

THE CONSTITUTIONALITY OF THE CIVIL UNION ACT 17 OF 2006

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DECLARATION

I declare that The Constitutionality of the Civil Union Act 17 of 2006 is my own work, that it has not been submitted before any degree or for examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged as complete reference.

SIGNED

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PREFACE

I would like to express my sincerest appreciation and gratitude to my supervisor, Dr A Louw. Without her guidance and expertise this study would not have been possible. I am indebted to you Dr Louw.

KEY WORDS

Civil Union

Civil Marriage

Gay men

Lesbian

Constitution

Human dignity

Equality before the law

Unfair discrimination

Sexual orientation

Best interest of children

Same-sex life partnership

SUMMARY

During the pre-constitutional era, a civil marriage in terms of the Marriage Act 25 of 1961 between two heterosexual persons was the only family form recognised by South African law. The common-law definition of marriage did not make provision for same-sex marriage and consequently deprived same-sex couples of certain benefits that accrue to married couples. The introduction of a new constitutional order with the constitutional commitment to human dignity and equality and the inclusion of sexual orientation as a prohibited ground of discrimination in terms of section 9(3) of the Constitution, created a fertile ground for homosexuals to question the validity and constitutionality of the common law definition of marriage and certain statutes that excluded them from recognition during the pre-constitutional dispensation. This led to the recognition of same-sex life partnerships and, inevitably, same-sex marriage by means of a Civil Union Act 17 of 2006.

The object of this study was to investigate whether and to what extent there are grounds to consider the Civil Union Act unconstitutional. The constitutional inquiry will include a critical analysis of the effect of the Act on the constitutional rights of same-sex couples. The main issue will be whether the Act achieved what the Constitutional Court in *Minister of Home Affairs v Fourie* 2006 1 SA 542 (CC) required the legislator to do, namely to afford same-sex couples the same status, benefits and responsibilities accorded to opposite-sex couples. This investigation is conducted with reference to relevant legislation, comments of various authors and case law.

The dissertation concludes by recommending that both heterosexual couples and same-sex couples should be provided with a single statute to formalise their marriage. In this regard, it is suggested that a repeal of the Civil Union Act with a concomitant expansion of the Marriage Act to accommodate the solemnisation and registration of marriage for both heterosexual and same-sex couples should be the preferred option. The Marriage Act should be secular in nature and should include the registration of domestic partnerships.

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CHAPTER 1: GENERAL INTRODUCTION

1.1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996¹ (hereinafter referred to as the Constitution) guarantees the protection of fundamental rights of all people in South Africa. The Constitution is the supreme law of the Republic. Any law or conduct that is inconsistent with it, either for procedural or substantive reasons, is invalid and will not have the force of law.² The obligations imposed by the Constitution must be fulfilled.³

The Bill of Rights in the Constitution enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.⁴ The rights in the Bill of Rights are intrinsically interdependent, indivisible and inseparable.⁵ The rights to human dignity, equality, as well as freedom and security in particular, are influenced by our historical and political background.⁶ The preamble to the Constitution acknowledges the injustices of the past and affirms the intention of establishing a society based on democratic values, social justice and fundamental human rights.⁷

The preamble to the Constitution also acknowledges that South Africa belongs to all who live in it, united in our diversity. The preamble envisions a society based on democratic values, social justice and fundamental human rights where every citizen is equally protected by the law. Section 9(1) of the Constitution guarantees everyone equal protection and benefit of the law. Section 9(3) of the Constitution forbids discrimination on the basis of, *inter alia*, sex, marital status, gender or sexual orientation. Section 10 of the Constitution guarantees everyone the right to have their dignity respected and protected.

¹ Which came into operation on 4 February 1997. The final Constitution was preceded by an Interim Constitution, Act 200 of 1993, which came into operation on 27 April 1994.

² See s 2 of the Constitution. See also *Executive Council of the Western Cape Legislature v The President of the Republic of South Africa* 1995 4 SA 877 (CC) para 62.

³ S 2 of the Constitution.

⁴ S 7(1) of the Constitution.

⁵ *Gcaba v Minister for Safety and Security & Others* 2009 12 BLLR 1145 (CC) para 54.

⁶ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 4 SA 490 (CC) paras 73 - 77.

⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 4 SA 490 (CC) para 73.

Prior to the adoption of the Interim Constitution, a civil marriage in terms of the Marriage Act 25 of 1961 (hereinafter the Marriage Act) between two heterosexual persons was the only form of marriage recognised by South African law.⁸ The Marriage Act does not define the concept of marriage. In *Ismail v Ismail*,⁹ the Appellate Division held that it was quite clear from the context of the Act as a whole that it means a marriage under the common law, that is, a legally recognised voluntary union for life of one man and one woman to the exclusion of all others while it lasts.¹⁰ The common law definition of marriage did not make provision for same-sex marriage and consequently deprived same-sex couples of the benefits that accrue to married couples.

The introduction of a new constitutional order created a framework that allowed historically marginalised groups, such as gays and lesbians, to challenge the religious and ideological hegemony that dominated South African family law.¹¹ The constitutional right to human dignity as well as the entrenched right to equality and the inclusion of sexual orientation as a prohibited ground of discrimination in terms of section 9(3) of the Constitution, created a fertile ground for gay men and lesbian women to question the validity and constitutionality of the common law definition of marriage and certain statutes that excluded them from recognition and protection during the pre-constitutional dispensation. Societal groups, such as gays and lesbians, that had faced a history of marginalisation during the previous dispensation, were quick to approach the courts in order to challenge the legal legacy left by the pre-democratic South Africa.¹²

⁸ See Smith BS & Robinson JA 'The South African Civil Union Act 17 of 2006: A good of example of dangers of rushing the legislative process' 2008 (22) *Brigham Young University Journal of Public Law* 419, also available at www.law2.byu.edu/jpl/papers/v22n2_Bradley_Smith._Robinson.pdf.

⁹ 1983 1 SA 1006 (A) 1019H.

¹⁰ At 1019 - 1020. The court quoted from Hahlo HR *The South African Law of Husband and Wife* 4 ed (1975) at 28. See also the discussion of this case by Smith BS & Robinson JA 'The South African Civil Union Act 17 of 2006: A good of example of dangers of rushing the legislative process' 2008 *BYU Journal of Public Law* 419 at 423, who argue that two of the most noticeable deficiencies of this rigid approach were: (i) the blanket non-recognition of polygamous marriages and (ii) relationships between extra-marital cohabitants (both heterosexual and homosexual) received minimal legal recognition.

¹¹ De Ru H *The Recognition of Same-sex Unions in South Africa* LLM Thesis, University of South Africa (2009) at para 1.1.

¹² See discussion in para 2.2 below.

The Constitution empowers the legislature to enact legislation aimed at recognising different types of marital relationships.¹³ The decision of the Constitutional Court in *Minister of Home Affairs v Fourie*,¹⁴ led to the enactment of the Civil Union Act 17 of 2006 (hereinafter simply the Civil Union Act) which came into operation on 30 November 2006. The Civil Union Act extended the recognition of marriage rights to same-sex couples and provides same-sex couples who are above the ages of 18 years with the option to conclude either a marriage or civil partnership - collectively known as a civil union.

1.2 RESEARCH PROBLEM AND PURPOSE OF STUDY

This dissertation will focus on the constitutionality of the Civil Union Act. The main issue will be whether the Act achieved what the Constitutional Court in *Minister of Home Affairs v Fourie*¹⁵ required the legislator to do, namely to afford same-sex couples the same status, benefits and responsibilities accorded to opposite-sex couples. The Civil Union Act allows heterosexual and same-sex couples to enter into a fully recognised civil union, which may be called a marriage or a civil partnership.¹⁶ The difficulty is that the Civil Union Act is the only means for same-sex couples who want to obtain full legal recognition of their relationship. Heterosexual couples can acquire such recognition by way of either the Civil Union Act or the Marriage Act.¹⁷ The differentiation would appear to be in conflict with the equality clause in our Constitution. The fact that section 6 of the Civil Union Act affords secular marriage officers the option to refuse to solemnise a same-sex civil union may be seen as violating the equality clause as well as the right to human dignity in our Constitution, since it may curtail the rights of same-sex partners to enter into a civil union as freely as their heterosexual counterparts. These are some of the reasons why the constitutionality of the Civil Union Act has been questioned. This

¹³ S 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion. S15(3)(a) provides that this section does not prevent legislation recognising (i) marriages concluded under any tradition, or a system of religious, 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.

¹⁴ 2006 1 SA 542 (CC).

¹⁵ 2006 1 SA 542 (CC).

¹⁶ See s 1 of Civil Union Act.

¹⁷ See Heaton J *South African Family Law* 3 ed (2010) at 201- 202.

study is undertaken to investigate whether and to what extent there are grounds to consider the Civil Union Act unconstitutional.

1.3 RESEARCH METHODOLOGY

This dissertation will investigate the Civil Union Act through the prism of the Constitution. After providing an overview of the events leading up to the enactment of the Civil Union Act, the focus will shift to the content and constitutionality of the Act as a whole, as well as certain specific provisions of the Civil Union Act, in particular sections 1, 5, 6 and 13. In so far as the history of the Civil Union Act is traced, attention will be drawn to the importance of the judiciary in granting *ad hoc* recognition to same-sex partnerships. The constitutional inquiry will involve a critical analysis of the effect of the Act on the constitutional rights of same-sex couples. In this regard great reliance will be placed on the comments of authors. The dissertation thus implements a theoretical and qualitative methodology to achieve its aims.

1.4 OUTLINE OF CHAPTERS

This dissertation will be divided into four chapters. Chapter one will briefly outline the subject and scope of the dissertation. The same chapter will indicate the research problem and the methodology that will be used in this dissertation and will give a brief summary of the structure of the dissertation.

Chapter two will examine the development of the law relating to same-sex relationships leading up to the enactment of the Civil Union Act. The chapter will conclude with an overview of the provisions included in the Civil Union Act.

Chapter three of this study will investigate to what extent the Civil Union Act affords same-sex couples the same rights and responsibilities as heterosexual couples in terms of the Marriage Act. A comparison between the Marriage Act and the Civil Union Act will reveal a number of inequalities and differentiations which will be investigated for their constitutionality. A constitutional inquiry will be conducted into some of the provisions in the Act. It will be shown that the differences in the ways in which heterosexual and same-sex couples can formalise their unions amount to unfair discrimination that cannot

be justified in terms of the limitation clause contained in section 36 of the Constitution. Chapter three will also look at the co-existence of the Marriage Act and the Civil Union Act and consider the arguments for and against its continued existence within the matrimonial pluralistic regime found in South Africa.

The final chapter will conclude by summarising the research done and by making some suggestions and recommendations regarding the Civil Union Act and its constitutionality. It will be shown that while the Civil Union Act is in general constitutionally acceptable as a means of conferring full and formal recognition on same-sex unions,¹⁸ it has failed in its attempt to afford same-sex couples the status, benefits and responsibilities accorded to opposite-sex couples in every respect.

¹⁸ See Sinclair JD in Atkin B (ed) *International Survey of Family Law* (2008) at 404; Heaton J *South African Family Law* 3 ed (2010) at 201; See also De Vos P & Barnard J 'Same-sex marriage, civil unions and domestic partnerships in South Africa: A critical reflections on an ongoing saga' 2007 *SALJ* 797 at 820; Bilchitz D & Judge M 'For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa' 2007 *SAJHR* 466 at 482 - 484.

CHAPTER 2: THE DEVELOPMENT OF THE CIVIL UNION ACT

2.1 INTRODUCTION

The Civil Union Act came into operation on 30 November 2006. The Act was passed as a consequence of the judgment of the Constitutional Court in the case of *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbians and Gay Equality Project and Others*,¹⁹ which ruled that it was unconstitutional for the state to provide the benefits of marriage to opposite-sex couples whilst denying them to same-sex couples. The Civil Union Act makes provision for same-sex and opposite-sex couples to formalise their relationships by entering into either a marriage or a civil partnership,²⁰ both of which enjoy the same legal recognition, and give rise to the same legal consequences as a civil marriage under the Marriage Act.²¹

This chapter will examine the development of the law relating to same-sex relationships leading up to the enactment of the Civil Union Act. The stages of development preceding the enactment of the Civil Union Act can be divided into three distinguishable periods – the period preceding the enactment of the Constitution, the period following the Constitution during which spousal benefits were granted to same-sex partners on an *ad hoc* basis and the period in which marriage rights were eventually afforded to same-sex partners. The chapter has been structured to reflect these three developmental stages. This chapter will conclude with a succinct overview and analysis of the salient features of the Civil Union Act.

2.2 THE ERA PRIOR TO THE BILL OF RIGHTS

Unmarried life partners never enjoyed comprehensive legal protection at common law.²² During the period prior to the enactment of the Constitution, gay men, lesbians and other minorities suffered a particular harsh fate and were branded as criminals and

¹⁹ 2006 1 SA 524 (CC).

²⁰ S 1 definition of 'civil union'.

²¹ See s 13 of the Civil Union Act.

²² See Smith SB *The Development of South African Matrimonial Law with Specific Reference to the Need for and Application of a Domestic Partnership Rubric* LLD Thesis, University of the Free State (2009) at 126.

rejected by society as outcasts and perverts.²³ The South African legal system at the time did not recognise same-sex relationships or same-sex marriages. The rights and duties of persons were determined by their sexual orientation.²⁴ The notion of marriage as defined by the common law and statutes was based on principles of monogamy and heterosexuality-principles originally affirmed by Christian theology.²⁵ Based on the concept of marriage as it was defined within Christendom,²⁶ any recognition of same-sex unions in South Africa was forbidden, and sexual relations between persons of the same-sex were characterised as abnormal and criminal behaviour.²⁷ Partners in such relationships were excluded from the rights and obligations which automatically applied to partners in civil marriages, despite the fact that they functioned in a similar manner as traditional married families.²⁸

Bilchitz and Judge²⁹ note that:

‘The history of lesbian and gay discrimination, marginalisation and subordination in South Africa has been intimately tied to the legal prohibitions and restrictions. These restrictions initially focused on denying lesbians and gay people the right to a private space for their relationships by prohibiting various forms of sexual expression between members of the same-sex.’³⁰

²³ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) at 27F-28B.

²⁴ See *Moseneke v The Master* 2001 2 BCLR 103 (CC) para 21.

