

EQUALITY, SEXUALITY AND TAKING RIGHTS SERIOUSLY*

Karthy Govender
LLB LLB LLM
Professor of Law
University of KwaZulu-Natal, Durban
Commissioner with the South African
Human Rights Commission

SUMMARY

Minister of Home Affairs v Fourie 2006 3 BCLR 355 (CC) is, from a legal and constitutional perspective, relatively uncomplicated and the conclusion almost inevitable, given the explicit terms of the Constitution. However, the directive to Parliament to regulate gay and lesbian unions in a manner consistent with dignity, caused a national outcry. South Africans were confronted with having to take rights seriously. This article assesses the major legal changes wrought through the right to equality and human dignity and argues that the reasoning, conclusion and consequences of the *Fourie* judgment was positive for the country as it taught important lessons about the supremacy of the Constitution, the constraints upon majoritarianism, respect for those differently situated and the consequences of taking rights seriously.

1 INTRODUCTION

Two questions posed to me in vastly different contexts appear to be apposite starting points for this paper. A few years ago an American student asked why the South African Constitution emphatically and unequivocally protected gay and lesbian rights to the extent that it did, given the fact that this vulnerable and marginalized community had neither the guns nor the numbers to be a threat or serious nuisance to the nascent democracy. A few months ago, while representing the South African Human Rights Commission before the Home Affairs Portfolio Committee of Parliament in the hearings on the Civil Union Bill, I was asked whether the SAHRC had failed to discharge its constitutional obligation of informing and educating about constitutional rights. The Committee, in a grudging and reluctant attempt at complying with constitutional imperatives, placed the bill before

* This article was originally conceived as a tribute to Professor Ronald Louw who, in the prime of his life, succumbed to an AIDS-related illness. He, more than most, strove to achieve substantive equality and respected the dignity of all.

I would also like to express my appreciation to Prof Suria Govender and Mr Sam Kim, an intern from the USA, for assisting with the editing.

the public. The public response was less about the Constitution and the Civil Union Bill and more about the nation's antipathy towards gay and lesbian people. The Committee was buffeted by a public tidal wave of anti-gay sentiments transparently disguised as constitutional objections to the Civil Union Bill. The parliamentarian, fatigued by a few weeks of unrelenting criticism, was wondering aloud why after almost twelve years of development and growth of the Constitution, public opinion had not in any perceptible manner moved more decisively in the direction of inclusivity in respect of gays and lesbians.

It is easy to explain why we protected gay and lesbian rights as unequivocally as we did. As part of the compromise that guided us away from a cataclysmic race-based conflict it was agreed that the Bill of Rights would include all universally recognized fundamental rights and freedoms. The prohibition of unfair discrimination on the basis of sexual orientation is a manifestation of this directive. The explicitness, genuineness and extent of the constitutional protection of gays and lesbians probably has more to do with the heady circumstances prevalent during the transitional period as the country was being piloted away from an authoritarian regime to a constitutional democracy. We were caught up in the thrill of creating the promised land. As Cameron JA¹ put it:

"The national project of liberation would not be mean-spirited and narrow but would encompass all bases of unjust denigration. Non-discrimination on the ground of sexual orientation was to be a part – perhaps a relatively small part, but an integral part – of the greater project of racial reconciliation and gender and social justice through law to which the Constitution committed us."

This was the moment in time when space was created for the adoption of a number of rights, some of which were contrary to majoritarian sentiment and some may amount to a nuisance to those myopically and exclusively concerned with efficient governance. Had we not taken the opportunity during this window, it is probable that the chance would never have come again. Respecting the dignity of gays and lesbians, the right to access information, the right to just administrative action and some of the criminal justice rights all eased into the text of the Constitution as a consequence of our history and the need to do the right thing during the window of opportunity. Tribe and Landry prophetically describe constitution-making as an opportunity to structure the future. It is about laying a framework for the creation of a new nation and "to compose the atmosphere in which the politics of the future will be conducted".²

Turning to the question posed by the parliamentarian. Parliament had not engaged with the issue of gay and lesbian rights as it ought to have done. On more than one occasion, the courts either gently or pointedly requested legislative intervention to obviate the necessity for piecemeal assertion of rights on an *ad hoc* basis through judicial pronouncements.³ This was not a

¹ *Fourie v Minister of Home Affairs* 2005 3 BCLR 241 (SCA) par 10.

² Tribe and Landry "Reflecting on Constitution-making" 1993 8 *Am.U.J.Int'l & Pol'y* 627 630.

³ See comments by Goldstone J in *J v Director General of the Department of Home Affairs* 2003 5 SA 621 par 23, requesting comprehensive legislation to regularize the relationship

popular cause and there was no political capital to be gained. Parliament sat back in its comfort zone as a spectator and watched as the courts set aside sodomy laws,⁴ interpreted the statute regulating the pension rights of judges to include same-sex partners as beneficiaries,⁵ and found the implicit prohibition on the rights of same-sex couples to adopt children to be unconstitutional.⁶

The process of affirming an unequivocal and explicit constitutional right was left to the judicial process when much more efficacious and faster action could have been taken by curative legislative measures to rid the statute books of discriminatory anti-gay and -lesbian laws. This, the legislature did expeditiously in instances where laws discriminated on the basis of race and gender. By requiring the legislature to pass a law regulating the consequences of gay and lesbian unions, the Constitutional Court⁷ required it to assert itself and assume responsibility for defending the Constitution in so far as it applied to gays and lesbians, a responsibility which Parliament had up to that time abdicated to the courts and pressure groups. Parliament should have engaged in a dialogue on this issue with the nation much earlier. The dispute over gay marriages touched on the relationship between the state and dominant religions in the country. The secular state was required to change its laws even though the prescribed changes clashed sharply with the religious sentiments of the majority. Resistance had to be anticipated and no amount of education about rights would have prevented the sharp, spirited and robust response from the majority.

