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Multiplicity of Marriage Forms in Contemporary South Africa

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TABLE OF CONTENTS 1. Multiplicity of marriage forms and constitutional order in post-apartheid South Africa 2. Customary marriage and polygyny: a possible contrast between the preservation of traditional culture and the constitutional principle of non-discrimination. 3. Same-sex marriage as an application of the constitutional principle of non-discrimination.

1. Multiplicity of marriage forms and constitutional order in post-apartheid South Africa

From the perspective of family law, South Africa represents one of the most interesting realities on which a scholar can focus today. Indeed, according to its laws, South Africa recognized a multiplicity of marriage forms. In addition to common law marriage, which is deeply linked with the traditions of Western culture, both customary marriage and same-sex marriage are allowed, and furthermore civil unions are recognized for both heterosexual and homosexual couples.¹

Customary marriage, mostly a plural marriage practiced in the form of polygyny,² is typically related to the cultural identity of some South Africans; same-sex marriage is an innovation related to fundamental rights affirmed in the South African Constitution³.

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¹ See David J. Bederman, Lecture: the Bederman Lecture on Law and Jurisprudence: Public Law and Custom, 61 Emory L.J. 949, 956 (2012): “South Africa is a legal system where determinations of status (especially family status) combine both public and private law elements. South African law is strongly pluralistic, drawing strength and sustenance not only from civil law sources and traditions but also from indigenous customary regimes which exerted a profound influence on family and property law as well as local governance”. See also Macarena Saez, Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why "Same" is so Different, 19 Am. U.J. Gender Soc. Pol'y & L. 1, 7-8 (2011).

² In the perspective of multiplicity of marriage forms, the recognition of customary marriage and the practice of polygyny is not a specific characteristic of South Africa, but it is present in several African countries. See Yaw Oheneba-Sakyi & Baffour K. Taky, Introduction to the Study of African Families: A Framework of Analysis in African Families at the Turn of the 21st Century 1, 10 (Prager Publishers 2006).

³ See Johanna E. Bond, Culture, Dissent, and the State: The Example of Commonwealth African Marriage Law, 14 Yale H.R. & Dev. L.J. 1, 8 (2011): “Although distinct in its culture, politics, history, and economic status, South Africa
The reason for this plurality, characterized by the toleration and acceptance of different lifestyles, is based on the recent history of the country. The legal and constitutional transformation of post-apartheid South Africa embodies a democratic project; in this project “equality is the quintessential value.”

We can assume that both respect for cultural identity and non-discrimination according to sexual orientation are related to equality. The reason for the explicit affirmation of these principles in the Bill of Rights is a result of the highly advanced sensibility of the Constitution related to issues of equality, which is a reaction to the apartheid phase. There is, of course, the possibility that other constitutional values could conflict with the two values on which we are focusing. For instance, customary marriage, a non-gender-neutral plural marriage, represents a problem with respect to women's right to equality, while same-sex marriage could generate some problems for members of the clergy who, as marriage officers, might refuse to perform the ceremony.

A scholar, used to considering the plurality of forms of marriage, cannot ignore the most interesting aspect: in South Africa there coexist two forms of marriage, polygamy and same-

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7 See id. at 1485 and supra note 4, at 362.

8 Id. at 1485. See infra ¶ 2.

sex marriage, usually related, in an effort to reductio ad absurdum the problem concerning non-
traditional concept of marriage.\textsuperscript{10}

Both in common law and in civil law systems, opponents, considering the possibility of
recognition of same-sex marriage, very often suggest that it would force states to recognize
polygamous unions too.\textsuperscript{11}

This requires careful reflection, because these two forms of marriage are distinguishable in
several ways,\textsuperscript{12} according to their structure and function.\textsuperscript{13} The only characteristic they share
is their contrast with the traditional\textsuperscript{14} concept of marriage as “union of one man and one
woman.”\textsuperscript{15} We can consider the possibility that tradition would not be the main method to
characterize marriage.\textsuperscript{16} Different traditions can coexist – and South Africa is an example of
such a kind of multicultural society – and we cannot assume that cultural models of Western
society have to be imposed as general and absolute.\textsuperscript{17} In the same way, we have to consider
the axiologic approach linked to supreme constitutional values.

In a constitutional order that originated from a strong reaction to the offense of dignity, to
inequality and to lack of freedom, suffered by specific categories of people and assumed as
system – as apartheid was – we have to accept the primacy of some values, such as human
dignity, equality and freedom.

\textsuperscript{10} See Elizabeth M. Glazer, Sodomy and Polygamy, 111 Colum. L. Rev. Sideba 66, 66-67 (2011); Mark Strasser,
\textsuperscript{11} See id. at 60. In Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003), the Court - while allowing
same-sex marriage in Massachusetts - explicitly says that: “Nothing in our opinion today should be construed as relaxing
or abrogating the (…) polygamy prohibitions of our marriage laws.”
\textsuperscript{12} See Strasser, at 60.
\textsuperscript{13} Id. at 60-61.
\textsuperscript{14} Of course, speaking here of tradition, we refer to Western culture’s tradition.
\textsuperscript{15} “Coniunctio maris et feminae” according to the definition of Modestin, accepted in Roman Law (D. 23.2.1). See
Strasser, supra note 10, at 62.
\textsuperscript{16} Eugene Volokh, Same-sex marriage and Slippery Slopes, 33 Hofstra L. Rev. 1155, 1170 (2005).
\textsuperscript{17} See Ugo Mattei, Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems, 45 Am. J. Comp. L. 5, 34-
35 (1997).
The prevalence of this trinity of values over all other constitutional values is widely accepted. They indeed characterize South Africa as a democratic country and become the obligatory paradigm for the interpretation of the same Bill of Rights.

Even if human dignity is supposed to be the prevalent value in a hierarchical perspective, this trinity is deeply linked: we cannot considerate human dignity without equality and without freedom. They consider a system where the lack of one element determines the collapse of the whole.

From this perspective, we can understand why equality seems to be a nodal aspect when analysing the multiplicity of marriage forms: this value has to be prevalent over other values or rights, such as respect for religious beliefs or the preservation of cultural identities, social models, and traditions. Equality, as a part of the constitutional system of values, has to be regarded not only as an idealistic aim, but also as “a descriptive element of the kind of treatment that one should receive.” Its primacy has to be affirmed concretely in every aspect of human life: this includes, of course, marriage and family.