²⁵ For instance, in *Seedat’s Executors v The Master* 1917 AD 309 and *Ismail v Ismail* 1983 1SA 1006 (A) at 1019, marriage was defined as the legally recognised life-long voluntary union between one man and one woman to the exclusion of all others. See also De Ru H ‘A critical analysis of the retention of spousal benefits for permanent same-sex life partners after the coming into operation of the Civil Union Act 17 of 2006’ 2009 (2) *Speculum Juris* 111 at 111. Van der Vyver J ‘Constitutional perspective of church-state relations in South Africa’ 1999 *Brigham Young Univ PLR* 635 also notes that a distinct bias for Christianity was one of the aspects that denoted the fabric of the apartheid regime.

²⁶ South African Courts often referred to the well-known English decision in *Hyde v Hyde and Woodmansee* 1866 LR 1 P & D where it was stated that ‘marriage in Christendom, may ... be defined as the voluntary union for life of one man and one woman to the exclusion of all others’.

²⁷ See De Ru H ‘A critical analysis of the retention of spousal benefits for permanent same-sex life partners after the coming into operation of the Civil Union Act 17 of 2006’ 2009 (2) *Speculum Juris* at 111.

²⁸ See South African Law Reform Commission Project 118 *Report on Domestic Partnerships* (2006) at xi.

²⁹ Bilchitz D & Judge M ‘For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa’ 2007 *SAJHR* 466 at 468.

³⁰ The expression of gay male sexuality was prohibited in terms of the common law by the offences of ‘sodomy’ and the commission of ‘unnatural sexual acts’. Statutory offences such as section 250A of the Sexual Offences Act 23 of 1957 were created to close what were perceived as loopholes in the common

Bilchitz and Judge³¹ further believe that:

‘The law, whilst having a “chilling effect” on same-sex relationships through the possibility of arrest and imprisonment for individuals, was also clearly designed to send a clear social message³² and to stigmatise lesbian and gay individuals as “unapprehended felons”³³ whose sexuality was deviant and was comprised merely of fleeting sinful sexual acts.’

Calhoun³⁴ notes that lesbian women and gay men were thus required to adopt ‘pseudonymous heterosexual identities’ as a condition of access to public spaces.

2.3 EXTENSION OF RIGHTS TO SAME-SEX PARTNERS ON AN *AD HOC* BASIS

With the abolition of apartheid and the introduction of a new constitutional dispensation, a democratic and legal framework was created that allowed historically marginalised groups, including gays and lesbians, to challenge the religious and ideological hegemony that dominated South African politics.³⁵ The constitutional commitment to human dignity and equality, and the inclusion of sexual orientation as a prohibited ground of discrimination in terms of s 9(3) of the Constitution formed the *grundnorm* of several court cases in which recognition and protection of same-sex relationships were contested.³⁶ With the advent of the constitutional dispensation and taking into account the right to equality and the right to human dignity enshrined in the Constitution, it remained to be seen whether same-sex partners would allow the law to continue to deny them the right to marry one another. Societal groups, such as gays and lesbians, that had faced a history of marginalisation during the previous dispensation, were quick

law.

³¹ Bilchitz D & Judge M ‘For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa’ 2007 *SAJHR* 466 at 469.

³² See *National Coalition for Gay and Lesbians Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28 where Ackerman J held that ‘the symbolic effect of the criminalisation of consensual anal intercourse between men was to state that in the eyes of our legal system all gay men are criminals’.

³³ Cameron E ‘Sexual orientation and the Constitution: A test case for human rights 1993 *SALJ* 450 at 454.

³⁴ Calhoun C *Feminism, the Family and the Politics of the Closet: Lesbian and Gay Displacement* (2003) at 101.

³⁵ Mosikatsana TL ‘The definitional exclusion of gays and lesbians from family status’ 1996 *SAJHR* 549 at 554.

³⁶ Van Aardt WJ and Robinson JA ‘The biology of homosexuality and its implications for human rights in South Africa’ 2008 *THRHR* 179 at 180.

to approach the courts in order to challenge the legacy left by the pre-democratic South Africa.³⁷

In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,³⁸ the Constitutional Court found that gay men were a permanent minority in society and had suffered in the past from patterns of disadvantage and that the impact of the disadvantage was severe, affecting the dignity, personhood and identity of gay men at a deep level.³⁹ The court further found that the disadvantage occurred at many levels and in many ways and was often difficult to eradicate.⁴⁰ The Constitutional Court described the impact of discrimination on gays and lesbians as serious and characterised them as a group of people with 'vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favorable legislation for themselves.'⁴¹ The Constitutional Court struck down the common law crime of sodomy (as well as a number of laws that prohibited all-male sexual relations), and held that private consensual intercourse *per anum* between adult males was legally permissible. In a separate concurring judgment Sachs J stated as follows:

'In my view, the decision of this Court should be seen as part of a growing acceptance of difference in an increasingly open and pluralistic South Africa. It leads me to hope that the emancipatory effects of the elimination of institutionalised prejudice against gays and lesbians will encourage amongst the heterosexual population a greater sensitivity to the variability of the human kind'.⁴²

³⁷ For instance, in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Another* 2000 2 SA 1 (CC) para 56, the Constitutional Court found that s 25(5) of the Aliens Control Act 96 of 1991 discriminated against partners in permanent same-sex life partnerships as it only provided for the spouses of permanent South African residents to apply for immigration permits. In consequence of this finding, the Court ordered that the words or 'partner', in a permanent same-sex life partnership would henceforth be read into the Act after the word 'spouse' to remedy this defect.

³⁸ 1991 SA 6 (CC).

³⁹ At para 26.

⁴⁰ At para 26.

⁴¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 25.

⁴² At para 138.

Furthermore, concerning the *consortium omnis vitae* between same-sex partners, the Constitutional Court made the following innovational ruling:

- '(i) 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;
- (i) 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;
- (ii) They are individually able to adopt children and in the case of lesbians to bear them '.
- (iii) In short, they have the same ability to establish the *consortium omnis vitae*'.⁴³

Bilchitz and Judge⁴⁴ argue that this ruling by the Constitutional Court signified a critical shift in the 'status, moral citizenship and sense of self-worth' of lesbian and gay people. Although partners in a same-sex relationship were by no means placed on the same footing as spouses in a civil marriage, the Constitutional Court was prepared to extend spousal benefits to same-sex partners in a number of cases decided before the coming into operation of the Civil Union Act⁴⁵ on an *ad hoc* basis. The Constitutional Court justified its findings on section 9(3) of the Constitution which forbids unfair discrimination and section 10 of the Constitution which guarantees the right to human dignity. The rationale underlying the extension of spousal benefits to spouses in the same-sex relationship was based on the fact that same-sex partners could not choose to get married even if they wanted to marry. Smith and Robinson⁴⁶ argue that only

⁴³ At para 53.

⁴⁴ Bilchitz D & Judge M 'For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa' 2007 *SAJHR* 466 at 469.

⁴⁵ In the majority of the cases where the interpretation of spouse was extended to include same-sex partner, the court ordered a 'reading in' of 'permanent same-sex life partner' into the provision.

⁴⁶ Smith SB & Robinson JA 'Rethinking *Volks v Robinson*: the implications of applying "contextualised model" to prospective South African Domestic partnerships legislation' 2010 *PELJ* at 2.

heterosexual persons were permitted to marry explains, at least at face value, why the courts were prepared to extend many of the rights and obligations attached to marriage to same-sex life partners whilst refusing to do the same to heterosexual counterparts.⁴⁷

The concept of a 'same-sex life partnership' was first recognised by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others*.⁴⁸ In this case, the Constitutional Court set a benchmark regarding the recognition and development of jurisprudence relating to life partnerships in general and homosexual life partnerships in particular.⁴⁹ The Constitutional Court acknowledged the existence of another form of life partnership which is different from marriage as recognised by law. The court held that this form of life partnership is represented by a conjugal relationship between two people of the same sex.⁵⁰ The court found that same-sex life partnerships may differ with regard to duration and content, but in essence they represent an 'intimate and mutually interdependent' relationship.⁵¹ The Constitutional Court held that the constitutional rights to equality and dignity dictated the recognition and extension of spousal benefits, in this case, immigration rights to gay and lesbian partners in permanent same-sex life partnerships.⁵²

In *Satchwell v President of the Republic of South Africa and Another*,⁵³ the Constitutional Court concluded that same-sex partners should be included in benefits given to the spouses of judges under sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act.⁵⁴ In *Du Plessis v Road Accident Fund*,⁵⁵ the Supreme

⁴⁷ The Constitutional Court in *Volks v Robinson* 2005 5 BCLR 446 (CC) at paras 91 and 92 held that treating unmarried opposite-sex domestic partners different from their married counterparts did not infringe on their dignity and therefore could not be considered unfair discrimination because they had always had a choice or an option of marrying one another but nevertheless had chosen not to do so. In other words, by choosing not to enter into a marriage they denied themselves the rights and duties associated with marriage. Justices Mokgoro, O'Regan and Sachs dissented. They were of the view that excluding heterosexual life partners who had entered into reciprocal duties of support during the relationship, from benefits afforded by the Act constituted unfair discrimination on ground of marital status.

⁴⁸ 2000 2 SA 1 (CC).

⁴⁹ See Smith SB *The Development of South African Matrimonial Law with Specific Reference to the Need for and Application of a Domestic Partnership Rubric* LLD Thesis, University of the Free State (2009) at 203.

⁵⁰ At para 36.

⁵¹ At para 17.

⁵² At para 97.

⁵³ 2002 6 SA 1 (CC).

⁵⁴ 88 of 1989. See para 14 of the judgment. This judgment followed an earlier judgment in *Langemaat v*

Court of Appeal had to consider whether the plaintiff was entitled to claim damages for loss of support from his same-sex partner in terms of the Road Accident Fund Act.⁵⁶ The court found that in a society where the range of family formations had widened, such a duty of support might be inferred as a matter of fact in certain cases of persons involved in permanent, same-sex life partnerships.⁵⁷ The court concluded that the deceased therefor owed the plaintiff a contractual duty of support⁵⁸ and could thus claim from the Road Accident Fund as requested.

In *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)*⁵⁹ the Constitutional Court found that the exclusion of same-sex life partners from adopting children in circumstances where they would otherwise be eligible to do so did not serve the best interests of the children.⁶⁰ Thus the exclusion was in direct conflict with s 28(2) of the Constitution.⁶¹ The exclusion also deprived children of the possibility of acquiring a loving and stable family life as required by s 28(1)(b) of the Constitution and limited the right to dignity and equality of the same-sex life partners.⁶² The court held that the limitation of these rights was unjustifiable and granted the relief sought by the applicants to the effect that they can jointly adopt children.⁶³

In *J and Another v Director-General, Department of Home Affairs and Others*,⁶⁴ the Constitutional Court upheld the decision of the High Court and declared section 5 of the Children Status Act⁶⁵ to be inconsistent with the Constitution. The court concluded that when same-sex partners have a child together through artificial insemination, both are

Minister of Safety and Security 1998 3 SA 312 (T) in which the court held that a same-sex partner could be registered as a dependant for purposes of the police medical scheme.

⁵⁵ 2004 1 SA 359 (SCA).

⁵⁶ 56 of 1996, at para 1 of the judgment.

⁵⁷ At para 13.

⁵⁸ At para 16.

⁵⁹ 2003 2 SA 198 (CC).

⁶⁰ At para 22.

⁶¹ At para 22.

⁶² See paras 22, 26, and 26.

⁶³ At para 42.

⁶⁴ 2003 5 SA 621 (CC).

⁶⁵ 62 of 1987.

automatically the legal parents of the child.⁶⁶ The result of this decision was that a child born as a result of the artificial insemination of a woman in a same-sex life partnership was deemed to be the 'legitimate' child of her same-sex life partner.

Just weeks before the enactment of the Civil Union Act, the Constitutional Court in *Gory v Kolve*⁶⁷ declared section 1(1) of the Intestate Succession Act⁶⁸ unconstitutional on the ground that it unfairly discriminated against permanent same-sex life partners. The Constitutional Court found that as the deceased and the applicant were not legally entitled to marry, this amounted to discrimination on the listed ground of sexual orientation in terms of section 9(3) of the Constitution, which is in terms of section 9(5) presumed to be unfair unless the contrary is established.⁶⁹ The court found that given the recent jurisprudence of South African Courts in relation to permanent same-sex life partnerships,⁷⁰ the failure of section 1(1) to include within its ambit surviving partners to permanent same-sex life partnerships in which the partners have undertaken reciprocal duties of support is inconsistent with the applicant's right to equality and dignity in terms of section 9 and 10 of the Constitution and that the limitation of these rights could not be justified.⁷¹ The court eventually declared the applicant the sole intestate heir of the deceased.⁷² The judgment did, however, create some uncertainty regarding the rights of same-sex life partners should they be given the choice to formalise their unions in future. According to Van Heerden AJ:

'Any change in the law pursuant to *Fourie* will not necessarily amend those statutes into which words have already been read by this Court so as to give effect to the constitutional rights of gay and lesbian people to equality and dignity. In the absence of legislation amending the relevant statutes, the effect on these statutes of decisions of this Court in cases like *National Coalition for Gay and*

⁶⁶ At para 28.

⁶⁷ 2007 4 SA 97 (CC).

⁶⁸ 81 of 1987.

⁶⁹ At para 19.

⁷⁰ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC); *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).

⁷¹ At para 19.

⁷² At para 66.

Lesbian Equality v Minister of Home Affairs, Satchwell, Du Toit and J v Director-General, Department of Home Affairs will not change. The same applies to the numerous other statutory provisions that expressly afford recognition to permanent same-sex life partnerships.⁷³

The extension of spousal benefits by the courts to same-sex life partners amounted to measures designed to advance the social and economic status of gays and lesbians with the objective of eliminating their historical burden of inequality in order to promote the achievement of equality in our society.⁷⁴ Smith⁷⁵ notes that interestingly enough, the extensions permitted by the courts had the effect that in less than a decade South African family law evolved from a position where male same-sex activity was criminalised to a position where same-sex life partners enjoyed better legal protection than their unmarried heterosexual counterparts.⁷⁶

2.4 AFFORDING MARRIAGE RIGHTS TO PARTNERS IN A SAME-SEX RELATIONSHIP

The piecemeal recognition of same-sex partnerships was finally addressed in the case of *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*.⁷⁷ In this case, a lesbian couple with the help of the Lesbian and Gay Equality Project launched an application in the Pretoria High Court (Transvaal Provincial Division)⁷⁸ to have their union recognised and recorded by the Department of Home Affairs as a valid marriage and to direct the respondents to register their marriage in terms of the provisions of the Marriage Act and the

⁷³ At 28.