Much of the public response was more an attack on the founding constitutional principles of tolerance, inclusivity and respect for dignity irrespective of sexual orientation than it was on the Civil Union Bill. Parliament's silence and inaction, prior to the introduction of the bill, did not contribute to the creation of a culture of respect for gay and lesbian rights.

Bork⁸ observes that he, together with his clerks and secretaries, annually watched demonstrations on the anniversary of the decision of the Supreme Court in *Roe v Wade*,⁹ the decision which recognized the constitutional right to abortion. Separate demonstrations were held by pro-abortionists and anti-abortionists. The demonstrations would start at the White House and proceed directly to the Supreme Court building, "with hardly a glance" at the Houses of Congress. The pressure was clearly on the Supreme Court. In a constitutional democracy, one must anticipate this reaction to decisions of the court that are fundamentally at odds with the religious or other deeply held sentiments of the majority or of a significant minority. These

between gay and lesbian couples. The granting of piecemeal relief by the court was deemed unacceptable.

⁴ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC).

⁵ *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC).

⁶ *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC).

⁷ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs (Fourie)* 2006 3 BCLR 355 (CC).

⁸ Bork *The Tempting of America* (1991) 3.

⁹ 410 US 113 (1973).

demonstrations and counter-demonstrations are meant to convey messages as loudly as possible to the court when it adjudicates on deeply controversial or robustly contested issues. The court was at the epicentre of the controversy as it was seen to be the decisive decision-maker in issues which impact profoundly on people.

However, the reasoning of *Roe v Wade* is fundamentally different to the reasoning in *Fourie*. The XIV amendment to the Constitution of the US in part provides that “nor shall any state deprive any person of life, liberty or property, without due process of law ...” The Supreme Court found that the right to privacy exists within the penumbras of the XIV amendment and is part and parcel of the liberty that is protected. The right to privacy, in turn, was broad enough to encompass a women’s decision whether or not to terminate her pregnancy. The Court then laid down its trimester approach to balance the right of the woman to make decisions affecting her body and instances where the state had a compelling interest to restrict the right.

The cases involving gay and lesbian rights in South Africa have been decided on a constitutional text that is much more explicit and which directly prohibits unfair discrimination on the basis of sexual orientation. It is a text which unequivocally makes choices aimed at accepting “new entrants to the moral parity and equal dignity of constitutionalism”.¹⁰ In many instances, judges defend their decisions, especially those that are unpopular, by arguing that it is the text of the Constitution that has spoken. This is sometimes greeted with cynicism. In the instance of *Fourie*, there is an indelible and almost irrefutable nexus between the text of the Constitution and the conclusion in the case. In many ways this is a rare instance of the text providing a clear answer to the dispute before the court. However, given the moral outrage that the judgment evoked, it was sanguine to involve the democratically elected Parliament in the process of allowing gays and lesbians to marry legally.

Parliament had to be involved in defending the moral choices that it made when it drafted the Constitution in 1996. While the public consultation processes provided a platform for persons to articulate anti-gay sentiments, it also served to give notice to all, that the democratically elected representatives were reflecting upon a law which would directly and not merely tangentially provide legal acknowledgment and protection to gay and lesbian people. Parliament was stamping its imprimatur on the right of all, irrespective of sexual orientation, to be treated equally and with dignity. This was a watershed moment and the level of anti-gay and anti-lesbian rhetoric that whirled around the debate was probably a subconscious realization of this. While the imprimatur was reluctantly given and may well fall short of what is constitutionally required, it is an important affirmation of one of the founding values of the Constitution.

A robust dialogue was necessary, but after the law was passed, we returned to life as normal as we did when the anti-sodomy laws were abolished, and when we recognized the right of gay and lesbian couples to

¹⁰ Cameron JA in *Fourie v Minister of Home Affairs supra* par 24.

adopt children. The passage and contents of the Civil Union Act communicates the important lesson that democracy “is never simply the rule of the people but always the rule of the people within predetermined channels, according to certain prearranged procedures”.¹¹ The outrage of the majority of South Africans at the notion of the state regulating gay and lesbian marriages is not definitive of the issue. Pure majoritarianism is tempered sometimes by the text and tenor of the Constitution. This is entirely compatible with the system of constitutional democracy that we have almost unanimously embraced. As Jackson J¹² put it:

“The very purpose of the bill of rights was to withdraw certain subjects from the vicissitudes of political controversies, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote: they depend on the outcome of no election.”

The imperative to treat all equally before the law, the explicit prohibition of unfair discrimination on the basis of sexual orientation, the right to be treated with dignity, all unequivocally point to a constitutional commitment not to make the protection of gay and lesbian rights subject to the vicissitudes of majoritarianism. This was belatedly recognized by the organizations opposed to the recognition of gay and lesbian marriages and is probably the reason for their call for a constitutional amendment. Amending the Constitution to permit unfair discrimination against gays and lesbians would require excising the fundamental commitment to respect diversity and dignity, shedding the notion of inclusivity, and allowing the law to regard differently situated persons as the “deviant other”. Such changes would profoundly alter the character and broader objects of our Constitution and fundamentally negate the visions of the founders. It would harken back to a philosophy and mindset that this Constitution was drafted to avoid forever. Fortunately the clamour for constitutional change came to nought.