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19 S. Afr. Const. 1996 § 7. 1: “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom” (emphasis added). See Dawid van Wyk, Values, Values, Values or Mere Words, Words, Words? Values in the 1996 Constitution in CONSTITUTION AND LAW 19, 21.

20 S. Afr. Const. 1996 § 39 (1) (a): “When interpreting the Bill of Rights, a court, tribunal or forum (…) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.” See van Wyk, supra note 19, at 21-22.

21 The primacy of human dignity is evidenced by its collocation in § 1, 7, 36 and 39 of S. A. Constitution; see Nazeem M.I. Goolam, The interim Constitution, the working drafts and the South Africa’s new Constitution. Some observations, 12 S. A. Public Law, 186, 186 (1997): “It is not insignificant that the value of human dignity does not appear either after the values of equality and freedom or between the value of equality and freedom. On the contrary, it is highly significant that human dignity appears before both equality and freedom because essentially, human rights law must serve the purpose of effectively protecting the human dignity of the members of any society.” In the same perspective: see Goolam, supra note 18, at 27. Nishihara, supra note 18, at 13, dealing with the same subject, affirms that: “The notion of human dignity upholds (…) the primary value of the constitutional system.”

22 Id. at 12, referring to the values enumerated in § 1 of the South African Constitution, describes them as a “hierarchical system of values,” and affirms that “we should always be careful not to deviate from the system of fundamental constitutional values.”

At the same time, when we examine the correspondence to equality of a marriage form – it can be a traditional form, such as customary marriage, or a new one, as same-sex marriage - we have to regard the problem in a wider perspective, considering the other prevalent constitutional values: human dignity, and freedom.24

2. Customary marriage and polygyny: a possible contrast between the preservation of traditional culture and the constitutional principle of non-discrimination.

The model of traditional monogamous marriage in South Africa is based on British legal principles and on Roman-Dutch Common Law and was predominant during colonialism and apartheid.25 Customary marriage, just tolerated during those times,26 was legalized in 1998 with the Recognition of Customary Marriages Act27 (RCMA), and was a result of the new Constitution adopted two years before in South Africa.28 It has been observed that “the legal recognition of customary law was regarded as an important step in reclaiming authentically African norms that had been disrupted by colonialism and apartheid.”29 The Constitution of 1996 encourages this process of recognition. Article 30 and Article 31 of the Constitution30 establish indeed the right of each person to participate in the cultural life of his choice, even – of course – the traditional

26 See Tracey E. Higgins & Rachel P. Fink, *Gender and Nation-Building: Family Law as Legal Architecture*, 60 Me. L. Rev. 375, 391 (2008); “Although the secular colonial administration might have tolerated such marriages, pressure from religious interests led to sustained periods of nonrecognition of African marriages in many areas.” In spite of that, the apartheid government caused an improvement of polygamy while keeping Black women in the homelands and employing Black men in the White industrial areas: in such a perspective, many women had to choose a polygamous marriage. See also Connie M. Anderson, *The Persistence of Polygyny as an Adaptive Response to Poverty and Oppression in Apartheid South Africa*, 34 Cross-Cultural Research 99, 109 (2000); Tom W. Bennett, *Re-introducing African Customary Law to the South African Legal System*, 57 Am. J. Comp. L. 1, 4-5 (2009); Johanna E. Bond, *supra* note 3, at 32-33.
29 Higgins & Fink, *supra* note 26, at 399.
culture. But we have to consider that the Constitution establishes in addition that this right has to be exercised according to the fundamental principles of the Bill of Rights.

Customary marriage, polygynous and historically practiced according to a patriarchal tradition, presents actually some aspects hardly accordable with the fundamental values of the Bill of Rights. Among these values, we can surely consider human dignity and equality as some of the most significant.

There is a wide debate over this theme.

Customary marriage actually presents a clear contradiction: it can be considered as an effort to preserve the cultural identity of some South Africans, but - on the other hand - it shows elements of contrast with respect to the foundations of the Constitutional system of the country.

The South African Constitution expressly prohibits direct or indirect discrimination on the basis of gender, sex, pregnancy, or marital status.

The Promotion of Equality and Prevention of Unfair Discrimination Act similarly prohibits gender discrimination, gender-based violence, and “any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men.”

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31 See Bennett, supra note 26, at 1.
32 See supra ¶ 1.
33 See Higgins & Fink, supra note 26, at 399: “during the post-apartheid period, the recognition of African customary law became a highly contested political question.”
34 See Andrews, supra note 4, at 379: “By recognizing the reality of polygamous unions, the South African legislature gives effect to its constitutional promise of allowing everyone to practice the culture or religion of their choice. For a pluralist constitutional democracy, such latitude is crucial. But such recognition also suggests that the South African government is not prepared to make the hard choices that are necessary to ensure that the pursuit of gender equality is not derailed. Even though the Act is a celebration of cultural diversity, it also reflects a continued reticence about gender equality.”
36 Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 § 8. This section provides in full that, “subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including:

a) gender-based violence;
b) female genital mutilation;
c) the system of preventing women from inheriting family property;
d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
f) discrimination on the ground of pregnancy;
g) limiting women's access to social services or benefits, such as health, education and social security;
While recognizing both the right to gender equality and the right to preserve native culture (including the application of customary law), the South African Constitution sets up a potential conflict in the context of customary marriage, as some parts of native culture deny the equality of women.\textsuperscript{37}

We can assume that two approaches are possible in order to resolve this potential contrast (law and gender equality): gender neutrality and choice or consent.\textsuperscript{38}

Even if the recent regulation of customary marriage can be considered as “an important milestone on the road to gender equality,”\textsuperscript{39} polygyny itself creates an unequal status\textsuperscript{40} and represents a “symbolic manifestation of patriarchy.”\textsuperscript{41}

Gender neutrality seems to be – at least formally – the definitive solution to the problem.

In this perspective a polygamous marriage, to be allowed according to the principle of equality, needs to be possible both in the polyandrous form and in the polygynous one.