⁷⁴ De Ru H 'A critical analysis of the retention of spousal benefits for permanent same-sex life partners after the coming into operation of the Civil Union Act 17 of 2006' 2009 *Speculum Juris* 111 at 125.

⁷⁵ See Smith SB *The Development of South African Matrimonial Law with Specific Reference to the Need for and Application of a Domestic Partnership Rubric* LLD Thesis, University of the Free State (2009) at 129.

⁷⁶ As a result of cases such as *Gory v Kolver* 2007 4 SA 97 (CC), same-sex partners will now be treated like spouses despite the fact that like heterosexual partners they now also have the choice to formalise their union in terms of the Civil Union Act.

⁷⁷ 2006 1 SA 524 (CC).

⁷⁸ *Fourie and Another v Minister of Home Affairs and Another (The Lesbian and Gay Equality Project intervening as Amicus Curiae)* Unreported case No 17280/02 (18 October 2002) (T).

Identification Act.⁷⁹ They based their argument on the fact that the common law had developed in such a manner that it could recognise marriage between persons of the same-sex as a legally valid marriage in terms of the provisions of the Marriage Act. The High Court dismissed their application on the basis that they did not properly attack the constitutionality of the definition of marriage or the Marriage Act. Their application for leave to appeal directly to the Constitutional Court was refused and the High Court granted them leave to appeal to the Supreme Court of Appeal.

In the Supreme Court of Appeal, the court ruled that where the common law is deficient, the Constitution grants inherent power to the Constitutional Court, the High Court and the Supreme Court of Appeal 'to develop the common law, taking into account the interests of justice'.⁸⁰ The Supreme Court of Appeal held that the applicable common law definition of marriage deprived committed same-sex couples the right to get married and therefore denied gays and lesbians a host of benefits, protection and duties.⁸¹ The court observed that legislation has ameliorated,⁸² but not eliminated, the disadvantage same-sex couples suffer.⁸³ The court found that the definition of marriage excluded couples in a same-sex relationship from a community of moral equals that the Constitution promised to create for all.⁸⁴ The court noted that although the Marriage Act contains no definition of marriage, the Act was enacted on the assumption that the common law definition of marriage applied to heterosexual marriages only and it was this definition that underlined the Act.⁸⁵

The court found that there is a clear distinction between interpreting legislation in conformity with the Constitution and its values, and granting the constitutional remedies of reading in or severance.⁸⁶ The court found that these two processes are

⁷⁹ 68 of 1997.

⁸⁰ *Fourie and Another v Minister of Home Affairs and Others* 2005 3 SA 429 (SCA) at paras 4 to 5.

⁸¹ At para 15.

⁸² Cameron JA, quoted the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 37 where the Constitutional Court stated: 'A notable and significant development in our statute law in recent years has been the extent of express and implied recognition the legislature has accorded same-sex partnerships.'

⁸³ At para 15.

⁸⁴ At para 15.

⁸⁵ At para 27.

⁸⁶ At para 29.

fundamentally different in that the first process, being an interpretive one, is limited to what the text is reasonably capable of meaning. Whilst the latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretive aids, is found constitutionally invalid.⁸⁷ Section 30(1) of the Marriage Act contains a default marriage formula which also served as a hurdle for the applicants. The formula requires the couple to declare before the marriage officer whether they accept each other as 'lawful wife or husband'.⁸⁸ The court held that the exclusion of same-sex couples by the marriage formula could not be corrected by the reading in of words to include same-sex partners but that the development of the common-law definition of marriage would take practical effect as soon as the Minister of Home Affairs approved another formula which would also consider same-sex couples.⁸⁹ However, the court emphasised that neither the court's decision nor the ministerial grant of such a formula, in any way impinges on religious freedom.

The court found that the extension of the common law definition of marriage in terms of section 31 of the Marriage Act would not compel any religious denomination or minister of religion to approve or perform same-sex marriages.⁹⁰ The Supreme Court of Appeal developed the common law definition of marriage to embrace same-sex partners by redefining 'marriage' as 'the union of two persons to the exclusion of all others for life'.⁹¹ The court eventually set aside the decision of the High Court and held that the intended marriage between the appellants would be capable of being recognised as a legally valid marriage, provided that the formalities as set out by the Marriage Act were fully complied with.⁹²

The decision of the Supreme Court of Appeal was overturned by the Constitutional Court.⁹³ The Constitutional Court unanimously found⁹⁴ that the failure by the common

⁸⁷ At para 29.

⁸⁸ At para 27.

⁸⁹ At para 37.

⁹⁰ At para 36.

⁹¹ At para 49.

⁹² At para 49.

⁹³ *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs and Others* 2006 1 SA 524 (CC).

⁹⁴ At para 162.

law together with the Marriage Act to provide the means whereby same-sex couples could enjoy the same status, entitlements and responsibilities as heterosexuals do in marriage, constituted an unjustifiable violation of their rights to equality and dignity.⁹⁵ The court confirmed that the right to marry is an inalienable right that belongs to all who live in South Africa, black and white, gay or straight and that gay men and lesbians can only be affirmed as full and equal members of our society if this right is fully extended to them.⁹⁶ The Constitutional Court concluded that it would be important, first to afford Parliament the opportunity to cure the unconstitutionality of the existing law that excluded same-sex partners to marry and enjoy the same benefits as heterosexual couples. Sachs J⁹⁷ argued that one of the reasons for suspending the order of invalidity for a period of one year was precisely to afford the legislature sufficient opportunity to take proper cognisance of the comprehensive research done by South African Law Reform Commission (SALRC).⁹⁸

The Constitutional Court held that should Parliament fail to enact legislation that cater for same-sex marriages within a period of a year, the words 'or spouse' after the words 'or husband' would simply be read into section 30(1) of the Marriage Act, thereby providing a marriage formula that was wide enough to encompass the conclusion of same-sex marriages. O'Regan J⁹⁹ dissented on the question of remedy. She argued that the Constitutional Court should itself have provided an immediate relief to the litigants by developing the common law definition of marriage to include same-sex couples without sending it to Parliament.¹⁰⁰

⁹⁵ At para 114.

⁹⁶ At paras 117 - 118.

⁹⁷ At para 156.

⁹⁸ At paras 125 to 131. The SALRC made a Memorandum on the progress achieved concerning Project 118 on *Domestic Partnerships* available to the court on the 19 May 2005. Thereafter a Discussion Paper 104 Project 118 *Domestic Partnerships* was published in 2003: See Smith BS and Robinson JA 'An embarrassment of riches or profusion of confusion? An evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective domestic partnerships legislation in South Africa' 2010 *PELJ* para 3.1.

⁹⁹ At para 165.

¹⁰⁰ At para 169.

Smith and Robinson¹⁰¹ argue that the Constitutional Court charged the legislature with the unenviable task of legislating a highly contentious and emotional issue, namely the legal regulation of same-sex marriage. Bilchitz and Judge¹⁰² are of the view that if one looks closely at the majority judgment, it seems that the findings of unconstitutionality lay in the failure of the existing legal regime to provide same-sex couples with the means whereby they could enjoy the same status, entitlements and responsibilities accorded to heterosexual couples in marriage.¹⁰³ Barnard¹⁰⁴ notes that the Constitutional Court explicitly acknowledged that the extension of marriage to permanent same-sex life partnerships was a matter of the protection of equality and dignity and thus of plurality. Barnard¹⁰⁵ believes that the opening of the institution of marriage was thus also ‘a distinctively democratic political gesture that affirmed the rule of law and celebrated secularity’.

De Vos and Barnard¹⁰⁶ argue that the Constitutional Court in *Fourie* rejected many of the stereotypical assumptions made about gay men and lesbians and their intimate relationships. De Vos and Barnard¹⁰⁷ argue further that the court noted that gays and lesbians have a constitutionally entrenched right to dignity and equality and they are likewise capable of forming intimate, monogamous, and enduring relationship. The legislature responded to the *Fourie* case by enacting the Civil Union Act. Ntlama¹⁰⁸ notes that the Civil Union Act took place within the context and against the background of affirming the legitimacy of the development of measures that are designed to protect persons or categories of persons previously disadvantaged by unfair discrimination.

¹⁰¹ Smith BS and Robinson JA ‘The South African Civil Union Act 17 of 2006: A Good example of the dangers of rushing the legislative process’ 2008 *BYU Journal of Public Law* 425.

¹⁰² Bilchitz D & Judge M ‘For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa’ 2007 *SAJHR* 466 at 478.

¹⁰³ See para 114 of the judgment.

¹⁰⁴ Barnard J ‘Totalitarianism (same-sex) marriage and democratic politics in post-apartheid South Africa’ 2007 *SAJHR* 514.

¹⁰⁵ Barnard J ‘Totalitarianism (same-sex) marriage and democratic politics in post-apartheid South Africa’ 2007 *SAJHR* 514.

¹⁰⁶ De Vos P & Barnard J ‘Same-sex marriage, civil unions and domestic partnerships in South Africa: A critical reflections on an ongoing saga’ 2007 *SALJ* 795 at 800.

¹⁰⁷ De Vos P & Barnard J ‘Same-sex marriage, civil unions and domestic partnerships in South Africa: A critical reflections on an ongoing saga’ 2007 *SALJ* 795 at 800.

¹⁰⁸ Ntlama N ‘A brief overview of the Civil Union Act’ 2010 *PELJ* 191/234 at 194/234. See also s 14(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

2.5 THE ENACTMENT OF THE CIVIL UNION ACT 17 OF 2006

2.5.1 The recommendations of the South African Law Reform Commission (SALRC) to embrace marriage for same-sex couples in the Marriage Act

In 1996 the Minister of Home Affairs instructed the SALRC to investigate and recommend legislation relating to a new marriage dispensation for South Africa.¹⁰⁹ During the period of the investigation several important judgments were handed down. Two judgments of particular importance to the SALRC's investigation were the Constitutional Court rulings in *Volks* and the judgment in *Fourie*. Both judgments informed the final recommendations of the Commission.¹¹⁰

During its investigation, the Commission identified the following four options for reform aimed to afford same-sex couples the same rights currently afforded to opposite-sex partners in marriage.¹¹¹ The first option was to extend the common-law definition of marriage to same-sex couples by inserting a definition to that effect in the Marriage Act. The second option was to extend the common-law definition of marriage in the current Marriage Act to apply to same- and opposite-sex couples, and enact another Marriage Act to apply to opposite-sex marriages only. The third option entailed the separation of the civil and religious aspects of marriage by separating the ceremonies and then regulating only the civil aspects of marriage in the Marriage Act. The fourth option was to accord legal protection to same-sex couples in a separate institution, equal to marriage in all respects, but called a civil union.

The SALRC acknowledged¹¹² that the challenge 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. The Commission recommended as its first choice the amendment of the Marriage Act by the insertion of

¹⁰⁹ SALRC Project 118 *Report on Domestic Partnerships* (2006) para 1.1.1. See also Smith S and Robinson JA 'An embarrassment of riches or a profusion of confusion? An evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective domestic partnership legislation in South Africa' 2010 *PELJ* 10 at para 3.1.

¹¹⁰ SALRC Project 118 *Report on Domestic Partnerships* (2006) para 1.1.1.8.

¹¹¹ SALRC Project 118 *Report on Domestic Partnerships* (2006) at vii – viii.

¹¹² At viii.

a definition of marriage that makes the Act applicable to all couples wanting to get married, irrespective of their religion, race, culture or sexual orientation.¹¹³ The SALRC, however, considered it advisable from a policy viewpoint not to disregard the strong objections against such recognition.¹¹⁴ The concern for these objections was in the SALRC's view, an important consideration in the endeavour to accommodate religious sentiments, to the extent that it is constitutionally possible.¹¹⁵

The SALRC thus recommended, as its second choice, the enactment of an Orthodox Marriage Act (in addition to the amended Marriage Act) that would be applicable to opposite-sex couples only.¹¹⁶ The SALRC was of the opinion that section 15(3)(a)(i) of the Constitution, which allows legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law, supported this approach.¹¹⁷ The Orthodox Marriage Act would have been enacted in the same format as the current Marriage Act with a definition of marriage that limits the application of the Act to opposite-sex couples only. The wording of the Orthodox Marriage Act would otherwise have remained the same as the Marriage Act of 1961 and the *status quo* for opposite-sex couples in terms of this Act would be retained in all respects.¹¹⁸ In terms of the proposed Orthodox Marriage Act, Ministers of religion (or religious institutions) would have had the choice to decide in terms of which Act they wished to be designated as marriage officers.¹¹⁹

2.5.2 The legislature's response to the *Fourie* judgment

The Civil Union Act came into operation on 30 November 2006. This Act was the legislator's response to the decision of the Constitutional Court in the *Fourie* case in

¹¹³ The recommended text of the legislation giving effect to this choice was attached as Annexure C to the Report by the SALRC.

¹¹⁴ At xiv.

¹¹⁵ At xiv.

¹¹⁶ At xiv.

¹¹⁷ At xiv.

¹¹⁸ The recommended text of this Act appeared in Annexure D of the SALRC's Report.

¹¹⁹ At xv. The SALRC was of the view that it was necessary to accommodate the religious and moral objections that had been raised before the Commission against permitting same-sex marriage. However it was noted that the constitutionality of the proposal to separate the civil and religious aspects of marriage was doubtful and such an option was perceived to be impractical and would not be in compliance with the decision of the Constitutional Court: See SALRC Project 118 *Report on Domestic Partnerships* (2006) at para 5.5.25 read with paras 5.6.2 and 5.6.3.

which the common law definition of marriage and the marriage formula in the Marriage Act were declared unconstitutional to the extent that they excluded same-sex couples from the status, benefits and responsibilities accorded to heterosexual couples. The preamble of the Civil Union Act acknowledges that the family law dispensation as it existed after the commencement of the Constitution did not provide for same-sex couples to enjoy the status and the benefits that marriage accords to opposites-sex couples.