The debate around gay and lesbian marriages was more about the type of society the Constitutional plots for us as a nation as opposed to being solely about the rights of gay and lesbian couples to marry. The passage of the Civil Union Act through the ordinary legislative process has meant that the rights of gay and lesbian couples have been directly affirmed and the broader visions of the Constitution emphasized and endorsed.

¹¹ Holmes “Pre-commitment and Paradox of Democracy” in Elster and Slagstad (eds) *Constitutionalism and Democracy* (1988) 231 as quoted in Klug “Participating in the Design; Constitution-making in South Africa” in “Review of Constitutional Studies” 1996 3 *Alberta Law Review* 18.

¹² *West Virginia State Board of Education v Barnette* 319 US 625 (1943) 638.

2 A BRIEF DESCRIPTION OF THE EQUALITY JURISPRUDENCE¹³

As much as apartheid was about inequality, the Final Constitution is about the attainment of substantive equality. The first substantive right in the Bill of Rights is the right to be treated equally. The court has developed an equality jurisprudence that is relevant to South Africa, incrementally and cautiously.

Section 9(1) affirms the right of everyone to be equal before the law and to the equal protection and benefit of the law. However, it is the right not to be subject to unfair discrimination on the basis of listed and analogous grounds that has become the centrepiece of the developing law regarding equality.¹⁴ By defining equality to include the full and equal enjoyment of rights, substantive as opposed to formal equality, is protected and affirmative measures endorsed as a means of achieving substantive equality. The right not to be subject to unfair discrimination is horizontally applicable and the Promotion of Equality Act and the Prohibition of Unfair Discrimination Act of 2000¹⁵ (hereinafter "PEPUDA") give legislative effect to this right. Finally, in order to reduce the demanding burden of proof that has plagued applicants in other equality jurisdictions, there is a constitutional presumption that discrimination on one of the listed grounds is presumed to be unfair unless the contrary is established.

Differentiation is objectionable if burdens are imposed or benefits granted on the basis of categorisations that adversely impact on the dignity of the complainant. Thus the jurisprudence on equality had distinguished between categorisations that impact on dignity and those that do not. Categorisations that do not impact on dignity, such as differentiations between geographical areas, are not the central concern of section 9. The decision to have exacting planning and development laws in area A and less onerous planning laws in area B does not, without more, impact on dignity and is therefore not the main concern of section 9.

In respect of categorisations that do not impact on dignity, the courts have interpreted section 9(1) to mean that state differentiation is permissible if the categorisation is rationally related to a legitimate state objective.¹⁶ Section 9(1) does not require the state to satisfy the more exacting standard of reasonableness. Choosing between different categories of beneficiaries and imposing burdens on some and not on others are integral to the process of governance. Provided that these differentiations do not adversely impact upon dignity and amount to discrimination, our courts are content to subject them to the non-exacting rationality review and afford a significant measure of latitude to government. These categorisations can be assessed under

¹³ The descriptive account of the basic principles of the rights to equality has been taken in substantial part from Govender "Assessing the Constitutional Protection of Human Rights in South Africa During the First Decade of Democracy" 2005-2006 *South Africa 2005-2006 State of the Nation* 93.

¹⁴ S 9(3).

¹⁵ Hereinafter "PEPUDA".

¹⁶ *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC).

other provisions of the Bill of Rights, but any challenge under section 9(1) would only succeed if the applicant is able to demonstrate irrational action on the part of the state. Given the relative ease with which the state could justify its actions and rebut any challenge in terms of section 9(1) of the Constitution, successful constitutional challenges using this section are unusual. *Fourie* is a rare instance where the state was found to have acted in contravention of section 9(1) of the Constitution. The Constitutional Court in *Fourie*¹⁷ found that the failure of the law to regulate gay and lesbian unions while providing a detailed regime to regulate heterosexual marriages amounted to an infringement of section 9(1), section 9(3) and the right to dignity. The implication of the finding that the state violated section 9(1) is that there was no legitimate state objective that was being achieved by the failure to regulate gay and lesbian marriages. Thus, from a legal or constitutional perspective, this was a relatively easy and uncomplicated case. *Fourie* demonstrated that law or conduct could amount both to an infringement of section 9(1) and section 9(3).

Differentiation that amounts to discrimination is regulated by section 9(3) of the Constitution. Section 9(3) lists seventeen grounds on which unfair discrimination is prohibited.¹⁸ This list is not a closed one. The courts have held that differentiation on any one of the listed grounds amounts to discrimination.¹⁹ In terms of section 9(5) of the Constitution, discrimination on one of the listed grounds is presumed to be unfair unless the contrary is established. Proof of differentiation on a listed ground is converted relatively easily to a presumption of unfair discrimination. The listed grounds are deemed to have been used in the past to marginalise and oppress people and hence have the potential to adversely impact on their dignity.²⁰ If these grounds are the basis of classifications, then discrimination is deemed to have occurred and the presumption of unfairness is triggered. The onus will then be on the party differentiating on a listed ground to prove that the differentiation is fair and to provide an explanation for its decision. This process will allow an evaluation to be made on the merits of the case.

