

# THE EVOLUTION OF THE CONCEPT OF MARRIAGE IN SOUTH AFRICA: THE INFLUENCE OF THE BILL OF RIGHTS IN 1994\*

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## SUMMARY

This contribution focuses on the changes that have been brought about by the Constitution of the Republic of South Africa, 1996 with regard to the concept of marriage *qua* institution. The Act on Recognition of Customary Marriages 120 of 1998 and the decision of the Supreme Court of Appeal in *Fourie v Minister of Home Affairs* (2005 3 SA 429 (SCA)) are discussed against the background of the Constitution. In the discussion of the Act, the focus falls on the aspects of *lobolo* and polygyny that have been retained in the Act. It is also indicated that the decision in *Fourie* may be considered as the logical conclusion of a different approach towards marriage. In both instances, however, there is a deviation from the "one man and one woman" requirement. The conclusion is reached that the application of constitutional norms and prescripts may not result in the structure of marriage being negated as it has developed socio-legally. The suggestion is made, therefore, that in view of the interest of the state in stable relationships to form the cornerstone of society that formal recognition be given to relationships/unions that are characterised by reciprocal obligations of support and responsibility. Such relationships may be called a union, but the institution of marriage should be reserved exclusively for those who, out of religious convictions or cultural reasons, want to enter into a relationship that meets the common law requirement of the concept. Such couples will then be able to conclude not only a legally recognised union, but also a marriage which will be available only to heterosexual couples.

## 1 INTRODUCTION

The common law definition of marriage for many years reflected the only legally recognised family form in South Africa. Marriage carried with it a plethora of legal rights and obligations. It was, and still is, regarded as the cornerstone of society – a fixed traditional structure essential for the raising of children and a healthy family. In fact, marriage has enjoyed a uniquely privileged status. However, in the period post-1994, the institution of marriage has undergone significant changes.

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In this contribution the focus falls primarily on the influence of the Constitution<sup>1</sup> as impetus for the abandoning of what have been described as “archaic, moralistic rules” so as to provide legal recognition to other forms of relationships.<sup>2</sup>

## 2 THE POSITION BEFORE 1994

### 2.1 Historical background

In the period before 1994 the Westminster system of government applied in South Africa. In terms of the principle of the sovereignty of parliament that went with it, courts of law did not have the competence to question the legality of parliamentary legislation. The famous dictum of Blackstone that “[w]hat the parliament doth, no authority upon earth can undo” indeed held true for the position in South Africa and had a marked influence on formal attitudes towards marriage.<sup>3</sup>

The concept of marriage as it existed in this period, to a substantial extent reflected the position in Canon law and Roman-Dutch law. Canon law, basically being Roman law modernized and adapted to meet the needs of the medieval church, was received into Roman-Dutch law.<sup>4</sup> The Catholic Church of the Middle Ages was not only a spiritual institution. It was also a state with its own legislature and courts of law. The jurisdiction of the Church not only included all matters concerning the organization and property of the Church, but also matters connected with faith, sacraments and sin.<sup>5</sup> The Church’s jurisdiction overlapped to some extent with that of secular courts. The means by which the Church secured enforcement of its decrees was excommunication. However, judgments of ecclesiastical courts were enforced by Government *qua* the secular arm of the Church.

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<sup>1</sup> The Constitution of Republic of South Africa, 1996.

<sup>2</sup> South African Law Reform Commission *Domestic Partnerships* Discussion Paper Project 118 (2003) (hereinafter “*Domestic Partnerships*”) 5.

<sup>3</sup> Perhaps the correct point of departure to understand the socio-legal background currently prevailing in South Africa, is to reflect on the notions of Afrikaner nationalism and the religious inclination of especially the Afrikaner. The combination of these two factors provided a dominant consideration within the constitutional dispensation in the period before 1994. In the period stretching from the early 1930’s, Afrikaner nationalism became a strong driving force in the country. In essence, though, Afrikaner nationalism was intertwined with the religious dogma of Calvin. As such it created a framework which had a definite impact on views held by the legislature and the courts on the nature of marriage.

The notion of parliamentary sovereignty juxtaposed with Calvinist views on authority created an ideal environment for a legal system that was essentially positivistic in nature. Courts were to implement Acts of Parliament and not to question them. The seriousness with which these views were held, was already visible in the words of President Paul Kruger late in the 19<sup>th</sup> century. At the swearing-in ceremony of a chief justice he enunciated the Afrikaner views on the authority of Parliament that would haunt the minds of South African lawyers and judges for years to come. He explained that the testing right was a principle of the Devil, since the Devil had introduced the testing right into Paradise and thus tested God’s Word.

The constitutional exposition as set out above in essence held true until 1994. See Hosten, Nathan, Edwards and Bosman *Introduction to South African Law and Legal Theory* (1995) 315 *et seq.*

<sup>4</sup> Hahlo and Kahn *The South African Legal System and its Background* (1968) 511.