In terms of section 2 of the Civil Union Act, the objectives of the Act are to regulate the solemnisation and registration of civil unions by way of either a marriage or a civil partnership and to provide for the legal consequences of the solemnisation and registration of civil unions. In a broader context, the Civil Union Act can be seen as a way to achieve the values and the objectives envisaged in the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act.¹²⁰

Section 1 of the Civil Union Act defines a 'civil union' as the voluntary union of two persons who are 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in the Act to the exclusion while it last, of all others. The term 'civil union' includes a marriage and a civil partnership concluded in terms of the Act.¹²¹ The Civil Union Act defines a civil union partner as a spouse in a marriage or a partner in a civil partnership as the case may be, concluded in terms of this Act.¹²² Unlike the Marriage Act and the Recognition of Customary Marriages Act,¹²³ which allow a minor to enter into a civil or customary marriage provided he or she obtains the consent from the legal guardian or from the court,¹²⁴ there is no provision for people under the age of 18 years (minors) to

¹²⁰ 4 of 2000.

¹²¹ See s 2(a) of the Civil Union Act.

¹²² See s 1 of the Act.

¹²³ 120 of 1998.

¹²⁴ See s 18(3) of the Marriage Act and s 3(3) of the Recognition of Customary Marriages Act 120 of 1998. For a discussion of consent requirement in respect of a minor's customary marriage, see Van Schalkwyk LN 'Kommentaar op die Erkenning van Gebruiklike Huwelike 120 van 1998' 2000 *THRHR* 483 - 486.

marry one another in terms of the Civil Union Act, even if he or she is assisted by his or her parent or legal guardian.¹²⁵

A civil union may be registered by persons who would be able to enter into a civil or customary marriage.¹²⁶ Thus, for instance an adoptive parent may not enter into a civil union with his or her adopted child¹²⁷ and any person who is within the prohibited degrees of relationship for purposes of a civil or customary marriage may not enter into a civil union with each other.¹²⁸ The wording of section 8(6), however, does not make it clear whether lawfulness will depend on eligibility in terms of either or both the Marriage Act and the Recognition of Customary Marriages Act.¹²⁹

A civil union is monogamous, may only be entered into by adults, may not co-exist with a civil or customary marriage¹³⁰ and may be entered into by same-sex and opposite-sex couples.¹³¹ It is entirely up to the civil union partners whether their civil union is called a marriage or a civil partnership.¹³² At the time of solemnisation, the marriage officer must inquire from the parties whether their civil union should be known as a marriage or a civil partnership.¹³³ Their choice determines not just the marriage formula but also how their relationship is classified administratively.¹³⁴ The marriage officer conducts the

¹²⁵ S 24(1) of the Marriage Act provides that '[n]o marriage officer shall solemnise a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purposes of contracting the marriage has been granted and furnished to him in writing'.

¹²⁶ See s 8(6) of the Civil Union Act.

¹²⁷ See Heaton J *South African Family Law* 3 ed (2010) at 195 to 196.

¹²⁸ See Heaton J *South African Family Law* 3 ed (2010) at 195 to 196.

¹²⁹ 120 of 1998. See Van Schalkwyk LN *General Principles of Family Law* 5 ed (2014) at 156 – 157.

¹³⁰ If either party has previously been a party to a civil union or a customary marriage, the civil union may not be solemnised until the marriage officer has been provided with a certified copy of the divorce order or of the death certificate of the party's deceased spouse or civil union partner: Ss 8(4) and (5) of the Civil Union Act.

¹³¹ Heaton J *South African Family Law* 3 ed (2010) at 195, argues that it is generally accepted that the Civil Union Act applies to same-sex and heterosexual couples. See also Schafer in Clark B (ed) *Family Law Service* paras E16 and E37; De Vos P 'A Judicial revolution? The court-led achievements of same-sex marriages in South Africa' 2008 *Utrecht Law Review* 169; De Vos P & Barnard N 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' 2007 *SALJ* 821. However, Smith B 'The development of South African Matrimonial law with specific reference to the need for and application of a domestic partnership rubric' LLD Thesis, University of the Free State (2009) at 466, argues that certain provisions of the Civil Union Act create the impression that it only permits same-sex couples to enter into civil unions.

¹³² See s 11(1) of the Civil Union Act.

¹³³ See s 11(1) of the Civil Union Act.

¹³⁴ S 12(3) provides that the marriage officer must issue the partners to the civil union with a registration certificate stating that they have, under this Act, entered into a marriage or a civil partnership, depending

ceremony according to the prescribed procedure in the Act and is responsible for completing the legal documentation relating to the civil union.¹³⁵ Apart from the fact that a civil union may be concluded by parties of the same or the opposite sex, the requirements for a civil union are in most respects identical to those of a civil marriage.¹³⁶

Section 13(1) of the Civil Union Act provides that the legal consequences of a marriage contemplated in terms of the Marriage Act apply, with such changes as may be required by the context, to a civil union. The provision relating to the place for solemnisation of a civil union¹³⁷ is confusing. In terms of section 10(2) a marriage officer must solemnise and register a civil union 'in a public office or private dwelling-house or on the premises used for such purposes by the marriage officer'. The provision therefore does not refer to a church or other building used for religious purposes.¹³⁸ The meaning of the phrase 'premises used for such purposes' is also difficult to ascertain. Apart from these difficulties and omissions, the provisions relating to the place and formalities applicable in the case of a civil union mirror those applying to a civil marriage.

A civil union may only be solemnised by a marriage officer and any person who purports to solemnise a civil union without having the necessary authority to do so, or an authorised marriage officer who solemnises a prohibited civil union, is guilty of an offence.¹³⁹ All persons who are *ex officio* marriage officers in terms of the Marriage Act and all officers in the public, diplomatic or consular service who have been designated as marriage officers under the Marriage Act qualify as marriage officers for purposes of the Civil Union Act.¹⁴⁰ To this end, all secular marriage officers may solemnise civil

on the decision made by the parties under section 11(1).

¹³⁵ See ss 10 - 12.

¹³⁶ Heaton J *South African Family Law* 3 ed (2010) at 193.

¹³⁷ S 10(2).

¹³⁸ S 29(2) of the Marriage Act provides that a marriage officer shall solemnise any marriage in church or other building used for religious service, or in a public office or private dwelling-house, with open doors and in the presence of the parties themselves and at least two competent witnesses.

¹³⁹ See s 14(1). See Heaton J *South African Family Law* 3 ed (2010) at 193.

¹⁴⁰ See ss 2(1) and 2 of the Marriage Act read with the definition of marriage officer in s 1 of the Civil Union Act.

marriages and civil unions and their appointment as marriage officers for such marriages and unions is regulated by the same rules.¹⁴¹

A marriage officer other than a religious marriage officer may inform the Minister of Home Affairs in writing that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same-sex.¹⁴² He may thus be exempted from having to solemnise any same-sex civil union. A marriage officer who solemnises a civil union must keep a record of all the civil unions he or she solemnises and must issue each couple with a registration certificate which states that the couples entered into a civil partnership or marriage under the Civil Union Act.¹⁴³ A signed certificate of the marriage officer is *prima facie* proof of the existence of the civil union.¹⁴⁴ The same rules which regulate the dissolution of a civil marriage apply in the dissolution of a civil union.¹⁴⁵ Section 7(3) of the Divorce Act,¹⁴⁶ which deals with the redistribution of assets, does not find application to spouses married in terms of the Civil Union Act as the Act only came into operation on 30 November 2006.¹⁴⁷ This means that civil union partners who choose to exclude any form of profit sharing will not be able to institute an order for the redistribution of assets upon divorce.

2.6 CONCLUDING REMARKS

The Civil Union Act creates the only means by which same-sex couples may formalise their union. It is apparent from the above discussion that the legal consequences of a union concluded under the Civil Union Act are identical to those of a civil marriage under the Marriage Act. As such it can be concluded that same-sex civil unions are formally accorded a 'public and private status' that is indistinguishable from that enjoyed

¹⁴¹ See Heaton J *South African Family Law* 3 ed (2010) at 196.

¹⁴² S 6 of the Civil Union Act.

¹⁴³ See s 12(3) of the Civil Union Act.

¹⁴⁴ See s 12(4) of the Civil Union Act.

¹⁴⁵ See s 13 of the Civil Union Act.

¹⁴⁶ 70 of 1979.

¹⁴⁷ In terms of s 7(3) of the Divorce Act 70 of 1979, a spouse may ask the court to transfer the other spouse's assets, or such part of the other spouse's assets as the court may deem just, to him or her, if the spouses did not enter into an agreement concerning the division of their assets, and they were married (a) prior to the commencement of the Matrimonial Property Act on 1 November 1984, with an antenuptial contract which excludes community of property, community of profit and loss, and accrual sharing in any form; or (b) prior to the commencement of the Marriage and Matrimonial Property Law Amendment Act on 2 December 1988, in terms of s 22(6) of the Black Administration Act 38 of 1927.

by heterosexual spouses under the Marriage Act.¹⁴⁸ The question that begs an answer is why was it necessary to enact the Civil Union Act with the same legal consequences as the Marriage Act? The answer to this question will be investigated as part of the investigation into the constitutionality of the Civil Union Act, which will be dealt with in the following chapter.

¹⁴⁸ See Smith SB *The Development of South African Matrimonial Law with Specific Reference to the Need for and Application of a Domestic Partnership Rubric* LLD Thesis, University of the Free State (2009) at 771.

CHAPTER 3: CONSTITUTIONAL ENQUIRY

3.1 INTRODUCTION

Apart from the interpretational difficulties arising from its wording, the Civil Union Act in comparison with the Marriage Act creates some inequalities and differentiations which may be constitutionally contestable. The rest of the discussion in this chapter will be devoted to illustrate the nature of these inequalities and differences and the reasons why they can be challenged on constitutional grounds.

3.2 GROUNDS OF ATTACK

The constitutionality of the Civil Union Act, in the first instance, can be attacked on the ground that it offends the rights of same-sex couples to equality and human dignity as entrenched in sections 9 and 10 of the Constitution. Same-sex couples may claim to be unfairly discriminated against in terms of the Act for the following two reasons:

- (a) A marriage officer may in terms of section 6 of the Civil Union Act refuse to solemnise a same-sex civil union while it is not possible in the case of a heterosexual civil marriage solemnised in terms of the Marriage Act; and
- (b) same-sex couples can only formalise their union in terms of the Civil Union Act while heterosexual couples may formalise their union in terms of either the Marriage Act or the Civil Union Act. The resultant 'separate but equal' dispensation is in direct conflict with the directives of the Constitutional Court in the *Fourie* judgment.¹⁴⁹

The second basis for a constitutional challenge may be found in the blanket ban on same-sex minor couples to conclude a civil union in terms of the Civil Union Act. This ban not only conflicts with the common law minimum marriageable ages¹⁵⁰ but also with the Marriage Act and the Recognition of Customary Marriages Act¹⁵¹ that both allow

¹⁴⁹ *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at para 150.

¹⁵⁰ Which is related to the age of puberty of girls (12 years) and boys (14 years): See Heaton J *South African Family Law* 3 ed (2010) at 194.

¹⁵¹ 120 of 1998.

minors to conclude marriages.¹⁵² In addition to constituting an infringement of minors' right to equality, the Civil Union Act may in this regard conceivably also be regarded as not giving paramountcy to the best interests of children as required in terms of section 28(2) of the Constitution. Although perhaps of lesser importance, the possibility for same-sex couples to become spouses in terms of the Civil Union Act would also seem difficult to reconcile with the common law *pater est quem nuptiae demonstrant* presumption and the *lex domicilii matrimonii* rule as far as the patrimonial consequences of the civil union are concerned.

3.2.1 Violation of right to equality and dignity

(a) Exemption from duty to solemnise civil unions

Civil marriages and civil unions may be solemnised either by religious marriage officers or *ex officio* marriage officers who are civil servants. In case of civil marriages, the Marriage Act provides that an *ex officio* marriage officer¹⁵³ must solemnise all marriages placed before him or her and is not allowed to refuse to solemnise a marriage on the grounds of conscience, religion or belief.¹⁵⁴ A religious marriage officer who solemnises a civil marriage according to the rites of Christian, Jewish or Mohammedan beliefs and the rites of any Indian religion may refuse to solemnise a marriage which does not conform to the rites or beliefs of his chosen religion.¹⁵⁵ The Civil Union Act does not permit a religious marriage officer to object to solemnising a civil union which does not conform to the rites, tenets or doctrines of his religious beliefs. The procedure for the appointment of a religious marriage officer in terms of the Civil Union Act differs from that prescribed in terms of the Marriage Act. While a minister of religion in terms of the Marriage Act is designated and appointed as a marriage officer in his or her personal capacity,¹⁵⁶ the appointment of a minister of religion as a marriage officer in terms of section 5 of the Civil Union Act is subject to the approval of the religious institution or

¹⁵² S 26(1) of the Marriage Act and s 3(3) of the Recognition of Customary Marriages Act 120 of 1998.

¹⁵³ S 2(1) of the Marriage Act (Magistrates, Special justices of the Peace and Commissioners are *ex officio* marriage officers).

¹⁵⁴ S 2 of the Marriage Act.

¹⁵⁵ S 31 of the Marriage Act.

¹⁵⁶ S 3.

organisation of which that minister of religion is a member.¹⁵⁷ Only after the Minister of Home Affairs has approved the organisation can the minister of religion apply to be appointed as a marriage officer.¹⁵⁸

From a careful reading of section 5 of the Civil Union Act, it is interesting to note that the section only refers to ‘marriages’ and not to civil partnerships, the other type of civil union created in terms of the Act. The exclusive use of the word ‘marriages’ in the section creates a differentiation between the solemnisation of marriages, on the one hand, and civil partnerships on the other hand. The differentiation may be regarded as an infringement of the right to equality of religious marriage officers who wish to solemnise civil partnerships as enshrined in section 9(1) of the Constitution.¹⁵⁹ Heaton¹⁶⁰ argues that the differentiation further violates the right to equality of persons who want to have their civil partnership solemnised by a religious marriage officer, as it creates inequality before the law and unequal protection and benefit of the law. In the case of couples whose religion, conscience or belief dictates that they should have their civil partnerships solemnised by a religious marriage officer, the differentiation also constitutes unfair discrimination on the grounds of religion, conscience and belief in violation of section 9(3) of the Constitution.¹⁶¹ There is no discernible justification for these violations of the right to equality. The Act specifically differentiates between marriage and civil partnerships. It is submitted that the words ‘any other law’ in section 13 of the Civil Union Act cannot be interpreted to include the Civil Union Act because if this was the intention of the legislature, the Civil Union Act would have expressly made such provision. In terms of this section marriage in any other law, including the common law includes with such changes as may be required by the context, a civil union. I share the sentiments expressed by Heaton¹⁶² that it seems the use of the word ‘marriages’ in these sections is due to a drafting error which should urgently be corrected.

¹⁵⁷ S 5(4) of Civil Union Act.