In addition to the listed grounds, differentiation on analogous grounds may also be constitutionally illegitimate. Analogous grounds refer to immutable characteristics that have the potential to impact adversely on human dignity. Grounds such as citizenship²¹ and HIV-status²² have been held to be analogous grounds. In terms of section 9(3), the applicant has to establish that the classification is on analogous grounds and then has the onus of proving that the discrimination is unfair. The presumption of unfairness, in the context of section 9 of the Constitution, does not operate in respect of

¹⁷ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs (Fourie)* supra par 71-75.

¹⁸ The listed grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

¹⁹ *Harksen v Lane NO* 1998 1 SA 300 (CC) par 53.

²⁰ *Harksen v Lane NO* supra par 49.

²¹ *Larbi-Odam v MEC for Education (North-West Province)* 1998 1 SA 745 (CC).

²² *Hoffman v South African Airways* 2000 11 BCLR 1235 (CC).

analogous grounds.

It is now settled law that if a statute is enacted to give effect to a constitutional right, then that right must be enforced through the statute.²³ Thus assertions of unfair discrimination must be founded and based on provisions of PEPUDA and section 9 of the Constitution can only be directly relied upon if the assertion is made that the act is constitutionally defective in not providing adequate remedies. This would apply in the instance of PEPUDA,²⁴ the Promotion of Access to Information Act 2 of 2000²⁵ and the Promotion of Administrative Justice Act 3 of 2000.²⁶

Section 5(2) of PEPUDA provides that in the event of a conflict between a provision of that act and any other law, other than the Constitution, the sections contained in PEPUDA will prevail over the conflicting law. The normal rules of interpretation requiring laws to be interpreted consistently with each other must first be applied. It is thus only if the laws cannot be reconciled that the provisions of PEPUDA will take precedence. However, this does not mean that the laws conflicting with the provisions are rendered invalid. In practice they would be rendered inoperative to the extent that they deal with matters dealt with by PEPUDA and to the extent that the different provisions cannot be reconciled. Thus, if an application is brought to render a law invalid, the applicant would have to prove that the law is inconsistent with a provision of the Constitution and would then rely on section 2 of the Constitution, which provides that law inconsistent with the Constitution is invalid to the extent of the inconsistency. Thus, in the equality contest, it would have to be demonstrated that the law is inconsistent with section 9 read with section 36 (the limitation clause). The jurisprudence on section 9 would then be directly relevant in making the determination of inconsistency. It is probable that PEPUDA will be relied upon to challenge conduct while section 9 of the Constitution will be used to test the constitutionality of law.

PEPUDA²⁷ builds on section 9(3) and provides that if a *prima facie* case of discrimination is made out and if it is established that the discrimination occurred on grounds analogous to the listed grounds, the presumption of unfairness would arise. PEPUDA, drawing on the Constitutional jurisprudence, stipulates the criteria which have to be satisfied if a ground of differentiation is deemed analogous to a prohibited ground. The Act divides prohibited grounds of differentiation into the listed grounds²⁸ and into analogous grounds which are defined as grounds which cause or perpetuate systemic disadvantage, undermine human dignity or which adversely affect the enjoyment of a person's rights in a manner that is comparable to discrimination on a listed ground.²⁹ There is thus a direct nexus or link between the listed and analogous grounds.

²³ See Ngcobo J in *Minister of Health v New Clicks (Pty Ltd)* 2006 2 SA 311 (CC).

²⁴ S 9(3) of the Constitution.

²⁵ S 32 of the Constitution.

²⁶ S 33 of the Constitution.

²⁷ S 13 of PEPUDA.

²⁸ These are the seventeen grounds mentioned in s 9(3) of the Constitution.

²⁹ S b of the definition of prohibited grounds as contained in the definition section of PEPUDA.

In terms of PEPUDA, the complainant can either rely on the listed grounds or on the analogous grounds. Under section 9 of the Constitution, the grounds of differentiation mattered when it came to the onus of proof. PEPUDA has changed this materially and has significantly diminished the real difference between the listed ground and the analogous grounds.

The onus is on the complainant to prove that the ground in terms of which the differentiation occurred qualifies as an analogous ground as defined in the Act. This he or she would have to do by establishing one or more of the conditions to qualify as an analogous ground. Once it is established that there is a *prima facie* case of discrimination on an analogous ground then it is unfair unless the respondent proves that the ground of classification does not amount to an analogous ground or that the discrimination is fair.

The manner in which the constitutional right to equality has been interpreted has resulted in the issue of unfairness becoming the main area of contestation in matters of unfair discrimination. In the early decision of *Hugo*,³⁰ the presidential decision to discriminate against men by only pardoning and releasing women from prison who had children under the age of 12 was motivated by a genuine desire to assist the children of these women. In fashioning a test, the court had to have regard to the impact on the complainant, but could not ignore the true purpose of the measure.

In determining whether the discrimination is unfair, regard must be had to the impact it has on the complainant.³¹ Specifically, an assessment has to be made of whether the complainant belonged to a category of persons that were victims of past patterns of discrimination, whether the measure impairs the dignity of the complainant, and whether the measure is designed to achieve a laudable and important societal objective. The investigation of whether this measure perpetuates systematic and entrenched patterns of discrimination and the assessment of the impact on the complainant is often set against the laudable social objective of the measure.