Polygamy should so be a wide model of marriage where one spouse can be linked to several spouses of opposite sex.\textsuperscript{42}

Of course, this model has no complete parallel in customary marriage as practiced in South Africa, but it has two advantages: the results are coherent with equality and it could be applied - without any obstacle - to customary marriage itself.

On the other hand it is a matter of fact that formal respect to a constitutional principle is not enough;\textsuperscript{43} a gender-neutral recognition of polygamy would not mean that it could find full application in a society, such as the South African one, where only polygyny is socially accepted. In a more general perspective, being historically a matter of fact that polyandry is a

\begin{itemize}
  \item \textbf{h)} the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
  \item \textbf{i)} systemic inequality of access to opportunities by women as a result of the sexual division of labour.”
\end{itemize}


\textsuperscript{38} \textit{Id.}

\textsuperscript{39} See Andrews, \textit{supra} note 6, at 1493.

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} In order to not complicate the problem further, we don’t consider ‘polyamory’, that involves multiple same-sex or bisexual relationships. See Strasser, \textit{supra} note 10, at 99-100; Elizabeth F. Emens, \textit{Monogamy’s Law: Compulsory Monogamy and Polyamorous Existance}, 29 N.Y.U. Rev. L. & Soc. Change 277, 300-301 (2004).

\textsuperscript{43} Higgins, Fenrichy & Tanzerz, \textit{supra} 37, at 1664: “the concept of gender neutrality must be substantive, not merely formal.”
model present in a few traditional societies,\footnote{There are four societies where polyandry represented a prominent form of marriage: Tibet, Marquesas Islands in Polynesia and, in southern India, the Toda and Nayar communities. See George P. Murdock, \textit{World Ethnographic Sample}, 59 (4) American Anthropologist 664, 671-672 (1957). Tibetan polyandry - now outlawed – seems to have been quite diffused in the past. It has been studied to argue if polyandrous unions represent an adaptive phenomenon in order to produce more offspring than monogamous ones; see Eric A. Smith, \textit{Is Tibetan polyandry adaptive? Methodological and metatheoretical critiques}, 9 (3) Human Nature 225, 227 (1998). For other references to cases of polyandry, see \textsc{William N. Stephens}, \textit{The Family in Cross-Cultural Perspective}, 34-35 (University Press of America, 1982) (1963).} it seems difficult that - even if allowed - it could find real application; polygyny itself is a model nowadays in crisis.\footnote{See Andrews, \textit{supra} note 6, at 1495.}

Even in Islamic society, where it used to be allowed according to a traditional interpretation of the \textit{Qur'an},\footnote{See \textit{Qur'an}, 4:3: “If you deem it best for the orphans, you may marry their mothers - you may marry two, three, or four. If you fear lest you become unfair, then you shall be content with only one, or with what you already have. Additionally, you are thus more likely to avoid financial hardship.” But many contemporary Qur’anic scholars tend to consider critically that possibility, relating it to the text of Sura 4:129: “You can never be equitable in dealing with more than one wife, no matter how hard you try.” That’s the perspective supported by Muhammad ‘Abduh (1842-1905) and Qāsim Amīn (1863-1908). See: Roberta Aluffi Beck Peccoz, \textit{Il matrimonio nel diritto islamico, in IL MATRIMONIO. DIRITTO Ebraico, CANONICO E ISLAMICO: UN COMMENTO ALLE FONTI 181, 196–197} (Silvio Ferrari ed., Giappichelli 2006), NISRINE ABIAD, SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY, 13 (British Institute of International and Comparative Law, 2008), who underscores that: “some scholars also argue that rather than sanction polygamy, the Quran may in fact be interpreted as implicitly permitting only monogamy (…) the issue continue to be debated amongst scholars although, in general, Muslim jurists continue to uphold the male’s right to marry up to four wives.”} polygyny is nowadays less widespread.\footnote{See, in Morocco, the new family code of 2004, \textit{Mudawwanat al-usra}, that allows polygamy only in exceptional cases and that subordinates this kind of marriage to the authorization of a judge (art. 42); in Tunisia the \textit{Code of Personal Status} of 1956, that, at art. 18, prohibits polygamy. See Abiad, \textit{supra} 46, at 122 and 129-130.}

Nevertheless the proposed solution could accord the model of customary marriage with the constitutional principles of the Bill of Rights.

Gender neutrality is not the theoretical approach that has been chosen in South Africa; on the contrary, the option of preserving religious and cultural identity linked to customary marriage prevailed.

To mitigate the effect of such a perspective, the principle of “choice” or consent of spouses, who can decide freely and independently from accepting polygamy as permitted in the customary marriage model, developed.\footnote{See Higgins & Fink, \textit{supra} note 26, at 403-404.}

This statement of the problem implies that the family is mainly a private, cultural element, and that the state has to enter in that field just in order to establish general rules, so that people can be free to conserve – if they desire - traditional models.\footnote{Higgins, Fenrichy & Tanzerz, \textit{supra} note 37, at 1664.}
According to this perspective, the exclusive possibility of polygyny should not represent a problem, being the result of free choice.

Of course this approach doesn’t consider a central fact: it’s quite difficult to understand if what is expressed as “free choice” is not – on the contrary - the result of social influence or familiar pressure.\(^{50}\)

Certainly polygamy would not be problematic under the choice paradigm, so long as the polygamous marriages were a product of individual choice.\(^{51}\)

In any case a theoretical problem can be configured.

Freedom is one of the fundamental values of the South African Constitution, and – as we emphasized – it is deeply linked to the other fundamental ones: human dignity and equality.\(^{52}\)

If we view customary marriage as an expression of one constitutional value, freedom, but in contrast with another constitutional value, equality – in order to sexually discriminate – we have to look for a solution to balance, according to the reasonableness criteria,\(^{53}\) these two prominent constitutional values.

Considering the axiological prevalence of human dignity, as a constitutional value, we must ask ourselves if customary marriage, not regulated as a gender-neutral plural marriage, could offend human dignity.

From a formal perspective an affirmative answer seems admissible, but, realistically, a gender neutral regulation of customary marriage in South Africa is not – at the present – supportable.