<sup>5</sup> Hahlo and Kahn 511 *et seq.*

The sources of Canon law were primarily the Bible, the writings of Church fathers, Justinian's codification of the *Corpus Juris*, the canons of Church councils and the decretals of the popes. The Church taught, as a matter of revealed truth, that "Christ, our Lord elevated the very contract of marriage between baptized persons to the dignity of a sacrament".<sup>6</sup> The sacrament was "an outward sign instituted by Christ to give grace" – the "outward sign" here meaning the mutual external manifestation of internal consent by the two parties to the marriage contract. It was the contract of marriage that was the sacrament. An invalid marriage contract was, in fact, a non-existent contract and, hence, could not be a sacrament.<sup>7</sup> The status created by marriage as a sacrament was instituted by God; it was a natural relationship whose ends and essential properties were determined by natural law. These ends and properties could not be varied by human legislation, either civil or ecclesiastical, or by the consent of the parties. The primary purpose of marriage as instituted by God was the procreation and rearing of children.<sup>8</sup>

In Roman-Dutch law the philosophies of Montesquieu that the powers of legislation, administration and adjudication had to be separated, that each had to be entrusted to a different organ with the legislature supreme, were embraced.<sup>9</sup> The old ecclesiastical courts were abolished and the Reformed Church became the State Church of the Netherlands. By virtue of the *ius majestas circa sacra* the Church was subject to control by Government. Matters relating to doctrine and service were left to the sole decision of the clerical authorities, but all matters relating to the position of the Church in the community and the legal consequences of acts performed in church, including marriage, were henceforth the concern of the State.<sup>10</sup> Through the *ius supremæ inspectionis* Government exercised supervision over the appointment of ministers in the Church.

The marriage law of this period was prescribed in the Political Ordinance of 1580 and the Perpetual Edict of 1540. Both these instruments reflected the philosophies of the Reformation and to some extent secularized marriage law. Even though the doctrine of the sacramental nature of marriage was disclaimed, the idea of marriage being a divine institution in its general origin subsisted. The rules of Canon law which had their foundation, not in the sacrament or in any religious view of the subject, but in marriage as a natural and civil contract, were retained.<sup>11</sup> However, in view of Biblical texts it was accepted that marriage is a relationship between one man and one woman. It was especially the comparison of the relationship between a husband and a wife with that of Christ and His congregation that provided for the view of marriage as a relationship exclusively between one man and one woman.<sup>12</sup>

The exclusive definition of the nature of marriage as it existed in Roman-Dutch law was received into South African law part and parcel. Besides

<sup>6</sup> Snee "Canon Law of Marriage: An Outline" 1957-1958 *Detroit Law Journal* 311.

<sup>7</sup> Snee 1957-1958 *Detroit Law Journal* 312.

<sup>8</sup> *Ibid.*

<sup>9</sup> Hahlo and Kahn 528.

<sup>10</sup> *Ibid.*

<sup>11</sup> Hahlo *The South African Law of Husband and Wife* 3ed (1969) 11.

<sup>12</sup> Ephesians 5:23-33.

numerous Roman-Dutch texts, South African courts also often referred to the well-known English decision in *Hyde v Hyde and Woodmansee*<sup>13</sup> where it is stated that “[m]arriage as understood in Christendom, may ... be defined as the voluntary union for life of one man and one woman to the exclusion of all others ...”

The biblical justification for marriage as an exclusive relationship between one man and one woman was reflected *holus bolus* by the moral and legal climate predating the transitional Constitution.<sup>14</sup>

## 2.2 The institution of marriage before 1994

South African courts were challenged from time to time to reconsider the nature of marriage. The position the courts took, however, was a relatively simple one. In *Seedat's Executors v The Master (Natal)*<sup>15</sup> the issue before the court related to a potentially polygamous union.

“Bearing in mind the essential characteristics of marriage, it is clear that the union in question was not a marriage, as we understand it. It was a relationship recognized no doubt by the legal system under which the parties contracted, but forbidden by our own and fundamentally opposed to our principles and institutions. *And it is impossible for our courts when dealing directly with the position of a party to such a union to say that she ever was the wife in the sense in which our law uses that term ...* It is a hard result ... that a woman validly married in one part of the British Empire should not be treated as a wife in another part. *But relief can only properly be sought from the Legislature ...*” (italics added).

The monogamous form of marriage, though it was open to all population groups, irrespective of race, nationality or religion, was out of step with fundamental views held by some groups of different cultural and religious backgrounds. The pressure exerted by this state of affairs led to various statutory enactments which, on an *ad hoc* basis, conferred some of the consequences, patrimonial and personal, on relationships resembling that of marriage. In this fashion it was intended to alleviate some of the harsh consequences that followed from non-recognition of unions that did not conform to Roman-Dutch prescripts.<sup>16</sup> In addition to the statutory measures mentioned above, it should be noted that provision had already been in Roman-Dutch law for marriages that were void *ab initio* and which consequently possessed none of the consequences of a valid marriage, to be accepted as putative. If the marriage had been solemnized with prescribed formalities (*quod matrimonium fuerit rite et solemniter secundum morem patriae contractum*) and at least one of the spouses had contracted the marriage in good faith (*quod adfuerit bona fides in facto ipsorum contrahendum, vel saltem unius eorum*) certain of the effects of a legal marriage would attach to it.<sup>17</sup>

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<sup>13</sup> (1866) LR 1 P&D.

<sup>14</sup> Dlamini “The Role of Customary Law in Meeting Social Needs” 1991 *Acta Juridica* 75.

<sup>15</sup> 1917 AD 302 309.

<sup>16</sup> See Kaganas and Murray “The Contest between Culture and Gender Equality under South Africa's Interim Constitution” 1994 *Journal of Law and Society* 119 for a comprehensive exposition of such enactments.