In *Pretoria City Council v Walker*,³² the court had to consider whether the policy of differential tariffs was constitutional. The residents of the predominantly white part of Pretoria were charged a consumption-based tariff while residents of the African townships were charged a flat rate per household. The flat rate was significantly lower than the consumption-based tariff. White residents argued that they were being unfairly discriminated against on the basis of race. While this was indirect discrimination on the basis of race, the court concluded that the discrimination was not unfair. The Council had the constitutional mandate of equalising facilities and services to all within its region. The facilities in the townships were vastly inferior to that of "white Pretoria". The homes in the townships, unlike those in "white Pretoria" did not have individual meters to measure the consumption of water and electricity. The white residents, although a political minority, were not the victims of past patterns of discrimination. In the circumstances, it was

³⁰ *President of the RSA v Hugo* 1997 4 SA 1 (CC).

³¹ *Harksen v Lane* NO *supra* par 52.

³² *Pretoria City Council v Walker* 1998 2 SA 363 (CC).

not unfair to adopt the differential tariff scheme as an interim measure until meters were installed in the homes in the townships. Charging everyone the flat rate would decimate the coffers of the Council and make the realisation of its constitutional goals of improving the quality of life of all people impossible. The court held that cross-subsidisation was permissible in a democracy and occurs in various aspects of our society.³³ Further, the court held that the purpose of section 9 is to end unfair discrimination. The issue is whether from an objective perspective, the discrimination is unfair. It need not be established that the person discriminating has the intention to discriminate.³⁴

The theoretical position is that if law or conduct is found to discriminate unfairly, then the party seeking to uphold its constitutionality could do so by relying on the limitation clause and establishing that it was reasonable and justifiable in an open and democratic society. However, the criteria that the court has to consider in determining whether law or conduct amounts to unfair discrimination overlap with those that have to be reflected upon in determining whether it is reasonable and justifiable to limit the right. The rights of the complainant, particularly whether his or her right to dignity has been infringed, must be considered specifically; and by reflecting on the true purpose of the measure, the balancing enquiry, inherent in the limitation clause analysis, is brought forward. Thus, in most instances, the matter effectively ends after a finding of unfair discrimination.

However, the unfairness enquiry and the limitation enquiry focus on different issues and this can sometimes influence the outcome.

The unfairness enquiry³⁵ focuses on the impact on the complainant while the limitation clause analysis looks at the assessment of government policy and the extent to which its application could justify the limitation of the right. In *Harris*,³⁶ regulations increasing the school admission age to 7, were challenged *inter alia* on the basis that they unfairly discriminated, on the basis of age, against a learner attending an independent school who was prepared and ready for school at the age of 6, which was the previous age for admission. Given the circumstances of this case, the department was probably more likely to be able to justify its regulation under the general limitation clause than prove that it did not discriminate unfairly against this particular learner.

From the perspective of the applicant learner and the independent school that she attended, there were no sound reasons for not allowing her to start school when she was ready to do so. Denying her admission would, according to expert testimony, adversely affect her. The school had no reason, other than the departmental regulation, for refusing her admission until she turned 7. As the unfairness enquiry focuses on impact of the

³³ *Pretoria City Council v Walker supra* par 62.

³⁴ *Pretoria City Council v Walker supra* par 43.

³⁵ See paper presented on Equality by Professors Albertyn and Goldblatt at the CLOSA Conference on 29 March 2006 in Johannesburg.

³⁶ *Harris v Minister of Education* 2001 8 BCLR 706 (T).

regulation on the complainant, the Department of Education in *Harris* would have had serious difficulties in demonstrating that the discrimination was fair, even if regard is had to the objectives of the regulations.

However, the section 36 enquiry affords greater latitude to weighing the infringement of the rights of the applicant against the purposes of the limitation. Given the broader objectives of narrowing inequality in educational opportunities, the Department of Education could not possibly adopt a rule which had the impact of allowing children from independent institutions to start school earlier and consequently leave school a year earlier than those attending public schools. This would give learners from independent schools a distinct advantage and accentuate the differences between the two systems. Thus, under the limitation clause enquiry, the shortcomings and challenges of the public school education which necessitated the regulation being introduced became a relevant and important consideration in determining whether the infringement of the applicant's rights was reasonable and justifiable. One of the challenges that faced the department of education was that learners in public schools were entering the schooling system under-prepared at the age of 6 and remaining in the system much longer, and as a consequence, using up resources. It sought to utilize its resources more effectively by raising its admission age to 7. The broader justification for this regulation would be fully considered under section 36, thus providing a greater opportunity for the successful defence of the regulation.

The regulation that was challenged in *Harris* applied only to independent schools. However, the regulation sought to bring the age of admission of learners in independent schools into line with the regulations that were already applicable in public schools as from 1999. In the event, Coetzee J in *Harris*,³⁷ when applying the limitation clause, took cognizance of the fact that the regulation under challenge only applied to independent schools and that the failure rates in independent schools were negligible. The admission of children to independent schools did not adversely affect the financial position of the state. He was also of the view that the general statistics showing high failure rates in grade 1 did not support the contention that more six-year olds were failing than seven-year olds. He thus concluded that the state had failed to satisfy the requirements of the limitation clause.