In the country, the RCMA of 1998\(^{54}\) regulates customary marriage, that - for the first time - gives legal recognition to polygamous unions.\(^{55}\)

The RCMA is based on the choice – consent approach and it does not apply a formal gender neutrality principle. On the contrary it represents an effort to adapt – for what it is possible -

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\(^{50}\) Actually families exercise a strong practical control over the marriage decision. The involvement of the family has to be considered often a determinative factor in the marriage decision. See id. at 1671.

\(^{51}\) Id. at 1664-1665.

\(^{52}\) Supra ¶ 1.


\(^{54}\) Recognition of Customary Marriages Act of 1998. For a brief overview of the genesis of RCMA, see Andrews, supra note 6, at 1486-1487.

customary marriage to the model of marriage as it evolved in Western Countries during the twentieth century.

Coherently with the “choice - paradigm,” the RCMA tries to reduce the effects of the absence of a formal equality by ensuring the free consent of spouses. On the other hand, it attempts to regulate the institution in order to make it more “egalitarian” as it is possible.\(^{56}\)

Regarding the free choice of spouses, the Act makes the consent of the parties themselves (as opposed to their families) a central, necessary element of customary marriage.\(^{57}\)

It establishes furthermore that spouses will have equal legal capacity during the marriage and that community of property will be the rule, if the couple will not decide for separate property.\(^{58}\)

In the same perspective it has been disposed a division of existing property.\(^{59}\)

On the contrary, the RCMA presents elements openly in contrast with the gender neutrality when, ruling the practice, it uses the terms “husband” and “wife” instead of the neutral term “spouse.”\(^{60}\)

At the same time, the results are problematic in case of a new marriage (a polygamous marriage, of course); the RCMA doesn’t require the consent of prior wives, but only that they will be notified.\(^{61}\)

Considering the possibility of subsequent marriages of the husband, it can require a determination by the court to protect the interests of all parties.\(^{62}\)

The RCMA equalizes access to divorce for both men and women, according to common law legislation. It has created a single, common law ground for divorce, while the jurisdiction of traditional courts is not recognized.\(^{63}\)

Carrying out an equal treatment, women - as men - may choose to exit a marriage and can ask for divorce in a court that will protect their rights regarding custody and support for the post-divorce period.

\(^{56}\) See Higgins, Fenrichy & Tanzerz, supra note 37, at 1669-1670.
\(^{57}\) See Recognition of Customary Marriages Act of 1998 § 3(1)(a)(ii).
\(^{58}\) Id. § 7(1)-7(2), 10(1)-10(2).
\(^{59}\) Id. § 7(7)(a)(b)(bb).
\(^{60}\) Id. § 1(iv), 6.
\(^{61}\) Id. § 7(4)(b).
\(^{62}\) Id. § 6.
\(^{63}\) Id. § 8(5).
In this perspective, we can understand why it had been considered preferable to avoid constitutional scrutiny of RCMA, as it would have left most South African women without nondiscrimination protection in marrying, as well as divorcing.\textsuperscript{64}

3. Same-sex marriage as an application of the constitutional principle of non-discrimination.

The decision of the South Africa Constitutional Court on 1 December 2005, \textit{Minister of Home Affairs v. Fourie},\textsuperscript{65} imposed on Parliament a deadline of one year to make same-sex marriage legal\textsuperscript{66}.

To understand the real meaning of such a decision – inspected in a sub-Saharan country - it can be useful to remember the history of the South African Constitution\textsuperscript{67} and its deep characterization by necessity to avoid any kind of discrimination as a reaction to apartheid, the legal form of race discrimination practiced in the country for decades.\textsuperscript{68}

The Preamble to the Constitution of 1996 expresses that clearly. In the initial lines, referring to meta-juridical concepts as “social justice” and “open society,” it has affirmed the intent to “free the potential of each person.”\textsuperscript{69}

\textsuperscript{64}Johanna E. Bond, \textit{Gender, Discourse, and Customary Law in Africa}, 83 S. Cal. L. Rev. 509, 559-560 (2010): “The traditional leadership has not always embraced the values of the new constitution. In the drafting phase, for example, traditional chiefs in South Africa lobbied to exclude personal and customary law from the purview of the nondiscrimination provision in the constitution. They argued that personal law should be shielded from constitutional scrutiny, which would have left most South African women without nondiscrimination protection in marriage, divorce, inheritance, and other areas that dramatically affect women’s day-to-day lives.”

\textsuperscript{65} \textit{Minister of Home Affairs v. Fourie} 2006 (1) SA 524 (CC) (S. Afr.).

\textsuperscript{66}See Graham Gec, \textit{Same-Sex Marriage and Perry: a Case for Judicial Minimalism?}, 37 N.Y.U. Rev. L. & Soc. Change 265, 272-273 (2013): “Even in (...) South Africa where the push has been more clearly driven by constitutional challenges in the courts, the top courts have taken care to leave room for legislative action (...). While there are reasons to criticize the Constitutional Court’s maximalist declaration, its more minimal remedy provided scope for legislative authorization of same-sex marriage.”

\textsuperscript{67}See Eric C. Christiansen, \textit{supra} note 5, at 614: “The more robust application of its own constitutional values by the South African Constitutional Court is more easily justified by its history and its Constitution.”


\textsuperscript{69}See S. AFR. CONST. 1996, Preamble: “We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to:

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
In the first section of the Constitution it declared that human dignity represents a fundamental value and that the full realization of equality and the strengthening of human rights and freedoms are essential for the effective achievement of human dignity (section 1.a).

In the same section it is explicitly added that the democratic state is based on the rejection of racialism and non-sexism (section 1.b).

The principle of equality is reaffirmed also in the second Chapter of the Constitution, the Bill of Rights, section 7.1.

It was reputed as necessary a further addition, considering – evidently – the recent history of the country.

So it has been affirmed (section 9.1) that it is an assignment of the state to remove every form of discrimination regarding persons, or categories of persons, specifying (section 9.3) the spheres that don’t allow any form of unfair discrimination: in a detailed list, after race, gender, sex, and others, is expressly mentioned sexual orientation.

It is the first time that a constitution refers to sexual orientation on the same footing as discrimination.

• Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
• Improve the quality of life of all citizens and free the potential of each person; and
• Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”

70 Id. § 1.
71 Id. § 1: “The Republic of South Africa is one, sovereign, democratic state founded on the following values:
  a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
  b) Non-racialism and non-sexism.
  c) Supremacy of the constitution and the rule of law.
  d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability responsiveness and openness.”

72 Id. § 7.1: “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

73 Id. § 9.1: “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

74 Id. § 9.1: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth” (emphasis added).

The recent experience of apartheid and the political role of homosexual movements that supported the African National Congress and the United Democratic Front during the last years of that segregational system\textsuperscript{76} can explain how such an innovation emerged in a context scarcely attentive to homosexual reality.\textsuperscript{77}

Of course in its decision the Constitutional Court could neither ignore the meaning of the explicit reference to sexual orientation in the text of the Constitution, nor fail to consider the logical consequences, especially as far as the concept of human dignity is concerned\textsuperscript{78}.

In the order of same-sex marriage, the Court in fact focuses clearly on the problem: not allowing applicants access to marriage, does the state deny them an “equal protection of the law” and realize an “unfair discrimination” due to their sexual orientation?\textsuperscript{79}

To solve the question, the first step regards the accepted concept of marriage in the common law.

In fact the Marriage Act 25 of 1961, whose constitutionality the Court has to decide, does not define the concept of marriage.\textsuperscript{80}

\textsuperscript{76} Lisa Newstrom, *The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-Sex Marriage*, 40 Cornell Int'l L.J. 781, 786 (2007). See a partially different interpretation in Croucher, *supra* note 75, at 322-323: the author affirms that “gays and lesbians in South Africa did not, as a group, play a central role in breaking down apartheid” (at 322), but she recognizes that “The willingness of the ANC to include sexual orientation in its Bill of Rights and the receptiveness of other political parties during the drafting of the interim constitution depended heavily on the elite in those circles who were sympathetic to the cause of gay and lesbian liberation. Not only did the experience of exile in Europe and North America help sensitize many ANC leaders to the gay rights struggle, but these leaders were also sympathetic to the rights and equality claims of the many gay activists who had been loyal comrades in the struggle against apartheid” (at 323).


\textsuperscript{78} See Kate O'Regan, *supra* note 68, at 313: “The inclusion of sexual orientation within the list of prohibited grounds of unfair discrimination was of signal importance to the recognition of the equal worth of gay and lesbian people. But it is the use of the concept of human dignity to inform the meaning of unfairness that has enabled the Court to recognize fully and without equivocation the harm caused by pervasive discrimination against gay and lesbian people.”

\textsuperscript{79} See *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC) at 5 (S. Afr.): “the matter before us accordingly raises the question: does the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amount to denial of equal protection of the law and unfair discrimination by the state against them because of their sexual orientation? And if it does, what is the appropriate remedy that this Court should order?”

In South Africa the concept of marriage, as expressed more than a century ago from justice Innes in *Mashia Ebrahim v. Mahomed Essop*, has been accepted until recently: “a union of one man with one woman, to the exclusion, while it lasts, of all others.” If ever there should have been a question, it would have concerned the indissolubility of marriage, not certainly the nature of marriage itself.

In the pre-democratic phase of the history of the country, the same-sex unions did not find any form of protection. After the 1994 Bill of Rights was inserted into the Constitution, the perspective changed completely. It is now clear that it has produced a deep change, “a radical rupture with a past based on intolerance and exclusion”; a change that imposes a model of society rigorously based on equality, and in respect to every person.

The repudiation of a segregational system represents the key to understanding the meaning of such an evolution.

In the decision it is affirmed that to penalize a person because of his inner being means not to respect the specific value linked to human personality: equality implies the same treatment for everyone, despite their differences.

The parallel “skin colour,” during the apartheid, and “sexual orientation,” at the present, is drawn into the decision, even if it is not expressly declared.

The Court, considering the sexual orientation in the perspective of “equal protection” and “unfair discrimination,” refers to a precedent, the *Home Affairs* case of 2000, dealing with

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81 *Mashia Ebrahim v. Mahomed Essop* 1905 TS 59 at 61 (S. Afr.).
82 In some cases the union is said to be “for life”: see *Hyde v Hyde and Woodmansee* 1866 LR 1 P and D 130 at 133 (S. Afr.); *Seedat’s Executors v. The Master (Natal)* 1917 AD 302 at 309 (S. Afr.), (“with us marriage is the union of one man with one woman, to the exclusion while it lasts of all others”) and *Ismail v. Ismail* 1983 (1) SA 1006 (A) at 1019 (H) (S.Afr.), (“the legally recognized voluntary union for life of one man and one woman to the exclusion of all others while it lasts”).
83 *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC), at 4 (S. Afr.).
84 See id at 59: “our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all.”
85 Id. at 60: “to penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference.”
86 Id. at 60: “the issue goes well beyond assumptions of heterosexual exclusivity (…) the acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage” (emphasis added).
87 *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at 53 (S. Afr.).
the protection of same-sex life partners of South African citizens, in cases of immigration, in the same terms of heterosexual married partners.\textsuperscript{88}

According to the cited decision of 2000, the Court makes a list of “facts” affirmed as referable to homosexuals.\textsuperscript{89}

It affirmed their constitutional right to dignity and equality, and it affirmed the unconstitutionality of unfair discriminations in order to sexual orientation (section 9.3 and 9.5 of the Constitution). In matter of sexual orientation, it has been struck down as unconstitutional the criminal prescription of private and consensual sexual expression between homosexuals.\textsuperscript{90}

It is later recognized that subjects linked in a same-sex life partnership have the capacity to express, as other heterosexual married couples, mutual love in all the possible different forms. It is affirmed that they are able to create an intimate, permanent, “monogamic” relationship, both in the moral and material perspective, on order to originate a real \textit{consortium omnis vitae}.

In the list of “facts” it has explicitly affirmed the possibility for homosexuals to adopt and – of course for feminine subjects – to bear children; it so recognized a general capacity to create effectively a family, with the same enjoyment and benefits of an heterosexual family.