<sup>17</sup> Hahlo 111 *et seq.*

Within the framework set out above, it was rather predictable how courts would deal with issues falling outside of the ambit of the description of marriage reflected by Roman-Dutch law. Contentious issues that came before the courts from time to time related to the position of same-sex partners, the status of marriage in indigenous law and Muslim law, and the capacity in which people who had undergone a sex-change operation could conclude a marriage. The court in all these instances applied the concept of marriage as reflected in Roman-Dutch law – essentially it was a relationship between one man and one woman and no exception would be accepted.<sup>18</sup>

### 3 THE CONSTITUTIONAL BACKGROUND TO A CHANGING CONCEPT OF MARRIAGE

The new constitutional dispensation that came into force in 1994 radically deviated from the pre-constitutional era where Christianity and the world-view of the Afrikaner were favoured.

“South Africa is an open and democratic society with a non-sectarian state that guarantees freedom of worship; it is respectful of, and accommodatory towards, rather than hostile to or walled-off from, religion; acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world-view. The Constitution, then, is very much about the acknowledgement by the State of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination.”<sup>19</sup>

The new constitutional dispensation that entered into force in 1994 radically impacted on legal development in South Africa. The *Grundnorm* of the new constitutional dispensation is constituted by the equal protection and non-discrimination provisions in the Constitution. The provision that South Africa is to be an open and democratic society based on human dignity, equality and freedom, makes it clear that in the case of a conflict of constitutional interests, human dignity and equality will be the primary considerations.<sup>20</sup>

<sup>18</sup> In respect of sex change operations, see *W v W* 1976 2 SA 308 (W); *Simms v Simms* 1981 4 SA 186 (D&C); with regard to Muslim marriage, see *inter alia Ismail v Ismail* 1983 1 SA 1006 (A); *Seedat's Executors v The Master (Natal)* *supra* 302; and in relation to same-sex relationships, see *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W).

<sup>19</sup> *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 4 SA 1176 (CC) par 151.

<sup>20</sup> *S v Makwanyane* 1995 3 SA 391 (CC) 423B. The *Grundnorm* is borne out by, *inter alia*, the provisions of ss 8, 9, 39 and 36 of the Constitution. In terms of s 8 the Bill of Rights enshrined in the Constitution applies to all law. This provision determines that the legislature, the judiciary, the executive and all organs of state are bound by the Bill of Rights. A court is also under the obligation to develop the common law to meet the requirements of the Bill of Rights when it applies a provision of the Bill of Rights to a natural person. S 39 in essence obliges a court to promote the values that underlie a democratic society based on human dignity, equality and freedom when it interprets the Bill of Rights. When it develops the common law, it must promote the spirit, purport and objects of the Bill. In terms of s 36, the limitation of a constitutionally protected right must adhere to the following requirements:

- the limitation must be sanctioned by a law of general application;

In *Harksen v Lane NO*<sup>21</sup> the Constitutional Court set out the stages of an enquiry into a violation of the equality clause.<sup>22</sup> In essence it is required that a preliminary enquiry must be conducted into whether the impugned provision or conduct differentiates between people or categories of people. Of course, if there is no differentiation, there is no question of a violation of the provisions of section 9. However, if a provision does differentiate, a two-stage analysis must be applied. The first stage concerns the right to equal treatment and equality before the law and aims at determining whether the provision has a rational basis – whether there is a rational connection between the differentiation in question and a legitimate state purpose that it is designed to further or achieve. If the conclusion is negative, the impugned provision violates the equality clause in section 9 and it fails the first stage. If, on the other hand, the differentiation is shown to be rational, the second stage of the enquiry is activated. A differentiation that is rational may, however, constitute unfair discrimination when such differentiation relates to the specific grounds on which it is forbidden to discriminate. In principle, both unfair discrimination and differentiation without a rational basis can then in terms of section 36 be justified as limitations of the right to equality.<sup>23</sup>

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- the limitation must be reasonable; and
  - the limitation must be justifiable in an open and democratic society based on human dignity, equality and freedom.

S 9 entails the so-called equality clause. In terms of this provision, everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. However, to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. The state is therefore forbidden to discriminate unfairly directly or indirectly against anyone on a number of grounds set out in s 9(3). These include, *inter alia*, sex and sexual orientation. Private persons are also forbidden to discriminate unfairly on these grounds. In terms of s 9(5) discrimination on one of the grounds will be deemed to be unfair unless it is established that the discrimination is fair.

<sup>21</sup> 1998 1 SA 300 (CC).

<sup>22</sup> A distinction must be drawn between substantive and formal equality. Formal equality would simply mean that all persons are equal bearers of rights – that the law must treat individuals in the same manner irrespective of their circumstances; a so-called neutral norm/standard of measurement. Substantive equality on the other hand, takes the personal circumstances into account and requires the law to ensure equality of outcome. This form of equality requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld. It goes without saying that a purely formal understanding of equality would risk neglecting the deepest commitments of the Constitution. A substantive conception of equality would, in contrast, be supportive of these fundamental values. In *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 41 the Constitutional Court indicates a clear preference for substantive equality:

"We ... need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."

<sup>23</sup> De Waal, Currie and Erasmus *The Bill of Rights Handbook* 4ed (2001) ch 7 (hereinafter "De Waal *et al*").

## 4 RECENT DEVELOPMENTS IN SOUTH AFRICA WITH REGARD TO THE LAW PERTAINING TO MARRIAGE

Recent developments unmistakably deviate from the common-law requirement of one man and one woman. The Recognition of Customary Marriages Act<sup>24</sup> and the debate relating to the recognition of same-sex relationships bear testimony to a change in the public policy on both the exclusive nature of the marriage relationship and gender as the essential values of the common law description of marriage. It comes as no surprise, though, in view of the uncharted landscape the Bill of Rights has uncovered.