With respect to the learned judge, a much broader analysis was required. According to the statistics provided by the state, 60% of the learners in grade 1 were 6 years of age and there was a failure rate of 38% in this year. The state's conclusion that learners aged 6 were under-prepared and failing is one that is borne out by the statistics. Once this conclusion is reached then the more difficult question arises as to whether it is permissible to have one set of rules regulating admission to independent schools and a separate set regulating admission to public schools. Would the broader objectives of the Constitution countenance a system where learners attending public schools left school a year later and thus commenced their economic

³⁷ *Harris v Minister of Education supra* 805.

activities a year later than those attending private schools? It is probable that such laws would not have advanced the attainment of substantive equality. The limitation clause was specifically designed to balance the objectives of the limitation against the violation of the right. The learned judge ought to have considered whether the importance of having parity in admission standards justified the limitation of the right of the applicant more carefully. His failure to do so meant that the broader objectives of the measure were never really considered as they ought to have been. Had this been done, a different result may well have been reached.

The equality jurisprudence has been developed in a manner that is directly relevant in the South African context. Non-discriminatory differentiation, such as economic measures, is subject to the non-exacting rationality review under the equality clause. The Constitutional Court has made clear that the focus of the right to equality is to assess the fairness of differentiations that impact on dignity. It has charted a course that requires justification by those differentiating on a listed ground as opposed to insisting that the applicants prove all the requirements of unfair discrimination, including intention.

3 EQUALITY AND SAME-SEX MARRIAGES

The development of the equality jurisprudence has been characterized by some as overly cautious and circumspect. I am not convinced that this is valid. In a short period of about ten years, South African law regarding gays and lesbians has journeyed from declaring laws criminalizing sodomy as unconstitutional to requiring the Parliament to legislate and regulate gay marriages. This is an astonishing journey piloted largely by the courts, using as a vehicle, the right to equality. This journey is less the result of a carefully designed and meticulously implemented legal strategy and more the result of judicial determination to take rights seriously. The application in *Fourie* was, from a legal perspective, ill-conceived.³⁸ Civil recognition of same-sex marriages required changes to both the common law definition of marriage and the Marriage Act. The applicants asked the court to develop the common law to recognize same-sex marriage, without challenging relevant provisions of the Marriage Act 25 of 1961. This compelled the majority in the SCA to grant a limited and narrow order. The common law definition of marriage was developed to mean the union to two persons to the exclusion of others. The court then recognized that the Minister was at liberty to sanction religious formulae that encompass same-sex marriages. Thus, in terms of this order, same-sex marriages would have to be conducted through religious organizations that approved of gay and lesbian marriages. These marriages would then be solemnized in terms of the formulae approved of by the minister. Very limited relief was thus granted. The deficiencies in the application were cured when the Constitutional Court, somewhat magnanimously, granted the Lesbian and Gay Equality Project direct access to challenge the constitutionality of section 30(1) of the

³⁸ *Fourie v Minister of Home Affairs supra* par 34.

Marriage Act and heard this matter simultaneously with the appeals against the SCA rulings in *Fourie*. This then opened the way for an order requiring state recognition of same-sex marriages.

South African law had, prior to this case, been incrementally developed to allow same-sex couples some of the benefits and responsibilities of marriage. The common law definition of marriage and sections of the Marriage Act were under-inclusive in that they did not regulate same-sex marriages while doing so in respect of heterosexual couples. Thus same-sex couples were left in a state of “legal blankness” regarding the regulation of their unions.³⁹ The law quite simply chose to ignore them, allowed them their privacy and permitted them legal recognition on an *ad hoc* basis only when they demanded this by way of litigation. The Constitutional Court in *Fourie* emphasizes that both the *Sodomy case*⁴⁰ and the *Home Affairs case*⁴¹ were decided on the grounds of equality and dignity and not simply on the basis that same-sex couples should be afforded private space to live without interference from the state. This meant that the state could not confine itself to inaction and simply leave gays and lesbians alone. It required the state to act proactively and take the steps necessary to ensure that the law treated them equally and with dignity. Both the common law, which defines marriage as the union of one man with one woman to the exclusion of others and section 30 of the Marriage Act, which excludes same-sex couples from the marriage formula, clearly excluded gay and lesbian couples from the status, entitlement and responsibilities accorded to heterosexual couples through marriage.

The state appeared to have argued that, while the law may be deemed to be discriminatory against sex-same couples, the remedy lay, not in tampering with the definition of marriage, but in providing appropriate alternatives. Their contention thus appeared to be that a method, alternative to marriage, of regulating same-sex unions would render the discrimination fair. According to this argument, it was not necessary for gay and lesbian unions to be assimilated into the definition of marriage as it would be perfectly permissible in terms of the equality jurisprudence to provide them with an alternative to marriage. The net effect of these arguments would be the setting up of two legal regimes which would separately regulate and administer heterosexual marriages and same-sex marriages. Cumulatively the state and the *amici* offered four arguments in support of this contention.

It was argued that one of the defining characteristics of marriage is its procreative potential, in the absence of which, the union could not be described as marriage. The court held that, however persuasive this argument was from a sectarian religious perspective, it was not justified from a legal and constitutional view-point. Requiring every union to have the potential for procreation before it can be regarded as a marriage would be

³⁹ See Sachs J in *Minister of Home Affairs v Fourie supra* par 72. This is the phrase used by Sachs J in *Fourie* to explain the legal void in which gays and lesbians found themselves.

⁴⁰ *National Coalition for Gays and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).

⁴¹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC).

demeaning to couples of mature age, those incapable of procreating and those who choose not to have children.