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\textsuperscript{88} \textit{Id.} at 51.
\textsuperscript{89} Literally: “the judgment sums up what it calls the facts concerning gays and lesbians” (emphasis added). See \textit{Minister of Home Affairs v. Fourie}, 2006 (3) BCLR 355 (CC) at 53 (S. Afr.).
\textsuperscript{90} \textit{Id.} at 53: “The judgment sums up what it calls the facts concerning gays and lesbians as follows:

(i) Gays and lesbians have a constitutionally entrenched right to dignity and equality;
(ii) sexual orientation is a ground expressly listed in s 9(3) of the Constitution and under s 9(5) discrimination on it is unfair unless the contrary is established;
(iii) prior criminal proscription of private and consensual sexual expression between gays, arising from their sexual orientation and which had been directed at gay men, has been struck down as unconstitutional;
(iv) gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, eros and charity;
(v) they are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household;
(vi) they are individually able to adopt children and in the case of lesbians to bear them;
(vii) in short, they have the same ability to establish a \textit{consortium omnis vitae};
(viii) finally, (...) they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.”
\end{flushleft}
In that perspective, in the case that homosexual people are not allowed to create a family relationship, the results are evidence that their dignity is violated.\(^91\)

After having adopted words and concepts expressed in the *Home Affairs* case, the Court has to decide whether the *Marriage Act*, that defined until that moment a marriage in South Africa, has to be considered as discriminatory with respect to homosexual subjects.

The *Marriage Act* actually does not express any exclusion for homosexuals: it simply omits any reference to them. The Court considers that the omission itself represents an offence to the principle of equality and an unfair discrimination based on sexual orientation.

Using vivid words, the Court affirms that: “there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree.”\(^92\)

The Court, focusing on the sense of such exclusion, analyzes the meaning of marriage itself.

There is certainly a primitive function of the marriage legislation in the common law: the recognition and legitimization of sexual relationships and the designation of heirs apparent. Later other functions not considered quite important originated: right to inheritance or - in case of wrongful death - claims for the survivor spouse; medical insurance coverage, bereavement leave, tax advantages and benefits, post-divorce rights in order to the dissolution of marriage.\(^93\)

Even if all these practical benefits would be recognized – as in South Africa they were before the decision – using the form of recognized partnership, or civil union, it seems that the symbolic aspects linked to marriage could not be ensured.\(^94\)

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\(^91\) See *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at 53 (S. Afr.): “the message and impact are clear. Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians.” Quoted in the case *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC) at 54 (S. Afr.).

\(^92\) *Id.* at 78.

\(^93\) *Id.* at 70.

\(^94\) The decision often refers to the symbolic function of marriage: *id.* at 78, 81. In the same way, commenting on the decision, De Vos, *supra* note 9, at 165: “the exclusion of same-sex couples from marriage has both a *practical and*
The Court, in this regard, uses a vibrant mode of expression, in the measure of its involvement in the question: to deny to same-sex couples benefits and responsibilities that derive from marriage means to configure these entities as “biological oddities;” to consider the members of these couples as failed or defective human beings, unable to collocate themselves into normal society, undeserving of the moral consideration that the Constitution affirms it has to be recognized to everyone.95

Because of these reasons, the Court affirms that it is not enough to remove just the practical consequences of the exclusion - for same-sex couples – from the Marriage Act.

It has required that they get a public and private status that – also in the symbolic perspective – corresponds to the one that heterosexual couples obtain with marriage.96

This perspective was adopted by several scholars in South Africa before the Court decision. It seemed problematic, on a symbolic and emotional plane, to recognize the access to the civil unions, while denying the possibility of marriage.97 It should have meant to apply one more time the separate but equal doctrine. As affirms de Vos, “a doctrine of separate but equal was deeply humiliating and insulting when applied to black South Africans. It remains humiliating and insulting (and now also unconstitutional) when applied to homosexuals.”98

It is a nodal point of the decision: the Court calls attention to this aspect expressly99 when it refers to S v. Pitje case100: in denial of a coloured legal practitioner, during the apartheid, of letting free the table reserved to European practitioners and to sit at the one reserved to non European practitioners, it was decided, applying the concept separate but equal, that “a

symbolic impact (...). In responding to the unconstitutionality of the existing marriage regime, both the practical and the symbolic aspects had to be addressed.”

95 See the full text in Minister of Home Affairs v. Fourie, 2006 (3) BCLR 355 (CC) at 71 (S. Afr.): “The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples” (emphasis added).
96 Id. at 81: the Court considers that it has “to accord to same-sex couples a public and private status equal to that which heterosexual couples achieve from being married.”
97 De Vos, supra note 9, at 168.
98 Id. at 168-169
99 Minister of Home Affairs v. Fourie, 2006 (3) BCLR 355 (CC) at 150 (S. Afr.).
100 S v Pitje 1960 (4) SA 709 (CC) (S. Afr.).
practitioner would in every way be as well seated at the one table as at the other, and that he could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table.”101

In the *Fourie* decision the Court affirms that, according to the Constitution of 1994, a different treatment of a person - even without difference in the practical effects – is intolerable if it offends his value and his dignity.102

All differentiations originating from biological or natural needs are, of course, admitted – actually wished; the Court expressly exemplifies this kind of differentiation: “measures based on objective biological or other constitutionally neutral factors, such as those concerning toilet facilities or gender-specific search procedures.”103 On the contrary, differences based on “repudiation” or “distaste or inferiority” cannot be admitted at all.104

The Court clarifies the reason why marriage cannot be denied to same-sex couples because of mere biological or natural reasons.

The Court affirms that a couple’s lack of a natural procreative potentiality “is not a defining characteristic of conjugal relationships.”105

A different solution could offend value and dignity of all the heterosexual couples that, because of different factors, cannot procreate or decide to renounce that possibility.

In the same perspective, it would diminish the value of adoption compared to the one of procreation, because it would mean that only natural procreation merits the highest respect and consideration.106

With the same determination used in these argumentations, the Court denies the thesis that affirms same-sex marriage cannot be recognized because of reasons linked to religious sensibility.