¹⁵⁸ S 5(4).

¹⁵⁹ Heaton J *South African Family Law* 3 ed (2010) at 197. See also See Schafer L in Clark B (ed) *Family Law Service* (2014) at para R38.

¹⁶⁰ Heaton J *South African Family Law* 3 ed (2010) at 197.

¹⁶¹ See Schafer L in Clark B (ed) *Family Law Service* (2014) para R41. See Heaton J *South African Family Law* 3 ed (2010) at 197.

¹⁶² Heaton J *South African Family Law* 3 ed (2010) at 197.

While a religious marriage officer may not object to solemnise a civil union, section 6 of the Civil Union Act states that *ex officio* marriage officers may be exempted from solemnising a same-sex civil marriage if they object on the grounds of conscience, religion or belief.¹⁶³ As explained earlier, this section permits any marriage officer, other than a minister of religion appointed under section 5 of the Civil Union Act, to notify the Minister of Home Affairs in writing that he objects on the grounds of conscience, religion and belief to solemnising same-sex marriages and civil partnerships. By submitting this notice, the marriage officer is relieved of any obligation to solemnise such unions.¹⁶⁴ This exemption does not apply to ministers of religion and other persons occupying a responsible position in any designated religious organisation appointed by the Minister in terms of section 5 of the Civil Union Act.¹⁶⁵

Heaton¹⁶⁶ argues that the differentiation between religious and secular *ex officio* marriage officers in terms of the Civil Union Act may be premised on the assumption that if the religious marriage officer had objections he or she would not apply to be appointed. However, she argues, quite rightly in my opinion, that a civil union may also be concluded by heterosexual couples.¹⁶⁷ The only ground for objection is therefore based on a person's homosexual orientation. It is submitted that this provision raises constitutional issues. The conscience provision in the Civil Union Act accommodates the right to freedom of conscience, religion and belief of civil servants who are marriage officers and who object to the solemnisation of a civil union by same-sex couple. I share the view expressed by Bonthys¹⁶⁸ that this provision limits the constitutional rights of same-sex couples who wish to marry in terms of the Civil Union Act.

¹⁶³ S 2(1) and (2) of the Marriage Act defines an *ex officio* marriage officer as 'Every Magistrate, every Special Justice of the Peace and every Commissioner and states that the marriage officer shall 'by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office'. Furthermore, 'the Minister and any officer in the public service authorised thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area'.

¹⁶⁴ For a discussion on the constitutionality of this provision, see Schafer L in Clark B (ed) *Family Law Service* para R38.

¹⁶⁵ See Van Schalkwyk LN *General Principles of Family Law* 5 ed (2014) at 152 – 153.

¹⁶⁶ Heaton J *South African Family Law* 3 ed (2010) at 197.

¹⁶⁷ Heaton J *South African Family Law* 3 ed (2010) at 197.

¹⁶⁸ Bonthys E 'Irrational accommodation: conscience, religion and same-sex marriage in South Africa'

The wide scope of section 6 of the Civil Union Act has also been the subject of some criticism. It not only accommodates the religious beliefs of *ex officio* marriage officers but provides for objections on the grounds of conscience and belief as well.¹⁶⁹ Bonthuys¹⁷⁰ argues that the grounds of conscience and belief are problematic in the sense that neither the Civil Union Act nor the Constitution requires that these beliefs must be rational or that they must be a central part of a system of religious beliefs. It is therefore possible for an *ex officio* marriage officer with no religious beliefs to impose a moral judgment based on irrational and homophobic beliefs on a same-sex couple and object to solemnising a civil union on any absurd ground. De Ru¹⁷¹ argues that based on the abovementioned submissions, the accommodation of the rights of conscience and belief is too broad and that it confers rights upon *ex officio* marriage officers to reinforce marginalisation directed towards gay and lesbian couples.

Ntlama¹⁷² notes that the equal contest between the rights not to be unfairly discriminated based on sexual orientation and the right to freedom of religion has made the development of the principles of non-discrimination subject to social, moral and legal convictions of those authorised to solemnise marriages. It allows the enforcement of equal rights to depend on the willingness of marriage officers to use their discretion in balancing their constitutional rights to religion and the right of same-sex couples to equal benefit of the law. She argues that the contest between the right to freedom of religion and the right to freedom of sexual orientation in the Civil Union Act has made the substantive translation of the right to equality subject to mere choice. The choice enables the marriage officers to use their discretion, forcing them to draw a distinction

2008 SALJ 473 at 478.

¹⁶⁹ See De Ru H *The Recognition of Same-sex Unions in South Africa* LLM Thesis, University of South Africa (2009) at para 3.5.1.2.

¹⁷⁰ Bonthuys E 'Irrational accommodation conscience religion and same- sex marriage in South Africa' 2008 SALJ 473 at 479. See De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 555.

¹⁷¹ See De Ru H *The Recognition of Same-sex Unions in South Africa* LLM Thesis, University of South Africa (2009) at para 3.5.1.2; See also De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 555.

¹⁷² Ntlama N 'A brief overview of the Civil Union Act' 2010 *PELJ* 191/234 at 202/234.

between people, which perpetuates the privileges of couples in heterosexual relationships.

The primary purpose of the Civil Union Act is to protect the rights to dignity and equality of same-sex couples and to remedy the intentional discrimination the old South African family imposed upon them.¹⁷³ The preamble of the Civil Union Act acknowledges that the family law dispensation that existed after the commencement of the Constitution failed to 'provide for same-sex couples to enjoy the status and benefits coupled with the responsibilities that marriage accords heterosexual couples'.¹⁷⁴ It is submitted therefore that section 6 of the Civil Union Act is in direct conflict with the objectives of the Civil Union Act and undermines the purpose of the Act to remove discrimination on the ground of sexual orientation and to uphold the constitutional rights to equality and dignity.

Section 7(2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights contained in the Bill of Rights. I agree with the views expressed by De Ru that to the extent that the Civil Union Act allows *ex officio* marriage officers who are servants of the state to object to solemnise a same-sex civil union on the grounds of conscience, religion or belief, is inconsistent with the entrenched provisions of section 7(2) of the Constitution in that it fails to respect and promote the rights to dignity and equality for same-sex couples.¹⁷⁵

The right to human dignity involves the right to family life for same-sex couples. In *Dawood and Others v Minister of Home Affairs*,¹⁷⁶ the Constitutional Court emphasised the fact that marriage and the family are social institutions of vital importance.¹⁷⁷ The court found that these institutions provide security, support and companionship of members of our society and bear an important role in the rearing of children.¹⁷⁸ The

¹⁷³ Bonthys E 'Irrational accommodation conscience religion and same- sex marriage in South Africa' 2008 *SALJ* 473 at 479.

¹⁷⁴ See Preamble to the Civil Union Act. See also De Ru H '*The Recognition of Same-sex Unions in South Africa*' LLM Thesis, University of South Africa (2009) at para 3.5.1.2.

¹⁷⁵ See De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 559.

¹⁷⁶ 2000 3 SA 936 (CC) at para 30.

¹⁷⁷ At para 30.

¹⁷⁸ At para 31.

court found that the celebration of a marriage gives rise to moral and legal obligation particularly, the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage.¹⁷⁹ The court stated that the decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many people and to prohibit the establishment of such a relationship, impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance.¹⁸⁰ The court concluded that it is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit their right to dignity.¹⁸¹ Whether such a limitation is unconstitutional or not will depend upon whether it is reasonable and justifiable in an open and democratic society in terms of section 36(1) of the Constitution.¹⁸²

As far as the right to equality in general is concerned, it is important to keep in mind that Section 9 of the Constitution is not aimed merely at achieving formal equality.¹⁸³ The section as a whole must be read as grounded on a substantive concept of equality that takes actual social and economic disparities between groups and individuals into account.¹⁸⁴ Albertyn and Goldblatt,¹⁸⁵ are of the view that the test for unfair discrimination outlined in *Harksen v Lane NO and Others*,¹⁸⁶ can be pared down to the following three questions:

- (a) Does the differentiation amount to discrimination?
- (b) If so, was it unfair?

¹⁷⁹ At para 31.

¹⁸⁰ At para 37.

¹⁸¹ At para 37.

¹⁸² At para 37.

¹⁸³ Currie I & De Waal J *Bill of Rights Handbook* 5 ed (2005) at 233-234. See Louw AS 'The constitutionality of a biological father's recognition as a parent' 2010 *PELJ* 156/508 at 162/508.

¹⁸⁴ Currie I & De Waal J *Bill of Rights Handbook* 5ed (2005) at 233-234.

¹⁸⁵ Albertyn C & Goldblatt B 'Equality' in Woolman S *et al Constitutional Law of South Africa* 2 ed (2013) at 74.

¹⁸⁶ 1998 1 SA 300 (CC).

- (c) If so, can it be justified in terms of the limitation clause, that is, section 36 of the Constitution? To succeed with this inquiry, the criteria in terms of section 36 must be satisfied by showing that the right has been limited by a 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:
- (i) the nature of the right;
 - (ii) the importance of the purpose of the limitation;
 - (iii) the nature and extent of the limitation;
 - (iv) the relation between the limitation and its purpose; and
 - (iv) less restrictive means to achieve the purpose.¹⁸⁷

In applying the guidelines set out in the *Harksen* case, it must be determined first whether section 6 of the Civil Union Act differentiates between categories or groups of people and, if so, whether the differentiation bears a rational connection to a legitimate governmental purpose.¹⁸⁸ This involves the weighing up of competing rights.¹⁸⁹ The Constitutional Court dealt with a number of cases where it developed and applied the notion of reasonable accommodation.¹⁹⁰ The overriding considerations being whether a person or group of people can be exempted from complying with the general rule or law in order to accommodate that person's religious beliefs.¹⁹¹ It is submitted that the provisions of section 6 of the Civil Union Act differentiates between same-sex and opposite-sex couples in that it allows *ex officio* marriage officers to exercise their discretion not to officiate at a same-sex union on the grounds of a religious or conscientious objection.

¹⁸⁷ S 36 of the Constitution.

¹⁸⁸ See para 53 of judgment.

¹⁸⁹ At para 52.

¹⁹⁰ See *Prince v President, Cape Law Society* 2002 2 SA 794 (CC); *MEC for Education: Kwa-Zulu Natal v Pillay* 2008 2 BCLR 99 (CC); *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC). See also Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2005) at 333 – 345.

¹⁹¹ See *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) at para 50.

In *President of the Republic of South Africa and Another v Hugo*,¹⁹² Goldstone J, emphasised the importance of the prohibition of unfair discrimination against people who are members of disadvantaged groups.¹⁹³ He argued that at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.¹⁹⁴ He argued¹⁹⁵ that the achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked. De Ru¹⁹⁶ notes that the religious accommodation of *ex officio* marriage officers is clearly an attempt by the legislature to establish conciliation between the competing rights of religion, conscience and belief on the one hand, and freedom of sexual orientation on the other.

Section 9(1) of the Constitution guarantees everyone equality, protection and benefit of the law. Section 9(3) prohibits the state not to unfairly discriminate directly or indirectly against anyone on one or more grounds, amongst others, including race, gender, sex, sexual orientation, marital status, religion, conscience, belief etc. Section 9(5) provides that discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. The discrimination against same-sex couples is therefore automatically unfair as it is based on sexual orientation which is a listed ground in terms of section 9(3) read with section 9(5) of the Constitution. This raises the question whether the infringement could qualify as a justifiable limitation of right.

Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited 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

¹⁹² 1997 4 SA 1 (CC) at para 41.

¹⁹³ At para 41.

¹⁹⁴ At para 41. See also Rautenbach C, Bakker JC & Goolam NM *Introduction to Legal Pluralism* 3 ed (2011) at 209.

¹⁹⁵ At para 41.

¹⁹⁶ De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues?' 2010 *THRHR* 553 at 566.

freedom taking into account the nature of the right and the factors listed in the section.¹⁹⁷ In terms of section 36, only a law of general application may legitimately limit a right in the Bill of Rights.¹⁹⁸ The law of general application must be sufficiently clear, accessible and precise so that those who are affected by it can ascertain the extent of their rights and obligations.¹⁹⁹ Section 36 requires an overall assessment that varies from case to case.²⁰⁰ Sachs J in *Christian Education South Africa v Minister of Education*,²⁰¹ held that:

'limitations on constitutional rights can pass constitutional muster only if the court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose.'²⁰²

Currie and De Waal²⁰³ note that the law must also apply impersonally, it must apply equally to all and it must not be arbitrary in its application. In order for the limitation to be reasonable in an open and democratic society, the limitation must be constitutionally sound. In other words, the law that restricts a fundamental right must do so for reasons that are acceptable to an open and democratic society.²⁰⁴ To satisfy the limitation test, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law).²⁰⁵ The law of general application requirement in section 36 of the

¹⁹⁷ The factors listed in the section are: (i) The nature of the right; (ii) the importance of the purpose of the limitation; (iii) the nature and extent of the limitation; (iv) the relation between the limitation and its purpose; and (v) less restrictive means to achieve the purpose.

¹⁹⁸ Currie I & De Waal J *The Bill of Rights Handbook* para 7.2(a)(i).

¹⁹⁹ *Dawood and Others v Minister of Home Affairs*, 2000 3 SA 936 (CC) para 47.

²⁰⁰ See *S v Manamela and Another (Director General of Justice Intervening)* 2000 5 BCLR 491 para 32.

²⁰¹ 2000 4 SA 757 (CC) para 31.

²⁰² At para 31.

²⁰³ Currie I & De Waal J *The Bill of Rights Handbook* para 7.2(a)(ii).

²⁰⁴ Currie I & De Waal J *The Bill of Rights Handbook* para 7.2(a)(ii).

²⁰⁵ Currie I & De Waal J *The Bill of Rights Handbook* para 7.2(b).