It was contended that allowing the institution of marriage to be extended to include same-sex couples would fundamentally infringe deeply held religious beliefs. The court acknowledged the importance of religion in the life of our society, but correctly held that the religious texts of one religion cannot be used to interpret the Constitution of the land when determining the rights of other persons.⁴² The metaphor of two partly overlapping circles is apposite in this context. In matters of this nature, the right to believe and act in accordance with one's religious belief must co-exist with the constitutional rights of others in the secular sphere. Parts of the sectarian sphere may overlap with parts of the secular sphere. In the exclusively religious sectarian sphere, due regard must be afforded to sincerely held religious beliefs. Religious beliefs would have to predominate. Thus religious organizations and institutions that find the recognition of same-sex unions to be incompatible with their religious beliefs must be entitled to refuse to solemnize these unions. This right was repeatedly affirmed both by the SCA and by the Constitutional Court in an endeavour to convince those opposed to recognition of same sex-unions that their religious beliefs and commitments are being preserved and safeguarded.

By parity of reasoning, decisions pertaining to the exclusively secular sphere must be decided in accordance with constitutional imperatives, and religious beliefs, even if deeply held, are not determinative. The court was simply reaffirming the trite proposition that in a secular democracy, the Constitution is supreme in the secular sphere. In this sphere there are no countervailing rights or arguments to weigh against the rights of same-sex couples to be treated equally and with dignity.

It is in the overlapping area that reasonable accommodation needs to be made. This is presumably what led to the disappointing conclusion that:

“civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience”.⁴³

It is in this area where circles or spheres overlap that sagacious and appropriate balancing of rights need to be achieved. The issue of striking a proportionate and appropriate balance between the rights of marriage officers and those of same-sex couples was not a material issue before the court and ought to have been omitted from this judgment. The court appears to have departed from its own principles of restraint and of only deciding matters necessary to dispose of the dispute before it. Having done so, one would have expected the court to explore more fully the issue and stipulate in more concrete terms the criteria that would justify a civil marriage officer's refusal to register the union of a same-sex couple. In the *Christian Education* case,⁴⁴ the court held that believers “cannot claim an automatic right to be

⁴² *Minister of Home Affairs v Fourie supra* par 92.

⁴³ *Minister of Home Affairs v Fourie supra* par 159.

⁴⁴ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) par 35.

exempted by their beliefs from the laws of the land. At the same time, the state should whenever reasonably possible, seek to avoid putting believers to the extremely painful and intensely burdensome choice of either being true to their faith or else respectful to the law.” This statement which appears in a footnote in *Fourie*⁴⁵ would have been adequate. If a state-employed marriage officer is permitted to refuse to register a same-sex marriage on the basis of religious convictions then one must assume that a magistrate may be permitted to recuse him or herself from determining whether a same-sex couple should adopt children. These administrative steps are qualitatively very different from requesting a doctor or nurse to perform an abortion when to do so would be fundamentally at odds with their religious beliefs. These exemptions or recusals can then apply in a multiplicity of situations and can have an adverse effect on the dignity of gay and lesbian persons and on their right to be treated equally. The court in *Fourie* held that it was unacceptable that gays and lesbians were only able to enjoy their entrenched constitutional rights through *ad hoc* litigation in the courts. The ability of state officials to opt out of having to exercise their duties on the basis of religious objections could be the Trojan horse which once again requires gay and lesbian persons regularly to turn to the courts to assert their rights. This concern is borne out by section 6 of the Civil Union Act 2000 which provides:

“A marriage officer, other than a marriage officer referred to in section 5, may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union.”

This section completely ignores the intricate balancing that is required and simply allows the marriage officer to assert his or her right and pays no heed to the countervailing rights of gay and lesbian couples. A letter from the marriage officer notifying the Minister that he or she refuses to solemnize same-sex civil unions on the basis of conscience, religion and belief would justify his or her refusal to carry out official duties. This non-exacting opt out clause was certainly not what was envisaged by the Constitutional Court when it cautioned against “putting believers to the extremely painful and intensely burdensome choice of either being true to their faith or else respectful of the law”. The section misconstrues the *dicta* of the court and fails to appreciate that the decision of the marriage officer to refuse to solemnize same-sex marriages on the basis of conscience falls in the area where the secular and religious spheres overlap, and not in the exclusively sectarian sphere. The failure to appreciate this and set up mechanisms to achieve a proportionate balance will probably result in section 6 of the Act being rendered unconstitutional.

The state may also intervene in certain circumstances in the exclusively religious sphere if the particular religion engages in constitutionally offensive conduct. In this sphere, the court is dealing with issues of faith which often define and are integral to, the relationship between the believer and a higher

⁴⁵ *Minister of Home Affairs v Fourie supra* par 160.

being. Any secular intervention in this sphere must recognize the necessity to provide maximum scope to the freedom of religion and for issues of faith to be determined by the religion concerned. As was affirmed repeatedly in *Fourie*, religions that object to conducting gay and lesbian marriages, cannot be obliged by law to do so.

Based on article 16 of the Universal Declaration of Human Rights which entrenches the right of men and women of full age to marry, it was argued in *Fourie* that international law only recognizes the union of men and women. According to the state, it would thus be compatible with international law to restrict the institution of marriage to couples of the opposite sex and create a separate institution for same-sex couples. Stated differently, this differentiation would not amount to unfair discrimination. The court held that the UDHR sought to deal with the realities of the time and cannot be deemed to be the definitive description of marriage for all times. International law cannot be used to interpret the Constitution in a manner which emasculates or diminishes guarantees or rights. Thus the court held that while international law protects heterosexual marriages, this does not mean that it does so in a way that excludes equal recognition of marriages between same-sex couples.