### 4.1 Recognition of Customary Marriages Act

A substantial proportion of the South African population prefers not to enter into civil marriage of common law, but rather to enter into customary marriage. Probably the two most striking features of customary marriage is the polygynous nature thereof (the husband is permitted to take more than one wife) and the payment of *lobolo* as a requirement for the validity of the marriage. It goes without saying that the element of polygyny was the very reason that rendered customary marriages invalid at common law – it was considered to be contrary to public policy.<sup>25</sup> However, the Act<sup>26</sup> has now given full recognition to customary marriages regardless of how many customary wives a husband has. The Act retains both the features of polygyny and *lobolo*.

As for polygyny, the crisp question is whether it creates a violation of a woman's right to equality in terms of section 9. Legal opinion on this issue is divided and has to be considered against the provisions of sections 30 and 31 of the Constitution that provide, *inter alia*, for the right to participate in the cultural life of one's choice and to enjoy one's culture with other members belonging to a specific community. The exercising of these rights may not be in a manner inconsistent with a provision of the Bill of Rights though. It is commonly accepted that customary law is part of culture. When a court is therefore confronted with a claim that polygyny discriminates against women and that this aspect of the Act is therefore unconstitutional, it will have to make a finding on a highly sensitive issue that has, on the face of it, been pronounced upon by the legislature.<sup>27</sup> Some argue, therefore, that by enacting a statute that sanctions polygyny, the legislature can be taken to have expressed its views on two points: First, that the right to protection

<sup>24</sup> 120 of 1998. The Act came into operation on 15 November 2000.

<sup>25</sup> Another reason for its nullity was the fact that such marriage was not solemnized in terms of the Marriage Act 25 of 1961. The Legislature has afforded limited recognition to customary marriages. *Eg*, a widow from a customary marriage may claim damages for loss of support arising from her husband's death in terms of s 31 of the Black Laws Amendment Act; a customary marriage was deemed to be valid for establishing a black man's liability for maintenance in terms of s 5(6) of the Maintenance Act 23 of 1963; children born from these marriages were registered as legitimate in terms of the Births and Deaths Registration Act 51 of 1992.

<sup>26</sup> In this paragraph the Recognition of Customary Marriages Act, which came into operation on 15 November 2000, is referred to as the Act.

<sup>27</sup> Sinclair "Marriage" in *Boberg's Law of Persons and the Family* (1999) 168.

against unfair discrimination on the ground of culture, as in this case, required it to end the refusal by the courts to recognise African customary marriages by passing the Act. The Act may therefore be seen as the legislature's response to the injunction in section 9(4) of the Constitution to enact legislation to eradicate unfair discrimination (on the ground of culture in this case).<sup>28</sup> Secondly, that polygyny either does not discriminate against women or, if it does, that freedom from unfair discrimination on the ground of culture in terms of section 15(3) trumps the right to gender equality. Section 15(3) of the Constitution expressly permits legislation recognizing marriages concluded under any tradition. As such, the Act falls squarely within the ambit of section 15(3).<sup>29</sup>

Dlamini<sup>30</sup> vigorously defends polygyny. He contends that polygyny is not merely an invidious discrimination against women but that it has certain merits. Amongst others it enables women to marry and to have children in a traditional society where there are few job opportunities for women. Marriage therefore provides security in these circumstances as the alternative is life-long celibacy or spinsterhood for which no provision is made in traditional society. "Marriage, on the other hand, even a polygynous one, brought with it the enhanced status of wifehood and the procreation of legitimate children. The sharing of a husband, which is perceived as obnoxious by Westerners, may not have seemed too great a price to pay for the advantages of being a wife and a mother in a society where other careers were not open to women."<sup>31</sup> In addition, Dlamini contends, the co-wives benefit from the companionship and security which a large establishment provides. Polygyny can also be seen as a form of family planning as sexual intercourse during the period of lactation is prohibited. It is also mentioned that polygyny rescues women from excessive child bearing.<sup>32</sup> Spinsterhood is not catered for in customary law and a woman can choose lifelong dependency in her father's house or in her husband's.

On the other hand one finds dicta in decisions stating that the principle of gender equality in the Constitution may well lead to the conclusion that polygynous marriages are "as unacceptable to the *mores* of the new South Africa as they were to the old".<sup>33</sup> Various aspects illustrate the infringement of the right to equality of women which is inherent in polygyny. It is pointed out that no two wives are equal in rank and that the position a wife holds in the family hierarchy determines her status and that of her children. The practice of polygyny is significant in the traditional context as having more than one wife is a sign of power and success. It supplies men with sexual satisfaction and a larger pool of workers for subsistence farming where wage

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<sup>28</sup> *Ibid.*

<sup>29</sup> The question that arises because of the enactment of this Act, is whether the Act is immune from constitutional scrutiny. It would appear that the answer is a definite negative. S 15(3), like ss 30 and 31, provides that legislation recognising the marriage must be consistent with s 15 and other provisions of the Constitution. This qualification clearly implies that the statutory recognition of customary marriage may not infringe sex and gender equality.

<sup>30</sup> Dlamini 1991 *Acta Juridica* 71 *et seq.*

<sup>31</sup> Dlamini 1991 *Acta Juridica* 77.

<sup>32</sup> *Ibid.* The author concedes that there are benefits for women in polygynous households. Polygyny enables all women in the tribe to marry and bear children.

<sup>33</sup> *Kalla v The Master* 1995 1 SA 261 (TPD).



earning is rare. The more wives, the larger the area a man's family can cultivate.