Constitution prevents laws that have personal, unequal or arbitrary application from qualifying as legitimate limitations of rights.²⁰⁶

It is submitted that section 6 of the Civil Union Act is directed specifically at same-sex couples and therefore it is not a law of general application as envisaged by section 36 of the Constitution.²⁰⁷ The purpose of the limitation weighed against the prejudice and marginalisation suffered by same-sex couples cannot be justified in an open and democratic society like South Africa based on equality, freedom and human dignity. It is submitted that the limitation in terms of section 6 of the Civil Union Act violates the founding provisions of our Constitution which provides that the Republic of South Africa is based on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms.' It is submitted that section 6 of the Civil Union Act reinforces discrimination between heterosexual partners and same-sex partners. Particularly, in view of the legal and social history of gay men and lesbian women, it is submitted that the religious accommodation violates the equality clause.²⁰⁸

It is submitted that the constitutional right of *ex officio* officers to freedom of conscience, religion, and belief is protected by the Constitution whilst the rights of same-sex partners who wish to marry in terms of the Civil Union Act is limited.²⁰⁹ It is submitted that further *ex officio* marriage officers are obliged to uphold the law in an objective manner and may not judge people who appear before them for the solemnisation of marriage. The right of access to marriage for same-sex couples in terms of section 6 of the Civil Union Act is made dependent upon the convictions and beliefs of marriage officers who have an option to object to solemnise a union between same-sex partners. This limits the right of access for same-sex couples to enter into a marriage. Taking into account the

²⁰⁶ See *S v Makwanyane and Another* 1995 3 SA 391 (CC) at para 156.

²⁰⁷ See Wintemute R 'Religion vs Sexual orientation: A clash of human rights?' 2002 *Journal of Law and Equality* 125 at 141. See also Bilchitz D & Judge M 'The Civil Union Act: A messy compromise or giant leap forward?' in Judge *et al To have and to hold: The making of same-sex marriage in South Africa* (2008) at 157.

²⁰⁸ De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues?' 2010 *THRHR* 553 at 566.

²⁰⁹ See Bonthuys E 'Irrational accommodation: Conscience, religion and same-sex marriage in South Africa' 2008 *SALJ* 475 at 478; See also De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues?' 2010 *THRHR* 553 at 555.

inquiry to determine the constitutionality of a discriminating provision as developed in *Harksen v Lane NO and Others*,²¹⁰ it is submitted that the discrimination against same-sex couples is unfair. Despite the positive features of the Act, its adoption has created a separate status that strengthens the view that same-sex couples do not deserve the same status and respect as heterosexual couples.²¹¹

Bilchitz and Judge²¹² argue that the effect and the social impact of the limitation imposed by the religious accommodation principle as contained in section 6 of the Act represent an oblique statement by the law that same-sex relationships are in some sense inherently more controversial than heterosexual relationships. This has the effect of treating same-sex couples in a manner they were treated before the constitutional dispensation. It is submitted that by allowing *ex officio* marriage officers who are employed by the state to refuse to solemnise a same-sex civil union is inconsistent with section 7(2)²¹³ of the Constitution in that the state fails to respect and promote the rights to dignity and equality for same-sex couples.

De Ru²¹⁴ believes that the effect of the limitation imposed by the religious accommodation of *ex officio* marriage officers in terms of section 6 of the Civil Union Act is that it restricts same-sex couples' access to basic state administrative services that are freely available to heterosexual couples. Given the widespread homophobia in South Africa, the practical effect of this accommodation of religious beliefs is that same-sex couples could find it tremendously difficult to find marriage officers willing to conduct their same-sex civil unions. To this end, it is submitted that the religious accommodation in terms of section 6 of the Civil Union Act violates the equality clause entrenched in our Constitution and there can be no justification whatsoever in terms of section 36 of the

²¹⁰ 1998 1 SA 300 (CC).

²¹¹ Ntlama N 'A brief overview of the Civil Union Act' 2010 *PELJ* 191/234 at 207/234.

²¹² Bilchitz D & Judge M 'The Civil Union Act: A messy compromise or giant leap forward' in Judge *et al To have and to hold: The making of same -sex marriage in South Africa* (2008) at 157.

²¹³ S 7(2) of the Constitution provides that the state must respect, protect, promote and fulfill the rights in the Bill of Rights.

²¹⁴ De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 558. See MacDougall B 'Refusing to officiate at same-sex marriages' 2006 *Saskatchewan LR* 351 at 359.

Constitution.²¹⁵ It also infringes the right to dignity that involves the right to family life for same-sex couples.

(b) Separate but unequal institution of marriage

During the period prior to the Bill of rights, the South African family was structured around a two-tier hierarchy of monogamous intimate partnerships - married and unmarried.²¹⁶ During that period, marriage had only one meaning and was defined in terms of the common law. The Appellate Division in *Ismail v Ismail*²¹⁷ defined marriage as a legally recognised voluntary union for life of one man and one woman to the exclusion of all others while it lasts. A civil marriage had to comply with the provisions of the Marriage Act for it to be a valid marriage. Minors needed the consent of their parents or from the court to enter into a civil marriage.²¹⁸ The marriage had to be solemnised by a marriage officer in terms of section 30(1) of the Marriage Act. The marriage officer had to comply with certain prescripts of the Marriage Act before he or she solemnises a marriage.²¹⁹ In terms of the Marriage Act, it is only a husband who can marry a wife.²²⁰ Marriage by proxy is not permissible and no one can conclude a valid marriage through a representative.²²¹

Currently, there are three pieces of legislation governing the solemnisation of marriage in terms of the South African family law, namely, the Marriage Act, the Civil Union Act and the Recognition of Customary Marriages Act.²²² A heterosexual monogamous civil marriage is currently available in terms of the Marriage Act and the Civil Union Act. The Civil Union Act did not repeal the Marriage Act. The Recognition of Customary

²¹⁵ See Bonthuys E 'Irrational accommodation: conscience, religion and same-sex marriage in South Africa' 2008 *SALJ* 475 at 477; De Vos 'A judicial revolution? The court-led achievement of same-sex marriage in South Africa' 2008 *Utrecht LR* 162 at 172.

²¹⁶ See Louw AS 'Domesticating life partnerships in South Africa' 2011 *Juridikum* 234 at 235.

²¹⁷ 1983 1 SA 1006 (A) at 1019.

²¹⁸ See s 26 of the Marriage Act.

²¹⁹ For instance, in terms of s 12 of the Act the Marriage Officer may not solemnise a marriage unless each party furnishes his or her identity document or the prescribed affidavit. In terms of s 29(A)(1), a marriage officer who solemnises a marriage, the parties thereto as well as the two competent witnesses must sign the marriage register immediately after the marriage has been solemnised.

²²⁰ S 30(1) of the Marriage Act expressly states that only a 'husband' can marry a 'wife'.

²²¹ S 29(4) of the Marriage Act.

²²² 120 of 1998.

Marriages Act²²³ allows spouses to marry in terms of customary law.²²⁴ A customary marriage is a monogamous or polygynous opposite-sex marriage concluded in terms of indigenous custom.²²⁵

Bakker²²⁶ argues that:

‘The co-existence of the Marriage Act and the Civil Union Act is problematic. After the Constitutional Court declared the common law definition of marriage unconstitutional, the legislature opted to draft a separate Act rather than to incorporate same-sex marriages into the Marriage Act. Not accommodating same-sex marriage in the common law definition of marriage creates the impression that a civil marriage is still the preferred form of intimate relationship.’

Bakker²²⁷ is of the opinion that the Civil Union Act is, however, not limited to same-sex relationships and also allows for opposite-sex civil unions.²²⁸ A civil union is recorded in a register separate from that of a civil marriage.²²⁹ A bureaucratic differentiation between the two forms of intimate relationships exists.²³⁰ Stricter requirements are set for the conclusion of a civil union although the consequences are the same.²³¹ If parties enter into a marriage in terms of the Civil Union Act they will call their civil union a ‘marriage’ and the parties to the civil union will be known as ‘spouses’. If parties enter into a civil partnership they will call their ‘civil union’ a civil partnership and the parties to the civil union will be known as ‘civil partners’.²³² The different terms have specific

²²³ 120 of 1998.

²²⁴ See Clark B *Family Law Service* (2014) at 25.

²²⁵ S 1 of the Recognition of Customary Marriages Act 120 of 1998 defines customary marriage as ‘a marriage concluded in accordance with ... the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people’.

²²⁶ Bakker P ‘Chaos in Family Law: A model for the recognition of intimate relationships in South Africa’ 2013 *PER / PELJ* 122/392.

²²⁷ Bakker P ‘Chaos in Family Law: A model for the recognition of intimate relationships in South Africa’ 2013 *PER / PELJ* 121/392.

²²⁸ Ss 1 and 8(6) of the Civil Union Act.

²²⁹ S 12 of the Civil Union Act.

²³⁰ Bakker P ‘Chaos in Family Law: A model for the recognition of intimate relationships in South Africa’ 2013 *PER / PELJ* 125/392.

²³¹ In terms of s 13 of the Civil Union Act the legal consequences of a marriage in accordance with the Marriage Act are applicable to civil unions.

²³² Bakker P ‘Chaos in Family Law: A model for the recognition of intimate relationships in South Africa’ 2013 *PER / PELJ* 125/392.

established sociological connotations.²³³ According to Bakker, a partnership has always been regarded as being of less importance than a marriage.²³⁴

De Ru²³⁵ is of the view that the co-existence of the Marriage Act and the Civil Union Act creates a threefold hierarchy within the institution of marriage, namely the heterosexual superior marriage under the Marriage Act and the more inferior marriage or civil union between heterosexual couples; and lastly the marriage or civil union between homosexual couples. She believes that until this hierarchy is removed homosexual couples will remain inferior.²³⁶

However, Bilchitz and Judge²³⁷ argue that in terms of the Civil Union Act, a space is created to form different social forms of intimate relationships under the label 'civil partnership'. Bilchitz and Judge²³⁸ categorise the 'purposes and goals' behind the validation of same-sex marriage into three main categories, namely:

- (i) a 'formal rights' perspective in terms of which the rights and benefits of marriage are extended to same-sex couples without necessarily equalising the 'social meaning' of marriage;
- (ii) a 'substantive rights' perspective that, by granting same-sex couples the full right to marry, equalises the 'social meaning' but retains marriage as the central form of intimate relationship; and

²³³ Bakker P 'Chaos in Family Law: A model for the recognition of intimate relationships in South Africa' 2013 *PER / PELJ* 125/392.

²³⁴ Bakker P 'Chaos in Family Law: A model for the recognition of intimate relationships in South Africa' 2013 *PER / PELJ* 125/392.

²³⁵ De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 566.

²³⁶ De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 566.

²³⁷ Bilchitz D & Judge M 'For whom does the Bell Toll? The challenges and possibilities of the Civil Union Act for Family Law in South Africa' 2007 *SAJHR* 466 at 484 - 485. See also Smith SB *The Development of South African Matrimonial Law with Specific Reference to the Need for and Application of a Domestic Partnership Rubric* LLD Thesis, University of the Free State (2009) at 764.

²³⁸ Bilchitz D & Judge M 'For whom does the Bell Toll? The challenges and possibilities of the Civil Union Act for Family Law in South Africa' 2007 *SAJHR* 466 at 467 – 468. See also Smith BS & Robinson JA 'An embarrassment of riches or a profusion of confusion? An evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective domestic partnership legislation in South Africa' 2010 *PER/PELJ* 10 at para 5.2 for a discussion on a case for retaining the Civil Union Act and a counter argument for the repealing of the Civil Union Act.

(iii) the 'transformative' perspective that 'seeks to de-centralise marriage as the sole and primary legal and social form for the recognition of interpersonal relationships and seeks to create legal possibilities for the recognition of a plurality of familial forms.'

According to Bilchitz and Judge,²³⁹ the Civil Union Act has the ability to achieve all three of these ideals, particularly due to the fact that, by introducing the concept of a civil union that allows the parties to such a union to choose between marrying one another or concluding a civil partnership, the pre-eminence traditionally accorded to marriage can to some extent be displaced.²⁴⁰ The essence of this contention is that the South African legislature's unique use of the term 'civil union' implies that marriage is not the only means of securing legal and societal recognition of an interpersonal relationship.²⁴¹ According to these authors,²⁴² the Civil Union Act is a vehicle in terms of which parties may enter into a formal relationship with consequences similar to those of a marriage, but which do not carry the same socially loaded meaning as marriage. A space is therefore created for the development of a new social definition of 'civil partnership'. These authors are of the view that the Marriage Act is superfluous and that it should be repealed.²⁴³ They believe that it is irrational to have two Acts that perform the same function and, moreover, offensive to same-sex couples to force them to marry in terms of separate legislation.²⁴⁴

²³⁹ See Smith BS & Robinson JA 'An embarrassment of riches or a profusion of confusion? An evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective domestic partnership legislation in South Africa' 2010 *PER/PELJ* 10 at para 5.2.

²⁴⁰ Bilchitz D & Judge M 'For whom does the Bell Toll? The challenges and possibilities of the Civil Union Act for Family Law in South Africa' 2007 *SAJHR* 466 at 485.

²⁴¹ Bilchitz D & Judge M 'For whom does the Bell Toll? The challenges and possibilities of the Civil Union Act for Family Law in South Africa' 2007 *SAJHR* 466 at 486.

²⁴² Bilchitz D & Judge M 'For whom does the Bell Toll? The challenges and possibilities of the Civil Union Act for Family Law in South Africa' 2007 *SAJHR* 466 at 484 - 485.

²⁴³ Bilchitz D & Judge M 'For whom does the Bell Toll? The challenges and possibilities of the Civil Union Act for Family Law in South Africa' 2007 *SAJHR* 466 at 487. See also See Smith BS & Robinson JA 'An embarrassment of riches or a profusion of confusion? An evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective domestic partnership legislation in South Africa' 2010 *PER/PELJ* 10 at para 5.2.

²⁴⁴ Bilchitz D & Judge M 'For whom does the Bell Toll? The challenges and possibilities of the Civil Union Act for Family Law in South Africa' 2007 *SAJHR* 466 at 487. See also See Smith BS & Robinson JA 'An embarrassment of riches or a profusion of confusion? An evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective domestic partnership legislation in South Africa' 2010 *PER/PELJ* 10 at para 5.2.

De Vos and Barnard²⁴⁵ argue that the problem with the Civil Union Act is its co-existence with the Marriage Act which relies on the common law (it could be said the colonial) definition of marriage as the exclusive union between man and woman. The problem being that the choice for heterosexual couples is a choice between the Marriage Act and the Civil Union Act, whereas homosexual couples who want to marry can only do so by way of the Civil Union Act. The authors believe that the signal that is sent out to society is that somehow heterosexual couples remain special or superior in that they have the choice to separate or exclude themselves from tainted and inferior homosexual couples by accessing the institution of marriage through the traditional Marriage Act. This has the effect of violating the right to equality for same-sex couples.

