THE TIME IS RIPE FOR THE FULL RECOGNITION AND PROTECTION BY THE LAW OF SAME-SEX MARRIAGES.

BLASPHEMY OR BENEDICTION?

by

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SUMMARY

This short dissertation is an appraisal of same-sex marriages. The traditional arguments against same-sex unions are examined and rejected as being circular, unconvincing and baseless. Some of the international developments on the subject of same-sex unions are examined and it is noted that a slow but distinct change in attitude towards same-sex marriages is beginning to emerge from international judiciaries. The legal position of people with same-sex orientation in the South African legal system is examined with special reference to our Constitution. It is submitted that our Constitution is the foremost vehicle for legal change in this regard and that the equality clause of our Constitution is authority for the recognition by the law of same-sex marriages. This dissertation concludes that same-sex marriages ought to be fully accepted and recognised by the law for reasons, inter alia, of fairness and equality for people of same-sex orientation.

KEY TERMS

Same-sex marriage; sexual orientation; homosexuality; lesbianism; legal recognition of same-sex unions; constitutional protection; homophobia; legal protection of gays; equality; discrimination on the ground of sexual orientation.
We believe in a God who says, "Behold I am making all things new." We are heirs of a Judeo-Christian history which is characterised by a continual Exodus into new-found freedom. We live under the promises of a new Testament and a new Covenant, a new Heaven and a new earth, a new commandment, a new song, and a new life.

P.K. THOMAS
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CHAPTER ONE

INTRODUCTION

In the huge diversity of peoples who make up the human race, there are a number of universal constants which have always been part of the human condition. One is that people who are different inspire fear which often leads to prejudice; another is that a proportion of the human race is homosexual. During the nineteenth century much was written about lesbians and gays throughout the world. Psychiatrists, doctors, judges, politicians and the clergy seem to have known very well who "the homosexual" was and what "he" was like. They wrote books, reports and expert opinions about the characteristics of "the homosexual", about his perversions, his diseases and his sins. The sources they used for their research were psychological, medical or juridical "cases" which were written from the assumption that homosexuality was abnormal. Their dubious "evaluations" combined with their prejudices and their results were presented as scientific truth. Hardly anybody in the nineteenth century actually asked lesbians or gays themselves what it was like to be gay or lesbian. They were simply objects of what masqueraded as scientific research. They were victims of scientific curiosity about the "abnormal" and were often abused as objects of projection for irrational fantasies and fears. Lesbians and gays were not listened to as subjects and experts on their own lives and specific experiences but used as
material for sensational stories. And of course gays and lesbians were prohibited from marrying someone of their own sex.

According to Sinclair marriage is traditionally defined (by lawyers) as the legally recognised voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts. It has been said that marriage is one of the most venerable impenetrable institutions in modern society, and that it provides the ultimate form of acceptance for personal, intimate relationships in our society, and gives those who marry an insider status of the most powerful kind. The institution of marriage furthermore secures for heterosexual couples a multiplicity of rights and benefits which are generally denied to same-sex couples by virtue of their non-admittance to the "institution of marriage" with each other. According to Simpson all lesbians and gays are born innocent of the knowledge that the natural lives which lie ahead of them have already, for centuries, been "legislated" against. The laws against this minority are not only unjust but also unreasonable. The ideology of heterosexism, says Wolhuter, naturalizes the gendered roles within the traditional nuclear family and necessitates the gender specificity of marriage by coupling it with the aim of procreation. Sexual relations that do not conform to this traditional model are rendered deviant. Homosexual orientation is therefore distorted by heterosexual ideology and recharacterized as immoral or pathological.

According to Retief the Nationalist Government "discovered" the gay subculture in the latter half of the 1960's and, in a flurry of panic, proceeded to launch a vigorous legislative campaign against it. Retief states that the then Minister of Justice told the House of Assembly in 1967 that, if unchecked, homosexuality would bring about the utter ruin of civilization in South Africa.
Social opprobrium towards gays and lesbians remain very much in evidence today in spite of the fact that homosexuality is a part of our society, is becoming increasingly visible, and is here to stay.

As with racism and sexism, prejudice and discrimination against lesbians and gay men is a violation of human rights. It is a form of oppression because it does not just affect individuals, but results from the way in which society is structured.

The evolutionary nature of family law requires that the law keep pace with societal changes by enacting appropriate legislation to suit specific societal requirements. What follows will be a short excursus in an effort to answer the questions, firstly, whether our law ought to fully recognise same-sex marriages and, secondly, whether our law has indeed advanced to the stage where same-sex marriages are now to be regarded as lawful.
The notion of same-sex marriage is generally frowned upon by society. Some of the popular arguments used by society to rationalise its position are the following:

a) **Homosexuality Is A Sin**

This one is by far the most common argument against people with same-sex orientation. According to Van der Veen and Dercksen,¹¹ people persecuted for their sexual orientation in the past were known as “sodomites” and “witches”. Such persecution has been banned since the eighteenth century, but religious conceptions of homosexuality as a sin are still used to justify unequal treatment. It has been noted that the Bible’s condemnation of homosexual conduct, combined with the total absence of any scriptural language approving same-sex marriage, creates an implied negation of same-sex marriage that is equally as strong as the Bible’s express affirmation of opposite-sex marriage.¹² The church has accordingly not been known to officially sanction same-sex marriages.

Narrow-minded judges have also been quick to jump onto the religious bandwagon in denouncing homosexual behaviour. For instance in the American case of *Bowers v
Judge Burger stated that

"condemnation of those practices [homosexual conduct] is firmly rooted in Judeo-Christian moral and ethical standards."

Also Judge Peterson in another American case, *Baker v Nelson*, in which a refusal to grant a marriage licence to two men was upheld, stated that

"the institution of marriage as a union of man and woman . . . is as old as the book of Genesis."