Customary marriage is also characterized by the payment of *lobolo*. *Lobolo* means cattle (or their equivalent in money) which the bridegroom, his father or his guardian agrees to deliver to the father or guardian of the bride for purposes of ratifying the matrimonial contract between the group of the bridegroom and the group of the bride and of ensuring that the children of the marriage adhere to the family of the bridegroom.<sup>34</sup> There are diverse opinions regarding the real meaning and function of *lobolo*, and also whether the payment of *lobolo* infringes upon the right to dignity of women. It was previously argued that the payment of *lobolo* meant that the wife was actually bought by the husband or his family. This argument is not accepted any longer, though. *Lobolo* is not the purchase price of the woman – a husband cannot buy or sell his wife, nor does he obtain ownership rights in respect of her. He owes her a duty of support and other spousal duties. The prevailing opinion appears to be the following:

“The primary function of *lobolo* is to transfer the reproductive capacity of the woman to the family of the husband; in other words; there is a direct correlation between (a) the transfer of the *lobolo*; and, (b) the reproductive potential of the woman. From a customary legal point of view, the marriage is only ‘complete’ if, on the one hand, the woman has fulfilled the expectations of bearing ... children for the lineage of her husband, and, on the other when the commitment to transfer the *lobolo* has been fully satisfied. As long as these two requirements have not been met, the marriage is still regarded as being ‘incomplete’. This ‘incompleteness’ does not affect the validity of the marriage.”<sup>35</sup>

From this perspective the argument that *lobolo* does not discriminate against the woman as it merely compensates the wife's family for the loss of a daughter, seems rather far-fetched. In fact, Cronjé and Heaton point out that the real objects of *lobolo* are sometimes ignored with the result that the bride's family charges exorbitant *lobolo* and/or uses it to discharge their own debts, or the husband views its payment as strengthening his authority over his wife. Furthermore, as the wife's family usually has to return the *lobolo* if she is the party at whose instance a divorce is obtained, they may force her to continue with an unhappy marriage.<sup>36</sup>

These incidents inherent in polygynous marriages lead authors to conclude that some practices within customary marriages are seemingly incompatible with the provisions of the Bill of Rights. Mention is made that these practices have the effect of objectifying the woman within the marriage. From the perspective of gender equality the objection is raised that the mere fact that the husband is permitted to take more than one wife but the wife is not allowed to take more than one husband, means that there is no formal equality in polygyny.<sup>37</sup> However, the objections go beyond the desire for formal equality and it is said that polygyny fosters and reinforces

<sup>34</sup> Nhlapo “South African Family Law at the Crossroads: From Parliamentary Supremacy to Constitutionalism” 1994 *The International Survey of Family Law* 428.

<sup>35</sup> Cronjé and Heaton *South African Family Law* 2ed (2004) 216.

<sup>36</sup> Cronjé and Heaton *Die Suid-Afrikaanse Familiereg* 2ed (2004) 239.

<sup>37</sup> See, however, the commentary of Kaganas and Murray 1994 *Journal of Law and Society* 126.

patriarchy which is the real evil.<sup>38</sup> Some authors suggest that irrespective of one's views on the constitutionality of polygyny, an immediate ban would be difficult, if not impossible, to enforce. In fact, even though these authors admit that polygyny may infringe the right of women to dignity and the right not to be discriminated against on the basis of sex and marital status, they maintain that the position as it was before the Act should not be reverted to; non-recognition would lead to more inequality and indignity than is the situation now in terms of the Act. A gradual process of disuse should therefore be allowed to take its course in view of the fact that polygyny is definitely obsolescent and will in time disappear.<sup>39</sup>

One may conclude therefore that despite Constitutional prescripts relating to discrimination and dignity, the legislature saw fit to accommodate a cultural practice of the majority of the population and retain aspects that may be taken to infringe upon the dignity of women in the Act. Section 36 of the Constitution only allows for the limitation of a fundamental right if such limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Should the constitutionality of the Act be disputed, therefore, a court may indeed be hesitant to find that in an open and democratic society the infringement of core values and norms like human dignity and equality will be reasonable and justifiable. A strong argument may consequently be made out that the aspects of polygyny and *lobolo* should be found unconstitutional since they discriminate unreasonably and unjustifiably against women in a way that infringes upon their right to dignity and equality.<sup>40</sup>

## 4.2 The legal position with regard to gay/lesbian relations

A further example of a deviation from the common-law exposition of one man and one woman relates to the relationship of same-sex partners. In this instance reference may be made to a number of occasions where patrimonial and personal consequences typically pertaining to marriage have been ascribed to same-sex partnerships. Same-sex partners have been held to be entitled to access to statutory health insurance schemes;<sup>41</sup> the right of permanent same-sex partners to equal spousal benefits provided in legislation has been asserted;<sup>42</sup> the protection and nurturance same-sex partners can jointly offer children in need of adoption have been put on equal

<sup>38</sup> Cronje and Heaton (n 35) 215 *et seq.*

<sup>39</sup> Bennett *Human Rights and African Customary Law* (1995) 120; Cronje and Heaton 217; and Nhlapo 1994 *The International Survey of Family Law* 429. Kaganas and Murray 1994 *Journal of Law and Society* 126 explain that judging polygyny against the standard of equality between men and women may initially seem unproblematic and that this approach is also adopted by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). However, on closer analysis it is not easy to justify this conclusion. They point at various examples that indicate that women and men are unequal in polygynous unions but contend that one can hardly suggest that feminist objections to polygyny would be addressed if women were given the same opportunities as men to accumulate spouses. "The notion of a woman acting as wife to more than one man suggests greater oppression."