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101 *Id.* at 710.
102 See *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC) at 151 (S. Afr.): “our equality jurisprudence (…) emphasises the importance of the impact that an apparently neutral distinction could have on the dignity and sense of self-worth of the persons affected.”
103 *Id.* at 152.
104 *Id.* at 152.
105 *Id.* at 86.
106 *Id.* at 86.
It is not a question dealing with the value of religious organizations in South African social life. What is clearly affirmed is the principle that religious beliefs of someone cannot be adopted as a model to determinate the civil rights of someone else.\textsuperscript{107}

The Court is concerned with assuring the opportunity of objection of conscience to marriage officers who, as member of the clergy, for religious reasons, do not intend to celebrate a same-sex marriage.\textsuperscript{108}

The Court, having the awareness that because of its decision, South Africa became one of the few Countries the world – and the only one in the African continent - to allow marriage for same-sex couples, considers implications regarding international law.

In particular the Court focuses on art. 16 of the \textit{Universal Declaration of Human Rights} (UDHR) of 1948\textsuperscript{109}.

The Court relates to a decision of the \textit{United Nations Human Rights Committee} of 2002: \textit{Joslin v. New Zealand},\textsuperscript{110}

The committee was asked to decide the question whether the New Zealand law would violate the \textit{International Covenant on Civil and Political Rights} (ICCPR) while denying marriage licence to homosexual couples. The committee said that – considering that the treaty refers expressly to “men and women,” instead of a generic formulation to indicate any person - the

\textsuperscript{107} Id. at 92: “it would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others.” De Vos, \textit{supra} note 9, at 165-166, observes – effectively - that “this was a logical consequence of the constitutional imperative that the religious beliefs of some could not be used to determine the constitutional rights of others” (emphasis added).

\textsuperscript{108} \textit{Minister of Home Affairs v. Fourie}, 2006 (3) BCLR 355 (CC) at 97 (S. Afr.). De Vos, \textit{supra} note 9, at 172, considering that marriage officers may only refuse to celebrate a marriage under the Civil Unions Act and exclusively in order to same-sex marriage - as to say in order to the sexual orientation of the couple - affirms that “this provision thus clearly endorses sexual orientation discrimination by state officials and will most probably be struck down by the Constitutional Court if challenged.”

\textsuperscript{109} \textit{Universal Declaration of Human Rights} (UDHR), General Assembly of the United Nations resolution 217 A (III) of 10 December 1948: “16.1 Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

16.2 Marriage shall be entered into only with the free and full consent of the intending spouses.

16.3 The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

results clearly show “the treaty obligation of States (…) is to recognise as marriage only the union between a man and a woman wishing to be married to each other.”

The constitutional Court, on the contrary, considers preferable to take distance from the committee’s decision. The court affirms, indeed, that the reference - in art. 16.1 - to “men and women” is not prescriptive, but merely descriptive: its function is to prevent a marriage involving children (“of full age”) and to guarantee the right to marriage (“have the right to marry and to found a family”) indiscriminately (“without any limitation due to race, nationality or religion”); it doesn’t prescribe expressly that marriage has to involve exclusively a man and a woman.

Unfortunately, the Court does not go further: it lacks any other hermeneutic interpretation of § 16.1, as there is no other justification of this statement based on other principles expressed in the Declaration.

The Court focuses its attention on § 16.3 and observes that - considering polygamy - the reference to the family as a “natural and fundamental group unit of society, entitled to protection by the state” cannot be considered as an element strong enough to justify a restrictive interpretation.

This definition indeed is compatible both with the nuclear model of family based on monogamic marriage in the common law, and also with the enlarged, polygamic model of family, characterizing customary marriage and, in that perspective, also with a model of non

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111 Id. § 8.2: “given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term ‘men and women’, rather than ‘every human being’, ‘everyone’ and ‘all persons’. Use of the term ‘men and women’, rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.” Ignacio Saiz, Bracketing Sexuality: Human Rights and Sexual Orientation. A Decade of Development and Denial at the UN, 7 (2) Health and Human Rights 48, 54 (2004), criticizes the decision: “this categorical assertion is at odds with the views expressed elsewhere by the Committee and other international human rights bodies that ‘marriage’ and ‘the family’ are continuously evolving concepts that apply to a diversity of arrangements across cultures and so must be interpreted broadly. Neither is defined in any international standard.” From this perspective, see: Human Rights Committee, General Comment 19: Protection of the Family (1990), § 2; Human Rights Committee, General Comment 28: Equality of Rights between Men and Women (2000), at § 23, 27; Committee on the Elimination of Discrimination Against Women, General Recommendation 21: Equality in Marriage and family relations (1994), at § 13-18.

112 Lisa Newstrom, supra note 76, at 800, points out this limitation: “unfortunately, international analysis is one aspect of the Fourie decision that the Constitutional Court does not fully develop.”
heterosexual family: the Court considers that the “natural and fundamental group unit of society” cannot be related exclusively and definitively to a specific model of family.  

This can be justified – according to the approach of the Court – considering that rights cannot be configured as perpetual and not subjected to modification; on the contrary, they have to evolve in the same measure that equity and justice change, adjusting to the real condition of the life of the people.

Looking at the recent history of South Africa, the Court underscores how, when the Universal Declaration of Human Rights was approved, colonialism and racial segregationism were considered as natural phenomena quietly accepted into legislation of several so-called “civil” nations.

In the same way, even if the main part of principles that are at the base of family law have not changed from that moment, in some circumscribed fields we can note an intense evolution: the patriarchal structure of family, once considered a “biological” aspect, not subject to modification in the more traditional legal systems, nowadays no longer represents a worldwide juridical principle. The same can be said regarding corporal punishment once reserved to women and children.

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113 Minister of Home Affairs v. Fourie, 2006 (3) BCLR 355 (CC) at 101 (S. Afr.): “The statement in Article 16(3) of the UDHR that the family is the natural and fundamental group unit in society, entitled to protection by the state, has in itself no inherently definitional implications. Thus, it certainly does not confine itself to the nuclear monogamous family as contemplated by our common law. Nor need it by its nature be restricted intrinsically, inexorably and forever to heterosexual family units. There is nothing in the international law instruments to suggest that the family which is the fundamental unit of society must be constituted according to any particular model. Indeed, even if the purpose of the instruments was expressly to accord protection to a certain type of family formation, this would not have implied that all other modes of establishing families should for all time lack legal protection.”