3.2.2 Infringement of children's rights

Children are the soul of our society. If we fail them, then we have failed as a society.²⁴⁶ Children are in need of nurturance and protection.²⁴⁷ Section 28(2) of the Constitution provides that 'a child's best interests are of paramount importance in every matter concerning the child'.²⁴⁸ Section 9 of the Children's Act²⁴⁹ echoes the Constitution and clearly sanctions the paramountcy of children's best interests.²⁵⁰ Section 28(2) of the Constitution which enshrines the best interest of child has been the overriding consideration in court proceedings involving children.²⁵¹ In *S v M (Centre for Child Law as Amicus Curiae)*,²⁵² the Constitutional Court acknowledged that the language of section 28 was 'undoubtedly wide' and indicated that law enforcement must always be child-sensitive, with courts functioning in a manner which always took cognisance of

²⁴⁵ De Vos P & Barnard J 'Same-sex marriage, civil unions and domestic partnership in South Africa: A critical reflections on an ongoing saga' 2007 *SALJ* 795 at 821.

²⁴⁶ *SS v The Presiding Officer of the Children's Court: District of Krugersdorp* 2012 6 SA 45 at para 1 (GSJ).

²⁴⁷ Malherbe J & Govindjee A 'A question of blood: Constitutional Perspectives on decision-making about medical treatment of children of Jehovah's witnesses' 2010 *THRHR* 61 at 77.

²⁴⁸ See also *Fletcher v Fletcher* 1948 1 SA 130 (A).

²⁴⁹ 38 of 2005.

²⁵⁰ Article 3(1) of the Children's Convention provides that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.'

²⁵¹ See *Bannatyne v Bannatyne* 2003 2 SA 363 (CC) para 24.

²⁵² 2008 3 SA 232 (CC).

children's rights.²⁵³ The Constitutional Court held that section 28 of the Constitution requires the law to endeavour to avoid any breakdown of family life or parental care where possible, so that children would not be placed at greater risk.²⁵⁴

It is clear from the definition of a Civil Union Act that both prospective civil union partners must be 18 years of age.²⁵⁵ The Marriage Act permits the marriage of a minor with the appropriate consent of a guardian or parent.²⁵⁶ Unlike the Marriage Act, there is no provision for minors or people under the age of 18 years to marry one another.²⁵⁷ Therefore, a minor cannot validly conclude a civil union even if he or she is assisted by his or her parent or legal guardian. Van Schalkwyk²⁵⁸ argues that if this view is correct, this provision is in conflict with the common law as well as the Marriage Act. In terms of the common law as well as the Marriage Act, a minor boy of 14 years and older and below 18 years of age and a minor girl of 12 years and older but below 15 years, may conclude a marriage with ministerial permission.²⁵⁹ Van Schalkwyk²⁶⁰ argues that section 1 of the Civil Union Act *prima facie* amount to unfair discrimination and can thus be deemed unconstitutional. Van Schalkwyk²⁶¹ believes that the fact that a person below 18 years of age may conclude a heterosexual civil marriage in terms of the Marriage Act but not in terms of the Civil Union Act, makes the provision subject to 18 years and older unconstitutional.

The Marriage Act²⁶² authorises the High Court to consent to marriage of a minor in cases where the parent, guardian or commissioner of child welfare, without adequate

²⁵³ At para 15.

²⁵⁴ At para 20. See also balancing rights and interests in the 'best interest of child' by Malherbe J and Govindjee A 'A question of blood: Constitutional Perspectives on decision-making about medical treatment of children of Jehovah's witnesses' 2010 *THRHR* 61 at 74.

²⁵⁵ S 1 of the Civil Union Act.

²⁵⁶ See s 24(1) of the Marriage Act.

²⁵⁷ S 24(1) of the Marriage Act provides that no marriage officer shall solemnise a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purposes of contracting the marriage has been granted and furnished to him in writing.

²⁵⁸ Van Schalkwyk LN *General Principles of Family Law* 5 ed (2014) at 151.

²⁵⁹ See s 26(1) of the Marriage Act.

²⁶⁰ Van Schalkwyk LN *General Principles of Family Law* 5 ed (2014) at 151.

²⁶¹ Van Schalkwyk LN *General Principles of Family Law* 5 ed (2014) at 151.

²⁶² Section 24(1) provides that a marriage officer may not solemnise a minor's marriage unless the consent which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing. Section 27 also lays down that if a marriage officer reasonably suspects that the age of a prospective spouse is such that he or she may not marry without having obtained some other

reason and contrary to the interest of the minor, refuses consent to the marriage of the minor. However, the court will not lightly overrule the parent's decision not to consent to the marriage of the minor. Serious considerations will be given to the objections of the parents.

For instance, in *B v B*²⁶³ the court held that the tests set out in section 25(4) of the Marriage Act are complementary and must not be considered separately. The court held that in considering the section 25(4) tests, the court must take all the circumstances into account and weigh the reasons for the parent's refusal, with due allowance for the fact that the parents are in a better position than the court to make a decision of such a personal nature.²⁶⁴ In this case, the applicant was 17 years old. She wanted to marry a Muslim young man who was 22 years old. The applicant's parents chastised and forbade the applicant to marry and even took her out of school to prevent her from having opportunities to meet clandestinely with her lover. The applicant brought an *ex parte* application for a rule calling upon her parents to show cause why they should not be restrained from assaulting or interfering with her, and why she should not be granted leave to marry her lover.²⁶⁵ The parents filed affidavits opposing the confirmation of the interim order.²⁶⁶ The parents raised two objections, namely:

- (a) That the applicant was too young to undertake the responsibility of marriage and
- (b) the difference in religion between their daughter and her lover.

The court found that in an application in terms of section 25(4) it was in the best interest of the applicant to allow the marriage and that the parents' refusal to consent was contrary to her interests and the court granted the application.²⁶⁷

In *Allcock v Allcock and Another*,²⁶⁸ the applicant was a minor, aged 20 years old. She brought an application under section 25(4) of the Marriage Act for leave to marry her fiancée who was 23 year old as her parents had refused to give their consent to her

person's consent, the marriage officer may refuse to solemnise the marriage unless he or she is furnished with the required consent in writing or with satisfactory proof that such consent is not required.

²⁶³ 1983 1 SA 496 (N) at 501.

²⁶⁴ At 501F.

²⁶⁵ At 498B.

²⁶⁶ At 498C.

²⁶⁷ At 501H.

²⁶⁸ 1969 1 SA 427 (N).

proposed marriage.²⁶⁹ Her parents had repeatedly been asked for reasons in refusing their consent but had given no reply. In her affidavit, the applicant stated that she had no inkling of their reasons or grounds for such refusal.²⁷⁰ Notice of the application, to which was attached copies of the affidavits and other documents, was duly served upon each of the applicant's parents who were cited as respondents, but neither of them filed any affidavit or communicated with the registrar or appeared at the hearing.²⁷¹ The court found the silence of the applicant's parents puzzling.²⁷² The court noted that section 25(4) requires a court to apply its mind to two factors namely:

- (i) Whether the parental refusal is 'without adequate reason' and
- (ii) whether it is contrary to the interests of the minor. Unless the court is of the opinion both that the parental refusal is without adequate reason and that such refusal is contrary to the interests of the minor, the court shall not grant consent to the proposed marriage.²⁷³

In this case, the court held that 'adequate reason' in the section suggested sufficient reason to justify the parental refusal of consent.²⁷⁴ The court was satisfied on a preponderance of probabilities that the order had to be granted as prayed.²⁷⁵

In *Kruger v Fourie and Another*,²⁷⁶ the father refused to give consent to his minor daughter as he was of the view that his daughter was not matured enough and ready for marriage. In considering an application for consent in terms of section 25(4) of the Marriage Act, the court held that where the father of a minor child refuses to consent to such child's marriage and application is made to court under section 25(4) of the Marriage Act to obtain such consent, the court must, in accordance with the provisions of the section, give earnest consideration to the objections raised by the father.²⁷⁷ The court held that section 25(4) places a heavy responsibility on the court and that the

²⁶⁹ At 427.

²⁷⁰ At 428B.

²⁷¹ At 428E-F.

²⁷² At 430D.

²⁷³ At 429D-F.

²⁷⁴ At 429.

²⁷⁵ At 430.

²⁷⁶ 1969 4 SA 469 (O).

²⁷⁷ At 473.

court ought not lightly to override the father's objections and grant consent to such marriage where the father, who is having regard to the interests of the child, has intimate knowledge of his minor child and *bona fide* believes that it is not in the interest of the minor child to enter into the marriage.²⁷⁸ The court found that the reasons given by the father of the applicant were adequate and the application for consent in terms section 25(4) was dismissed by the court.²⁷⁹

It is submitted that the exclusion of same-sex minors from concluding civil union in terms of the Civil Union Act without giving them the opportunity of parental or ministerial consent to conclude a civil union while allowing them (minors) to enter into a civil marriage or a customary marriage with the consent of their parents violates their constitutional right to equality as enshrined in section 9 of the Bill of Rights.²⁸⁰ It is further submitted that the preference of a child who has reached such age of maturity such that he can express his views, due weight must be given to his wishes.

Taking into account the court decisions set out above, it is submitted that the blanket prohibition for same-sex minor couples to conclude a civil union, at least with parental consent, has the effect of denying them the right to express a preference of marrying in terms of the Civil Union Act. It is submitted that to the extent that section 1 of the Civil Union Act prohibits same-sex minor couples to conclude a civil union even with parental consent, offends against their right to human dignity which involves the right to family life. In *Dawood and Others v Minister of Home Affairs*,²⁸¹ the Constitutional Court emphasised the fact that marriage and the family are social institutions of vital importance.²⁸² It is argued that this also applies to same-sex minor couples. In *Du Toit*

²⁷⁸ At 473.

²⁷⁹ At 474A.

²⁸⁰ See Schafer L in Clark B (ed) *Family Law Service* (2014) para R 41. For a discussion of children's rights in the Constitution see Keightley R *Children's Rights* (1996) at 7; see also Heaton J *The South African Law of Persons* 3 ed (2008) at 87.

²⁸¹ 2000 3 SA 936 (CC) at para 30. See para 4.2.1.2: 'Unfair discrimination against same-sex couples: Sexual orientation versus religious accommodation' for the discussion of this case.

²⁸² At para 30.

*and Another v Minister of Welfare and Population Development and Others*²⁸³ Skweyiya AJ stated that:

‘The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However, we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change.’

I agree with the views expressed by De Ru²⁸⁴ when she argues that the exclusion of minors from the option of ‘entering an honorable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations’,²⁸⁵ perpetuates a sense of inferiority and signifies that minors who are attracted to members of their own sex lack the inherent humanity to have their family life respected and protected and this constitutes a serious invasion of their dignity.

Heaton²⁸⁶ argues that as a civil union is the only means by which a same-sex couples can obtain full recognition of their relationship, the exclusion of minors from the ambit of the Act violates not only the equality clause but also same-sex minors’ rights to dignity and flies in the face of the decision in *Minister of Home Affairs (Doctors for Life International, Amici Curea); Lesbian and Gay Equality Project v Fourie*.²⁸⁷ It also denies same-sex minors the opportunity to acquire the status, benefits and responsibilities which opposite-sex minors can acquire.²⁸⁸ It is submitted that a blanket ban on same-sex minors from entering into a civil union which differs from the legal position in terms

²⁸³ 2003 (2) SA 198 (CC) at para 19.

²⁸⁴ See De Ru H ‘The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues’ 2010 *THRHR* 553 at 562.

²⁸⁵ *Fourie v Minister of Home Affairs* 2005 3 BCLR 241 (SCA) at para 14.

²⁸⁶ See Heaton J *South African Family Law* 3 ed (2010) at 194.

²⁸⁷ 2006 1 SA 524 (CC).

²⁸⁸ See Van Schalkwyk LN ‘Kommentaar op die Civil Union Act 17 of 2006’ 2007 *De Jure* 168. See also Sinclair JD in Atkin B (ed) *International Survey of Family Law* (2008) at 408.

of the Marriage Act and the Recognition of Customary Marriages Act²⁸⁹ is unconstitutional because same-sex minors are deprived of a legal means to make their relationships official, and they are accordingly excluded from the social and legal standing that the law affords to heterosexual minors.²⁹⁰

De Ru²⁹¹ believes that these inequalities created by the Civil Union Act call the constitutional commitment of the legislature to the social and legal transformation of a minority group disadvantaged by past discrimination into question. To this end, it is submitted that the continued enhancement of the hetero-normative framework that was responsible for the initial marginalisation of those members of society who express same-sex desire creates intolerance for the plurality of our society.²⁹² It is further submitted that in an open and democratic society based on human dignity, equality and freedom, the blanket discrimination based on age, and sexual orientation cannot be justified in terms of section 36 of our Constitution.

3.2.3 Problems with the *pater est quem nuptiae demonstrant* presumption

Section 40 of the Children's Act²⁹³ provides that whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gametes of those spouses had been used for artificial fertilisation. The effect of this provision is that a child born out of artificial insemination between two consenting spouses whether gay, lesbian or heterosexual is deemed for all intents and purposes, the child of the two consenting parents.

Section 13(1) of the Civil Union Act provides that the legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the

²⁸⁹ 120 of 1998.

²⁹⁰ See also De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 567.

²⁹¹ De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 567.

²⁹² See De Vos P 'From heteronormativity to full sexual orientation? Equality and sexual freedom in Laurie Ackermann's constitutional jurisprudence' 2008 *Acta Juridica* 254 to 255.

²⁹³ 38 of 2005.

context to a civil union. One of the invariable consequences of marriage provides that if a child is born of a married woman it is presumed that the child is born of the spouses of that marriage (*pater est quem nuptiae demonstrant*).²⁹⁴ In other words, a child born to a married woman is presumed to have been fathered by her husband.²⁹⁵ The application of the *pater est* presumption in a civil union between heterosexual couples is easy when there is a female civil union partner who gives birth and there is a male civil union partner. In such a case, it is presumed that the husband is the father of the child. It is unclear how this presumption can be adapted to fit the circumstances of a same-sex civil union. The presumption specifically refers to a father while there are two female or males in a same-sex civil union. It is submitted that the application of the marital presumption in same-sex civil unions is not viable since the child cannot possibly have been conceived by both civil union partners.²⁹⁶

3.2.4 Problems determining the *lex domicilii matrimonii*

In the absence of an express agreement, the patrimonial consequences of marriage are governed by the law of the husband's domicile at the time of the marriage.²⁹⁷ The rationale for this rule, according to the Roman Dutch authorities is that the parties establish their matrimonial home in the country where the husband was domiciled at the time of the marriage and to have submitted themselves to the matrimonial regime obtaining in that country.²⁹⁸ Section 13 of the Civil Union Act equates a civil union with a civil marriage and provides that, with the necessary contextual changes, a reference to marriage, husband, wife or spouse in any other law including the common law includes a civil union and a civil union partner. This means that the common law and the Matrimonial Property Act²⁹⁹ regulate the proprietary consequences of a civil union.