<sup>40</sup> Cronjé and Heaton (fn 35) 217.

<sup>41</sup> *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T).

<sup>42</sup> *Satchwell v President of the RSA* 2002 6 SA 1 (CC).

footing with heterosexual couples;<sup>43</sup> the right of a same-sex partner not giving birth to a child conceived by artificial insemination to become the legitimate parent of the child has been confirmed;<sup>44</sup> the equal right of same-sex partners to beneficial immigrant status has been established;<sup>45</sup> and the common law has also been developed by extending the spouse's action for loss of support to partners in permanent same-sex partnerships.<sup>46</sup> However, it was only in *Fourie v Minister of Home Affairs*<sup>47</sup> where the crisp question before the Supreme Court of Appeal was whether two adults of the same sex who loved each other and who had deliberately expressed an exclusive commitment to one another for life ought to be allowed to marry. Adopting the perspective that the Constitution contains particularly generous measures of protection for all South Africans and that non-discrimination on the ground of sexual orientation should be an integral part of the greater project of racial conciliation and social and gender justice, the court reiterated prior decisions articulating far-reaching doctrines of dignity, equality and inclusive moral citizenship.<sup>48</sup>

The court held that the capacity to choose to get married, which is denied to gays and lesbians at common law, embraces the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition; it offers a social and legal shrine for love and commitment and for a future shared with another human being to the

<sup>43</sup> *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC).

<sup>44</sup> *J v Director General: Department of Home Affairs* 2003 5 SA 621 (CC).

<sup>45</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC).

<sup>46</sup> *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA). See, however, *Volks v Robinson* 2005 5 BCLR 446 (CC) where it was held that s 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990 which confers on surviving spouses the right to claim maintenance from the estates of their deceased spouses if they are not able to support themselves, does not discriminate unconstitutionally against a survivor of a stable permanent relationship between two persons of the opposite sex who had not been married to each other.

<sup>47</sup> 2005 3 SA 429 (SCA).

<sup>48</sup> The court quoted previous decisions with regard to gay/lesbian relationships in which it was decided that s 10 of the Constitution recognizes and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected:

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

exclusion of all others.<sup>49</sup> The common law definition deprives committed same-sex couples of this choice and injures gays and lesbians because it implies a judgment on them. It does not only suggest that their relationships and commitments are inferior, but also that they can never be fully part of the community of moral equals that the Constitution promises for all.<sup>50</sup> This state of affairs, the court finds, undermines the values that underlie an open and democratic society based on freedom and equality. In the absence of justification, it cannot but constitute unfair discrimination that violates the equality and other guarantees in the Bill of Rights.<sup>51</sup>

The court reiterates earlier decisions that procreative potential is not a defining characteristic of conjugal relationships.<sup>52</sup> It also finds that the applicants do not seek to limit procreative marriage in any way, but rather than they wish to be admitted to its advantages. To deny them access to a conjugal relationship would inflict a deep and scarring hardship on a very real segment of the community for no rational reason.<sup>53</sup>

“The focus in this case falls on the intrinsic nature of marriage, and the question is whether any aspect of same-sex relationships justifies excluding gays and lesbians from it. What the Constitution asks in such a case is that we look beyond the unavoidable specificities of our condition – and consider our intrinsic human capacities and what they render possible for all of us. *In this case, the question is whether the capacity for commitment, and the ability to love and nurture and honour and sustain, transcends the incidental fact of sexual orientation. The answer suggested by the Constitution and by ten years of development under it is Yes*”<sup>54</sup> (italics added).

In the last instance the court refers to the argument that “most South Africans still think of marriage as a heterosexual institution, and that many may view its extension to gays and lesbians with apprehension and disfavour”.<sup>55</sup> In rejecting this argument the court conveys that its task is to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In this regard the court’s sole duty lies to the Constitution, but those the court engages with most deeply in explaining what its duty entails, are the people of this nation, whose understanding of and commitment to constitutional values is essential if the larger project of securing justice and equality under law for all is to succeed.

### 4.3 Evaluation of *Fourie and Bonthuys*

The decision in *Fourie* hardly comes as a surprise. In fact, one can describe it as the logical conclusion to a line of reasoning that has been emerging over the last decade.

- Firstly, the founders of the Constitution deliberately refrained from including a provision recognizing the family as the basic unit of society. In

<sup>49</sup> *Fourie v Minister of Home Affairs supra* par 14.

<sup>50</sup> *Fourie v Minister of Home Affairs supra* par 15.

<sup>51</sup> *Fourie v Minister of Home Affairs supra* par 16.

<sup>52</sup> *Fourie v Minister of Home Affairs supra* par 17.

<sup>53</sup> *Fourie v Minister of Home Affairs supra* par 19.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Fourie v Minister of Home Affairs supra* par 20.

*In re Certification of the Constitution of the RSA*<sup>56</sup> the Constitutional Court explains that a survey of international instruments conveys that in general states have a duty, in terms of international human rights law, to protect the rights of persons to marry freely and to raise a family. The duty on states to protect marriage and family life has been interpreted in a multitude of different ways. There has by no means been universal acceptance of the need to recognize the rights to marriage and to family life as being fundamental in the sense that they require express constitutional protection.<sup>57</sup> The court then proceeds to explain that the absence of marriage and family rights in many African and Asian countries reflects the multi-cultural and multi-faith character of such societies.

