interests of justice served by an order in favour of a successful litigant are outweighed by the social dislocation such an order might occasion.[9] The importance of the principle that a successful litigant should obtain the relief sought has been acknowledged by this Court through the grant of interim relief where an order of suspension is made to ensure that constitutional rights are infringed as little as possible in the period of suspension.[10]

[171] There can be no doubt that it is necessary that unconstitutional laws be removed from our statute book by Parliament. It is equally necessary that provisions of the common law which conflict with the Constitution are developed in a manner that renders them in conformity with it. It would have been desirable if the unconstitutional situation identified in this matter had been resolved by Parliament without litigation. The corollary of this proposition, however, is not that this Court

---

[7] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 63-64; *Fraser v Naude and Others* 1999 (11) BCLR 1357 (CC) at paras 9-10.

[8] *Fraser* id.

[9] *Tsotetsi v Mutual and Federal Insurance Co Ltd* 1997 (1) SA 585 (CC); 1996 (11) BCLR 1439 (CC) at para 10.

[10] See for example, *Dawood* above n 7 at paras 66-67, *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC); 2000 (11) BCLR 1235 (CC) at para 29-30, *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 130-31.

should not come to the relief of successful litigants, simply because an Act of Parliament conferring the right to marry on gays and lesbians might be thought to carry greater democratic legitimacy than an order of this Court. The power and duty to protect constitutional rights is conferred upon the courts and courts should not shrink from that duty. The legitimacy of an order made by the Court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution. Time and again, there will be those in our broader community who do not wish to see constitutional rights protected, but that can never be a reason for a court not to protect those rights.

[172] There is one further comment I wish to add. It does not seem to me that an order developing the common law, as ordered by the majority in the Supreme Court of Appeal, coupled with an order reading in the words "or spouse" to the relevant provisions of the Marriage Act would undermine the institution of marriage at all. This Court has noted on several occasions the important role that institution plays in our society.[11] Permitting those who have been excluded from marrying to marry can only foster a society based on respect for human dignity and human difference. Nor will it undermine the special role of marriage as recognised by different religions. Such marriages draw their strength and character from religious beliefs and practices. The fact that gay and lesbian couples are permitted to enter civil marriages should not undermine the strength or meaning of those beliefs.

[11] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 58, *Dawood* above n 7 at paras 30-31, *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) at para 22.

[173] In sum, I dissent from the judgment of Sachs J in one respect. I would not suspend the order of invalidity as proposed by Sachs J. In my view, the Court should make an order today which has immediate prospective effect. Such an order would not preclude Parliament from addressing the law of marriage in the future, and would simultaneously and immediately protect the constitutional rights of gay and lesbian couples pending parliamentary action.

Minister of Home Affairs and Another v Marié Adriaana Fourie and Another:
For the applicants: MTK Moerane SC and S Nthai instructed by the State Attorney, Johannesburg.

For the respondents: P Oosthuizen and T Kathri instructed by M van den Berg Attorneys.

For the first amicus curiae: John Jackson Smyth QC. (Written argument only.)

For the second amicus curiae: John Jackson Smyth QC.

For the third amicus curiae: GC Pretorius SC, DM Achtzehn, PG Seleka and JR Bauer instructed by Motla Conradie Attorneys

Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others:
For the applicants: DI Berger SC and F Kathree instructed by Nicholls, Cambanis and Associates.

For the respondents: M Donen SC instructed by the State Attorney, Johannesburg.