The final argument in favour of a separate legal regime to regulate the union of same-sex couples was based on section 15(3)(a)(ii) of the Constitution which permits laws recognizing systems of personal and family law under any tradition. It was argued that this section implicitly required Parliament to draft the necessary laws and provide for a separate system of laws to regulate the unions of same-sex couples. The court held the section permitted Parliament to draft laws regulating African traditional, Hindu and Muslim marriages to provide legal recognition to these unions. The Court held that the section was inapplicable as same-sex marriages could be deemed to fall within a separate system of personal or family law. In any event the court held that the section could not be interpreted as providing the only avenue available to same couples to enjoy the status, entitlements and responsibilities of marriage.

Thus none of the arguments in favour of the contention that the hallowed institution of marriage should be preserved as is and not be extended to include same-sex marriages were found to be constitutionally convincing. The court expressed its distaste for the separate but equal option which would have the effect of producing new forms of marginalization.⁴⁶ Differential treatment which connotes "distaste or inferiority and perpetuates a caste-like status"⁴⁷ would be constitutionally unacceptable.

Efforts by the *amici* to justify the unfair discrimination against same-sex couples by using section 36 were dealt with summarily by the court. It was argued that the inclusion would devalue the institution of marriage and violate deeply held religious beliefs. The court held⁴⁸ that these reservations

⁴⁶ *Minister of Home Affairs v Fourie supra* par 150.

⁴⁷ *Minister of Home Affairs v Fourie supra* par 152.

⁴⁸ *Minister of Home Affairs v Fourie supra* par 131.

were premised on prejudice against homosexuals, which could never justify unfair discrimination. Finally, the recognition of same-sex marriages would not adversely impact on the rights of heterosexual couples to celebrate their marriages in accordance with their religious and cultural beliefs. Thus, in the balancing process, there were no constitutionally recognized countervailing rights or interests which could justify the infringement of the rights of gay and lesbian persons.

Having decided that the common law and the Marriage Act, by not regulating same-sex marriages, were under-inclusive and unconstitutional, the majority of the court decided that Parliament be afforded time to remedy the situation. Various options were open to Parliament and the view of the majority was that the elected representatives should make these choices and thus legitimize the process. Anticipating the stormy waters that lay ahead and the possibility of the legislature not delivering, the court decided that in the event of a default, the common law would be developed to read that "marriage is the union between two persons to the exclusion of others for life."⁴⁹ In addition the words "or spouse" would be read into section 30(1) of the Marriage Act. In a partial dissent, O' Regan J,⁵⁰ held that an immediate order should be made as the options open to Parliament were very limited as it was obliged to set up a regulatory regime that affords same-sex couples the same status as heterosexual couples. Thus, the option chosen would either directly or indirectly impact on the institution of marriage and the legislature had no discretion in respect of this aspect. O'Regan J cautioned that the courts are obliged to provide effective relief to successful litigants who have established that their constitutional rights have been unjustifiably infringed. In the circumstances she was not convinced that the order should be suspended and ordered that the common law be developed and section 30 of the Marriage Act be changed to include the right of same-sex couples to marry with immediate effect.

The process of drafting the remedial legislation got off to a sluggish start and it appeared highly probable that the deadline would not be met. Surprisingly, the first draft of the Civil Union Bill proposed a completely separate legal regime to regulate same-sex marriages. It appeared to encapsulate the proposal which the state and the *amici* unsuccessfully argued for in the Constitutional Court with the qualification that the parties could elect to call their union either a civil union or a marriage.⁵¹ The South African Human Rights Commission, in its submission to Parliament, pointed out that this would be the riskiest option to adopt and appeared to run counter to a strong message that the law should not contribute to further marginalization. The final version of the Civil Union Act is closer to the vision laid down by the Constitutional Court in *Fourie*. It now defines "civil union" as the voluntary union of two persons who are both 18 years of age or older.⁵² It maintains the right of the parties to elect to register their union either as a

⁴⁹ *Minister of Home Affairs v Fourie supra* par 22.

⁵⁰ *Minister of Home Affairs v Fourie supra* par 169.

⁵¹ See s 4 and 11 of the Bill.

⁵² S 1 of the Civil Union Act 2006.

civil union or a marriage⁵³ and provides that the same responsibilities and benefits that accrue from marriages registered under the Marriage Act 25 of 1961 now attach to unions registered in terms of the Civil Union Act. The present position is that the Marriage Act will be used exclusively to register heterosexual marriages and the Civil Union Act could be used by both same-sex and heterosexual couples to register their unions.

4 CONCLUSION

The question from the American student as to why gay and lesbian rights were protected to the extent they were, was perceptive. He saw, long before *Fourie*, the potential for revolutionary changes being brought about by the cocktail comprising the right to dignity, equality and privacy as far as gays and lesbians were concerned. The broader South African society, after basking in the reflected glory of international praise for its Constitution, belatedly realized the implications of having to take rights seriously. This debate that the nation has had with itself, has taught important lessons about the supremacy of the Constitution, the role of religion in secular matters, the constraints upon majoritarianism, respect for those differently situated, the consequences of living in a secular democracy and the need to take rights seriously. The South African society grew as a constitutional democracy by the litigation, public controversy and legislation that finally affirmed the legal rights of gay and lesbian couples to marry.

⁵³ S 13 of the Civil Union Act 2006.