“Families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms. They thereby avoid disagreements over whether the family to be protected is a nuclear family or an extended family, or over which ceremonies, rites or practices would constitute a marriage deserving of constitutional protection ... These are seen as questions that relate to the history, culture and special circumstances of each society, permitting of no universal solutions.”<sup>58</sup>

- Secondly, the Constitutional Court prefers not to give a definition of the family. This observation is borne out by the following argument in *Dawood v Minister of Home Affairs*:<sup>59</sup>

“The importance of the family unit for society is recognized in the international human rights instruments ... when they state that the family is the ‘natural’ and ‘fundamental’ unit of our society. *However, families come in different shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognizing the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms*” (italics added).

- From a legal and constitutional point of view, procreative potential is not a defining characteristic of conjugal relationships. This was held in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*<sup>60</sup> on the basis that a view to the contrary would be deeply demeaning to couples (whether married or not) who, for whatever reason are incapable of procreating when they commence their relationship or become so any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It may even be demeaning to a couple who voluntarily decide not to have children or sexual relations with one another; this decision being entirely within their protected sphere of freedom and privacy.

<sup>56</sup> 1996 4 SA 744 (CC).

<sup>57</sup> Par 98.

<sup>58</sup> Par 99.

<sup>59</sup> 2000 3 SA 936 (CC) par 31.

<sup>60</sup> *Supra* par 51.

- In the last instance, the court has on a number of occasions found that gay or lesbian couples are capable of establishing a *consortium omnis vitae*.<sup>61</sup>

The real question, it is suggested, to establish whether the exclusion of gays and lesbians from the institution of marriage meets the requirements set out in *Harksen v Lane NO*,<sup>62</sup> is to consider whether a gay or lesbian relationship truly reflects a *consortium omnis vitae* as the concept has developed socio-legally. It is submitted that the court's exposition *in casu* sets out in a very mechanical way the aspects of a *consortium* – indeed, the marriage relationship is more than the mere sum total of physical features pertaining to the relationship. Rather the *consortium* is an *abstraction* comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage.<sup>63</sup> From this perspective, it is submitted that one should reflect on the essentials of the structure of the institution of marriage and from that point of departure, consider whether the relationship of a gay or lesbian couple falls within that exposition.

The issue of gay/lesbian marriage has acquired particular impetus in view of constitutional prescriptions. However, it is equally true that marriage *qua* social institution has a typical and unique structure. As a natural institutional community it has a biological basis that is qualified by truth between the spouses. The structure is neither to be understood purely in terms of biological differences between male and female, nor is it solely a bond of love. The biological basis reflects the sexual bond upon which marriage is founded and provides the foundation for the bond of truth; these two aspects are intrinsically interwoven and the moral normative uniqueness of the institution may not be understood apart from its biological basis. The bond of truth is of a typical moral character and reflects a communal relation implying mutual duties and moral responsibility of a specific nature rather than a feeling of love.<sup>64</sup> By providing qualification to the biological basis, it causes the marriage relationship to be of a more perfect nature.<sup>65</sup> The inter-relation between the sexual basis and the bond of truth secures the unity of the marriage as an institution.

From this perspective the decision in *Fourie* appears to be problematic. In the first instance it is clear that the court, to a considerable extent, bases its argument on previous decisions of the Constitutional Court. However, these decisions all hail from the 2000 decision of the court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*.<sup>66</sup> In this case it was first mentioned that gays and lesbians are as capable as heterosexuals of

<sup>61</sup> See, eg, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs supra* par 53.

<sup>62</sup> *Supra*.

<sup>63</sup> *Best v Samuel Fox* 1952 2 All ER 394.

<sup>64</sup> *Joshua v Joshua* 1961 1 SA 455 (GW). See too Van der Vyver and Joubert! *Personae en Familiereg* (1991) 443 *et seq*; and Dooyeweerd *A New Critique of Theoretical Thought* (III) (1952) 271. Of course, the emotion of love cannot be negated. Such emotion is quite natural because of its foundation in the biological attraction between male and female. It must be clearly understood, however, that it is not the natural feeling with its emotional fluctuation and polarity which qualifies and directs the biological aspect.

<sup>65</sup> Dooyeweerd 269.

<sup>66</sup> *Supra*.

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forming a *consortium omnis vitae*, the denominator in terms of which the marriage relationship is described. It should be pointed out, though, that in the particular decision the court simply stated that in its view a *consortium* may be constituted under those circumstances. The court did not present a thorough exposition of the nature of a *consortium*. At the very least, it would appear that the authority upon which the Supreme Court of Appeal bases its argument, is doubtful.<sup>67</sup>

Secondly, while it is clear that the moral bond of love as described above corresponds with the aspects of *philia* and *agapé* in the description of the *consortium*, it is equally clear that the sexual differences between male and female form the very basis for the *consortium omnis vitae* and serve as the basis for the moral bond of love.<sup>68</sup> The *consortium*, of necessity therefore, implies sexual differences of spouses in such institutionalized union. It is submitted, consequently, that the Supreme Court of Appeal's reasoning is not well-founded – the exclusion from marriage of gays and lesbians does not constitute unfair discrimination. The absence of sexual difference simply results in a union lacking guaranteed unity, as does marriage. The court should have investigated the structure of marriage to ascertain whether the *Harksen* criterion was met, it is suggested.