The same attitude has been expressed from the Constitutional Court in the case Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) at 31 (S. Afr.): “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.”

114 Minister of Home Affairs v. Fourie, 2006 (3) BCLR 355 (CC) at 102 (S. Afr.): “rights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning.”

115 Id. at 102: “when the Universal Declaration was adopted, colonialism and racial discrimination were seen as natural phenomena, embodied in the laws of the so-called civilised nations, and blessed by as many religious leaders as they were denounced.”

116 Id. at 102: “similarly, though many of the values of family life have remained constant, both the family and the law relating to the family have been utterly transformed. Patriarchy, at least as old as most marriage systems, defended as being based on biological fact and which was supported by many a religious leader, is no longer accepted as the norm, at least in large parts of the world. Severe chastisement of women and children was tolerated by family law and international legal instruments then, but is today considered intolerable.”
So the Courts consider that, if in the past it has been recognized a form of protection to the heterosexual family in the International legislation, it does not mean – by itself - that later it cannot be allowed to accord the same protection to homosexual couples.\footnote{Id. at 105: “while it is true that international law expressly protects heterosexual marriage it is not true that it does so in a way that necessarily excludes equal recognition being given now or in the future to the right of same-sex couples to enjoy the status, entitlements, and responsibilities accorded by marriage to heterosexual couples.”}

Unfortunately, on this aspect – as before – the problem is drafted, but not completely developed.\footnote{Lisa Newstrom, supra note 76, at 800: “the Fourie decision interprets Joslin as signifying that although opposite-sex marriage is an internationally protected right, same-sex marriage is both unprotected and un-prohibited, but the true current situation is more complex.”}

On the base of all these considerations, the Court reaches two conclusions.

The definition of marriage in the common law has to be considered in contrast to the South African Constitution – and is not prescriptive in that it does not consider the extension to the homosexual couples of status and benefits – as of all responsibilities – accorded to heterosexual couples.\footnote{Minister of Home Affairs v. Fourie, 2006 (3) BCLR 355 (CC) at 162 (S. Afr.): “The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.”}

The absence of the words “or spouse” after “husband,” in section 30.1 of Marriage Act, has to be reputed in contrast to the Constitution and – because of that – the whole Marriage Act results are affected and invalid.\footnote{Id. at 162: “The omission from section 30(1) of the Marriage Act 25 of 1961 after the words “or husband” of the words “or spouse” is declared to be inconsistent with the Constitution, and the Marriage Act is declared to be invalid to the extent of this inconsistency.”}

It has been imposed that Parliament legalize same-sex marriage.

On August 2006 Parliament tabled the original version of the \textit{Civil Union Bill}.

The bill, in this phase, prospected the creation of “civil partnership” for same-sex couples, and recognized the same legal rights of heterosexual married couples.

This specific institution should have been characterized by being reserved to homosexual couples, by not being called marriage and by being accorded to marriage officers the right to refuse to solemnise this kind of union.\footnote{See De Vos, supra note 9, at 167-168.}

In other words, it should have been realized as a “separate but equal” system for same-sex couples, with all the implications we pointed out.
Furthermore, the exclusivity of such civil partnership for a specific kind of union could have been severely interpreted: “civil partnerships entered into by same-sex couples would therefore continue to have a lesser status than traditional marriage and would infringe on the rights of such couples not to be discriminated against.”

On the base of these arguments, the Parliament approved an amendment bill which allows same-sex couples to enter into a Civil Union marriage, allowing them to choose to call it “marriage” or “civil partnership.” It is remarkable that the amendment bill may be interpreted as permission for both same sex couples and different sex couples to enter into a marriage or a civil partnership. Such a choice does not influence the legal effects of the Civil Union marriage. In any case, they are the same, independently from the preferred denomination.

That is quite interesting, if it is considered in the perspective of the progressive critics in the debate over marriage and new families: they repute marriage as an obsolete model and challenge the fact that it has traditionally assigned to marriage plentiful special rights denied to other forms of family.

In South Africa a multiplicity of marriage forms is allowed. At the same time there is another prominent aspect that makes family law so innovative in South Africa: no special

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122 Id. at 168.
123 Civil Union Act 17 of 2006 § 1. See Du Toit, supra note 5, at 280-282. From a critical perspective, see Ntlama, supra note 24, at 205: “In essence, the Civil Union Act does not put same-sex couples on an equal footing with heterosexual couples as far as all of the other rights and responsibilities enjoyed by the latter group are concerned. The right of access to marriage has become a prerogative of heterosexual couples. The Civil Union Act relegated this right to a secondary position for same-sex couples, thus systematically institutionalising their stigmatisation.”
124 See Civil Union Act 17 of 2006 § 8(6), which establishes: “A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or the Customary Marriages Act.”
125 See De Vos, supra note 9, at 169, who points out that § 8(6) of the Act may be interpreted as restricting marriage to same-sex couples, while he believes that “it is clear from the context that this section does not prohibit different sex couples from entering a marriage in terms of the Civil Union Act. It merely states that such different sex couples would only be able to enter into a Civil Union marriage if they would also have been allowed to enter into a marriage in terms of one of the two other laws regulating marriage in South Africa.”
127 See RADHIKA COOMARASWAMY, IDEOLOGY AND THE CONSTITUTION. ESSAYS ON CONSTITUTIONAL JURISPRUDENCE 110 (ICES 1996): “the family should not be defined in a formalistic, nuclear construction as a husband, wife and children. The family is the place where individuals learn to care, trust and nurture each other. The law should protect and privilege that kind of family and not any other.”
128 See NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE. VALUING ALL FAMILIES UNDER THE LAW 2 (Beacon Press 2008): “the most contested issue in contemporary family policy is whether married-couple families should have “special rights” not available to other family forms.”
rights are recognized in marriage.\textsuperscript{128} Both heterosexual and homosexual couples can choose to obtain formal acknowledgement of their union in the form of civil partnership instead of “marriage,” and to have the same rights – as well as the same duties - linked to marriage.\textsuperscript{129}

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\textsuperscript{128} “Special rights” linked to marriage are strongly criticized from commentators, as Polikoff, who support a radical family pluralism.
\textsuperscript{129} De Vos, supra note 9, at 170.
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