²⁹⁴ See Heaton J *The South African Law of Persons* 3 ed (2008) at 55.

²⁹⁵ See *Van Lutterveld v Engels* 1959 2 SA 699 (A). See Heaton J *The South African Law of Persons* 3 ed (2008) at 55.

²⁹⁶ See Heaton J *The South African Law of Persons* 3 ed (2008) at 57. See also Heaton J *South African Family Law* 3 ed (2010) at 194.

²⁹⁷ Forsyth CF *Private International Law* 4 edition (2003) at 269; See *Frankel's Estate v The Master* 1950 1 SA 220 (A); *Sperling v Sperling* 1975 3 SA 707 (A).

²⁹⁸ *Lenferna v Lenferna* 2013 ZASCA 2014 (SCA) at para 10.

²⁹⁹ 88 of 1984.

If one of the same-sex civil union partners is domiciled in a foreign country, the regulation of the proprietary consequences becomes problematic.³⁰⁰ The civil union partners may enter into an antenuptial agreement to indicate a choice of law (*lex causae*) that will govern the proprietary consequences of their civil union.³⁰¹ The choice of law specified in the antenuptial agreement must be applied to the full, subject to relevant considerations of public policy.³⁰² In the absence of an express antenuptial agreement, the patrimonial consequences of a civil marriage, inclusive of a civil union, are governed by the husband's *lex domicilii matrimonii* at the time of marriage.³⁰³ However, in a same-sex civil union it is impossible to determine who the husband is and which legal system will regulate the patrimonial consequences of a same-sex civil union. The *lex domicilii matrimonii* as a default rule cannot be applied to same-sex civil unions. It is submitted that this infringes the right to equality as envisaged in section 9 of the Constitution because it unfairly discriminates against same-sex civil union couples on the ground of their sexual orientation.³⁰⁴ This is in violation of section 9(3)³⁰⁵ and (5)³⁰⁶ of the Bill of Rights.

In *AS v CS*³⁰⁷ the court held that the *lex domicilii matrimonii* is incapable of application in same-sex marriages.³⁰⁸ The Court held further that it is likely to fall foul of the equality provisions entrenched in section 9 of the Constitution.³⁰⁹ The court made a call for the legislature to address the position in relation to same-sex unions concluded by South Africans abroad in order that there can be certainty as to which property regime is

³⁰⁰ De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 564.

³⁰¹ See Forsyth CF *Private International Law* (2003) at 283-286; De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 564.

³⁰² See Forsyth CF *Private International Law* (2003) at 283-286; De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 564.

³⁰³ *Lenferna v Lenferna* 2013 ZASCA 2014 (SCA); See also *Sperling v Sperling* 1975 3 SA 707 (A).

³⁰⁴ See *AS v CS* 2011 (2) SA 360 (WCC) at para 56.

³⁰⁵ S 9(3) of the Constitution provides that 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 and birth.

³⁰⁶ S 9(5) provides that discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

³⁰⁷ 2011 2 SA 360 (WCC) at paras 55 - 56.

³⁰⁸ At para 55.

³⁰⁹ At para 55.

applicable to the parties marriage or civil partnership.³¹⁰ The court opined that there does not appear to be any problem in regard to such relationships concluded locally since the common law position (to be regarded as 'any other law' in terms of section 13(2)(a) of the Civil Union Act) of community of property would apply in the absence of an antenuptial contract.³¹¹

3.3. CONCLUDING REMARKS

The primary purpose of the Civil Union Act is to protect the right to dignity and equality of same-sex couples and to remedy the intentional discrimination the unreformed South African family law imposed upon them.³¹² Whilst it is accepted that in a broader context, the Act made progress for same-sex couples, it is argued that the Civil Union Act does not completely rise to the occasion in fully protecting the rights of same-sex couples. Importantly, the Act provides equal status for same-sex relationships and acknowledges the existence of a diverse range of family forms. However, certain provisions of the Act need to be revisited. Some renowned scholars are of the view that the Civil Union Act is a badly drafted piece of legislation that has only served to further fragment 'an already disjointed legal landscape'.³¹³

The right to sexual orientation as entrenched in our Constitution is aimed at protecting all people in South Africa inclusive of same-sex couples who experienced humiliation, stigmatisation and prejudice during the pre-constitutional dispensation. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,³¹⁴ Ackerman J, described the impact of discrimination on gays and lesbians as serious and described them as a group of people with 'vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves'.

³¹⁰ At para 56.

³¹¹ At para 56.

³¹² Bonthuys E 'Irrational accommodation: conscience, religion and same-sex marriages in South Africa' 2008 *SALJ* 473 at 479.

³¹³ Smith BS & Robinson JA 'The South African Civil Union Act 2006: progressive legislation with regressive implications' 2008 *International Journal of Law, Policy Family* 356 at 356.

³¹⁴ 1999 1 SA 6 (CC) at para 25.

The discussion above has revealed a violation of the rights to human dignity and equality as well as discrimination based on sexual orientation for same-sex couples. The discussion has also revealed the violation of rights for minor children to enter into a civil union. It is submitted that in an open and democratic society based on human dignity, equality and freedom, the blanket discrimination based on age, and sexual orientation cannot be justified in terms of section 36 of our Constitution. It is submitted that the specific provisions of the Civil Union Act discussed above, should be repealed because they unjustifiably violate the right to equality and human dignity for same-sex couples. The provisions of the Act discussed above, in particular section 6, confer a second class marital status on same-sex couples and produce a new form of marginalisation. It is argued that the Civil Union Act as a separate and unequal measure to govern same-sex marriages indicates the dominance of civil marriage as an exclusive institution available to heterosexual couples only.³¹⁵ To this end, the guarantee of democratic tolerance for all who live in South Africa still remains somewhat illusory.³¹⁶ It is doubtful if indeed we have in all respects succeeded to embrace our founding values in our Constitution of being united in our diversity.

³¹⁵ De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 568.

³¹⁶ De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 568.

CHAPTER 4: CONCLUSION

This study investigated the constitutionality of the Civil Union Act. The main issue was whether the Act achieved what the Constitutional Court in *Minister of Home Affairs v Fourie*³¹⁷ required the legislator to do, namely to afford same-sex couples the status, benefits and responsibilities accorded to opposite sex couples. It was demonstrated that the right to equality and the right to human dignity are the cornerstones and foundational rights in reconstructing the future of South Africa for all its inhabitants including couples in same-sex relationships and heterosexual couples.³¹⁸ It has been shown in this dissertation that during the pre-constitutional dispensation same-sex marriages were not recognised. The Constitution, however, expressly protects all citizens irrespective of their sexual orientation. The Civil Union Act is giving effect to the entrenched constitutional rights to equality and human dignity for same-sex couples who were stigmatised, marginalised and prejudiced during the pre-constitutional dispensation.

Taking into account the history of South Africa, it is essential that the state addresses the legacy of systemic discrimination and subordination. As we have seen in chapter three of this dissertation, prior to the advent of the constitutional dispensation, diversity in the nature of the intimate relationships in which South Africans were involved was largely ignored.³¹⁹ Our Constitution now envisions a society where heterosexual, gays and lesbians can be united in their diversity. The Constitution further embraces a substantive notion of equality which entails the elimination of existing discrimination and the implementation of measures to protect and advance those people who were, and are, disadvantaged by past discrimination.

It has been established in this dissertation that the Civil Union Act was a remedy to accord homosexuals the right to marry each other just like heterosexual couples so that they can enjoy family life as well. The Marriage Act was not repealed notwithstanding the fact that section 30(1) was found to be unconstitutional by the Constitutional Court.

³¹⁷ 2006 (1) SA 542 (CC).

³¹⁸ See para 2.2 above.

³¹⁹ See para 2.2 above.

The Marriage Act still remains an exclusive reserve for heterosexual partners. As at the time of writing this dissertation, South Africa does not have a specific Act catering exclusively for same-sex marriages, but the Civil Union Act permits the registration of a civil union which can take the form of either a marriage or a civil partnership; i.e. heterosexual and same-sex couples have the choice to enter into a marriage in terms of the formalities prescribed by the Civil Union Act, rather than those prescribed by the Marriage Act or a civil partnership in terms of the formalities prescribed by the Civil Union Act.³²⁰

It is submitted that the Civil Union Act is constitutionally acceptable as a means for conferring full recognition on same-sex relationships.³²¹ It is further submitted that the Act meets the requirements set out in *Minister of Home Affairs v Fourie (Doctors for life International, Amici Curea); Lesbian and Gay Equality Project v Minister of Home Affairs*³²² in affording same-sex couples the status, benefits and responsibilities accorded to opposite-sex couples.³²³ However, it is submitted that although the Civil Union Act is important for reasons mentioned above, the limitation of the right to equal access to marriage needs to be revisited.

Section 6 of the Act is unconstitutional to the extent that it unjustifiably limits the rights of same-sex couples to enter into a civil union. The provision enabling secular marriage officers to solemnise a same-sex civil union could have injurious implications for same-sex couples' rights to enter into a civil union in that it might render exercising their right very difficult.³²⁴ The theoretically equal rights of same-sex and heterosexual couples to enter into a civil union may therefore be endangered by marriage officers. Section 1 of the Civil Union Act is also unconstitutional to the extent that it prohibits same-sex minors to enter into a civil union. The exclusive use of the word 'marriages' in the section 5

³²⁰ See also Du Toit F 'National Report: The Republic of South Africa' *Journal of Gender, Social Policy & the Law* 2011 (19.1) 277 at 278.

³²¹ See Sinclair JD in Atkin B (ed) *International Survey of Family Law* (2008) at 404; Heaton J *South African Family Law* 3 ed (2010) at 201; See also De Vos P & Barnard J 'Same-sex marriage, civil unions and domestic partnership in South Africa: A critical reflections on an ongoing saga' 2007 *SALJ* 797 at 820; Bilchitz D & Judge M 'For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa' 2007 *SAJHR* 466 at 484.

³²² 2006 1 SA 524 (CC).

³²³ See paras 120, 158 and 162 of the judgment.

³²⁴ Heaton J *South African Family Law* 3 ed (2010) at 201.

creates a differentiation between the solemnisation of marriages and civil partnerships or civil union which infringe the right to equality of religious marriage officers who wishes to solemnise civil partnerships as enshrined in section 9(1) of the Constitution.³²⁵

It is a social reality that gays and lesbians are members of a vulnerable group that has been persecuted and marginalised by unfair discrimination in the past.³²⁶ It is submitted that both heterosexual couples and same-sex couples should be provided with a single statute to formalise their marriage. It has been established in this dissertation that the Civil Union Act unjustifiably violates the right to equality because some of its provisions apply only to same-sex couples.³²⁷ To this end, it is submitted that a repeal of the Civil Union Act with a concomitant expansion of the Marriage Act to accommodate the solemnisation and registration of marriage for both heterosexual and same-sex couples should be the preferred option.

It is recommended that the Marriage Act be amended by the insertion of a definition of 'marriage' that extends marriage in terms of the Act to same-sex and opposite-sex couples.³²⁸ It is further recommended that the Marriage Act be amended by the insertion of a definition of the word 'spouse' and that the marriage formula in the Act be amended to include the words 'or spouse'.³²⁹

The proposed Marriage Act should be secular in nature and should include the registration of domestic partnerships. Such an Act should make it possible for the parties to choose which personal system would be applicable in their life partnership, be it civil, customary law or Muslim religious law. Parties should be able to negotiate monogamy or polygyny and decide what their partnership should be called – a

³²⁵ Heaton J *South African Family Law* 3 ed (2010) at 197. See also See Schafer L in Clark B (ed) *Family Law Service* (2014) at para R38.

³²⁶ De Ru H 'A critical analysis of the retention of spousal benefits for permanent same-sex life partners after the coming into operation of the Civil Union act 17 of 2006' 2009 *Speculum Juris* 111 at 125.

³²⁷ The provisions which only relate to same-sex couples are section 6 and the exclusion of same-sex minors by the definition of 'civil union' in terms of section of the Civil Union Act.

³²⁸ As recommended by the SALRC in their Report on Project 118 (2006) *Domestic Partnerships* paras 5.6.6 and 5.6.7.

³²⁹ See De Ru H 'The Civil Union Act 17 of 2006: A transformative act or a substandard product of a failed conciliation between social, legal and political issues' 2010 *THRHR* 553 at 567.

marriage, a union or a partnership.³³⁰ To address any power imbalances between the parties in negotiating these consequences, the court should be given a wide discretion to overrule any obvious contentious stipulations.³³¹ This will ensure that same-sex couples and heterosexual couples formalise their union in terms of the same Act.

Alternatively, a solution could be to repeal the Marriage Act and leave the Civil Union Act as a more generic Act, since it provides couples with a wider choice as to the designation of their relationships, either as a marriage or a civil partnership.³³² As Bilchitz and Judge³³³ argued, by giving the parties the option to call their union a civil partnership, the Act decenters marriage as the sole and primary status to be accorded to interpersonal relationships.

It is submitted that the creation of one secular Act that regulates intimate relationships would bring about more legal certainty in the currently chaotic family law system.³³⁴ The Act would promote diversity by providing the parties with an option to regulate the nature of their intimate relationship, and this would promote private autonomy while acknowledging the diverse nature of South African families.³³⁵

³³⁰ Bakker P 'Chaos in Family Law: A model for the recognition of intimate relationships in South Africa' 2013 *PER / PELJ* 139/392 - 141/392.

³³¹ Bakker P 'Chaos in Family Law: A model for the recognition of intimate relationships in South Africa' 2013 *PER / PELJ* 141/392.

³³² See Louw AS 'Domesticating life partnerships in South Africa' 2011 *Juridikum* 234 at 243.

³³³ Bilchitz D & Judge M 'For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa' 2007 *SAJHR* 466 at 497.

³³⁴ Bakker P 'Chaos in Family Law: A model for the recognition of intimate relationships in South Africa' 2013 *PER / PELJ* 146/392.

³³⁵ Bakker P 'Chaos in Family Law: A model for the recognition of intimate relationships in South Africa' 2013(16)3 *PER / PELJ* at 146/392.

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