In the third place, the marriage relationship constitutes an “abstraction of rights”.<sup>69</sup> However, it is clear that the list setting out the similarities between hetero- and homosexual relationships reflects a mere mechanical exposition of incidents to the respective unions in the equalization process. The concepts of *eros* and *consortium omnis vitae* as used in two of the criteria have developed within a specific socio-legal background and reflect within that sphere a definite meaning. The equalization by the court of the relationships without explaining how it equates these concepts certainly reflects a very mechanical view of the marriage relationship. As pointed out above, previous decisions relating to gay/lesbian relations, dealt with aspects like pension, sexual expression and residence and not with the nature of the marriage relationship; they did not refer to the nature of marriage and the unique nature of the marriage relationship. In other words, the marriage *qua* institution was first dealt with in *Fourie*, but the court simply applies the list of incidents without comparing the homosexual relationship to that of marriage.

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<sup>67</sup> The Constitutional Court in the 2000 *NCGL* decision merely noted that the message and effect of the exclusion of gays and lesbians from certain statutory provisions could conveniently be expressed by comparing facts concerning gays and lesbians with what the specific provision stipulated. It then proceeded to set out a list of factors similar to that applied in *Fourie*.

<sup>68</sup> In this respect one must agree with the views put forward by different courts that procreation does not provide the essence of the marriage relationship – the inner essence of marriage as primordial natural community is not to be found in the aims to which it is serviceable according to its natural teleological order – marriage as love communion maintains its own structure notwithstanding its interwovenness with the family. One can say, therefore, that marriage is enriched and deepened by its natural interweaving with the family relationship (Dooyeweerd 269-322).

<sup>69</sup> See *Best v Samuel Fox supra*.

## 5 CONCLUSION

It is suggested that neither the legislature nor the Supreme Court of Appeal is providing clear direction in the development of constitutionally sound principles, values and norms in their endeavours to broaden the definition of marriage. In fact, one may refer to the fact that there appears to be a discrepancy between the approaches of the Supreme Court of Appeal and the legislature with regard to the weight to be attached to the views of a substantial proportion, if not the majority, of the population. The aspects of *lobolo* and polygyny which form an integral part of the Act on Recognition of Customary Marriages evidently do not meet the norms and requirements of the Constitution. Yet, the legislature saw fit to recognise customary marriages because they meet the needs of the majority of South Africans. It is clear that considerations of efficacy prompted the legislature to yield to the convictions of the broad community.

On the other hand the views and sentiments of “most South Africans [who] still think of marriage as a heterosexual institution, and ... that many may view its extension to gays and lesbians with disfavour”<sup>70</sup> are simply ignored by the Supreme Court of Appeal. It is clear that the court prefers the line of approach adopted in this regard in the decision of the Constitutional Court in *S v Makwanyane*<sup>71</sup> where it was decided that the question was not what the majority of South Africans believed a proper sentence for murder should be, but whether the Constitution allowed the death penalty. In fact, the court conveys that if public opinion were to be decisive there would be no need for constitutional adjudication and the protection of rights could be left to Parliament which has a mandate from the public and is answerable to the public for the way it exercises its mandate.

The question remains therefore – *quo vadis?* – how to develop the law of marriage to accommodate the relationships of gays and lesbians. It is clear that mere peripheral thought will not take the matter further; marriage *qua* institution has a definite structure and a decision of a court or an Act of Parliament cannot change its typical structure – it is simply a *supra*-legal phenomenon and not a juridical institution. It is however trite that from a legal-historical perspective, marriage has always been a uniquely private matter which initially in Roman law came into existence by mere consensus between the parties. Later on formalities were only required for the sake of legal certainty – the formation of marriage *qua* institution had never been dependent on the meeting of these requirements. In conjunction, the State has an interest in stable relationships to form “the cornerstone of society” (relationships in the new constitutional dispensation to be understood as “coming in all shapes and sizes”) and may not discriminate unfairly on the basis of any of the grounds mentioned in section 9 of the Constitution. In order to meet the constitutional imperative to develop the law of marriage it is suggested that in principle it be considered that formal recognition be given to relationships/unions that are characterized by reciprocal obligations of support and responsibility, irrespective of their nature. Legal consequences ascribed to such a unions may comprehensibly resemble

<sup>70</sup> *Fourie v Minister of Home Affairs supra* par 20.

<sup>71</sup> *Supra* par 87 *et seq.*



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those of marriage. People wishing to conclude a marriage for religious or cultural reasons, however, should enter both into such union and the state of marriage. Religious institutions may decide for themselves in terms of their own dogma for whom the blessing of their church/denomination will be available.<sup>72</sup> The effect of such separation will be that the requisites for the coming into being of such unions and the legal consequences pertaining thereto, will be prescribed by the Marriage Act (*sic!*) (which will have to be amended to include the unions of gays and lesbians) whereas marriage will be a ceremony with religious/cultural value only. Marriage will therefore be entered into only by heterosexuals who out of religious convictions or for cultural reasons, want to enter into a relationship that meets the common-law requirement of marriage – a relationship between one man and one woman.

*Note:*

After this contribution has been accepted for publication the Constitutional Court handed down its judgment on the issue in the *Fourie* case.<sup>73</sup> In essence the Constitutional Court confirmed the decision of the Supreme Court of Appeal in the matter that the failure of the common law and Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples constituted an unjustifiable violation of their constitutional rights to equal protection of the law and their right not to be discriminated against unfairly. The failure also constituted a violation of their right to dignity.<sup>74</sup> The Court also held that Parliament should be afforded a period of one year to correct the defect.<sup>75</sup>

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<sup>72</sup> This point of departure corresponds with option 2 under the heading Same-sex relationships of the discussion paper of the *Domestic Partnerships* in fn 1 above.

<sup>73</sup> Case No 60/04.

<sup>74</sup> Par 114.

<sup>75</sup> Par 156.