However Judge Blackmun in his bold dissenting judgment in the *Bowers* case stated that

"the assertion that 'traditional Judeo-Christian values proscribe' the conduct involved cannot provide an adequate justification for (the statutes). That certain, but by no means all, religious groups condemn the behaviour at issue gives the state no licence to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the state can advance some justification for its law beyond its conformity to religious doctrine."

In our ever-changing society, it simply does not make sense for a state legislature to promulgate laws which have as their basis merely ecclesiastical tradition that is two thousand years old. With the steady stream of gay men and lesbians coming out of the closet today, religious institutions are being forced to re-examine their steadfast beliefs on the subject of homosexuality and same-sex marriages.

Archbishop Desmond Tutu has said:

"the Church . . . far from being inclusive and welcoming of all, has over and over again pushed many to the periphery; instead of being hospitable to all, it has made many of God’s children outcasts and pariahs on the basis of something which, like race or gender, they could do nothing about - their sexual orientation. The church has joined the world in committing what I consider to be the ultimate blasphemy - making the children of God doubt that they are children of God. Lesbians and gays have been made to reject God and, in their rejection
of the church, they have been made to question why God created them as they were. I have found this official position of the church illogical, irrational and frankly un-Christlike, totally untenable.”

Of course while some religious organisations and authorities are changing their attitudes, it can comfortably be postulated that the less enlightened religious organisations will not do so for very many generations to come.

Coupled with the “sin” reasoning is the belief that AIDS has its roots in the gay community. According to Lamont,

“in ignorance of the epidemiological facts of HIV/AIDS it became common for the conservative religious movement to blame homosexuals for this new disease and in fact to declare that it was God’s judgment on an abhorrent and perverted lifestyle. God had finally acted against the rise of the gay movement and the decay of family values by punishing these communities with a new plague.”

However lesbians were conveniently ignored in this argument, implying that God approved of their behaviour. As a category of persons, lesbians are quite easily one of the lowest risk groups for the transmission of the virus. Furthermore the fact that thousands of heterosexual people in mostly African countries were also dying of AIDS-related diseases was also ignored.

Lamont states further that the media’s irresponsible reporting and the conservative church’s proclamation of God’s judgment on the gay community have effectively spread a message world-wide that AIDS and gay men are synonymous. The result of years of this misinformation has infected thousands of people who thought that being heterosexual created an immunity from infection.
Although the origins of the AIDS pandemic is uncertain, what is certain is that it affects heterosexuals and homosexuals alike. It is only the naive and uninformed who still believe that the homosexual community is responsible for the out-break of the disease. AIDS is not God’s judgment on an “abhorrent” and “perverted” lifestyle and AIDS can no longer be regarded as a gay plague.

b) Various State Interests

According to Gray various state interests have been articulated as policy reasons why same-sex marriages should not be recognised and the premise upon which this justification rests is that the state has a compelling interest in promoting heterosexual marriage and prohibiting same-sex marriage. Gray goes on to state that the interests of the state include encouraging procreation, preserving the traditional family unit, and encouraging morality.

(i) Procreation

In the American case of Skinner v Oklahoma it was said that

"the state has a basic interest in encouraging reproduction because procreation is fundamental to the very existence and survival of the race."

In upholding the denial of a marriage licence to two men, the Appeal Court of Washington in Singer v Hara stated:

"the state’s refusal to grant a licence allowing the [two men] to marry one another . . . is based upon the state’s recognition that
our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.”

The court’s reasoning amounts to a logical fallacy as there is no requirement in law that a pre-requisite for marriage be that the parties have the ability to have children, and neither are married couples bound by law to have children. Indeed many heterosexual couples are childless, due either to their inability to have children or simply to their choice.

The Singer judgment, is furthermore based on the incorrect premise that same-sex couples cannot have children. In reality, same-sex couples can and do have and/or rear children via alternative medical and legal means, like artificial insemination.

(ii) Preserving The Traditional Family Unit

According to Lind the view that marriage is traditionally a heterosexual institution and that it, together with the kind of family that it encourages, is of central importance to the state, fails to understand the diversity of family life to be found in society. Of course the state has a legitimate interest in encouraging and preserving the stability of the family. According to Lind, however, protection by the state of only the “traditional” family is wrong. Lind feels that the state’s recognition of a homosexual family norm will do little to undermine the traditional status of its heterosexual counterpart. Gray also holds this view:

“[G]iven the increase in cohabitation and divorce as well as other social changes since the 1960’s, a narrow interpretation of the family unit would not reflect the realities of contemporary
Gray therefore concludes by saying that

"ignoring the homosexual family does not negate its actual existence, but only works to burden and devalue it. This neglect by the legal system perpetuates negative and false notions about homosexuals and their relationships. By acting as if they do not and cannot exist, the implication is that homosexual relationships and families do not and cannot provide an environment of emotional and psychological care and love worthy of recognition. Penalizing homosexual cohabiters in an effort to preserve traditional families is arbitrary and unfair."  

(iii) Preserving The Morality Of The Majority

The argument against same-sex marriages in some quarters has its basis in the encouragement and protection of the morality of the majority. Of course the premise here is once again that homosexuality is immoral and that society at large needs to be protected from its pervasive corrupting influence. Hence the litany of anti-homosexual laws including sodomy laws, exclusions of homosexuals from the military, prohibitions against child custody and others which abound throughout the world. Dworkin has written that:

"even if it is true that most [people] think homosexuality an abominable vice and cannot tolerate its presence, it remains possible that this common opinion is a compound of prejudice, . . . rationalization . . . and personal aversion . . . . It remains possible that the ordinary [person] could produce no reason for his view, he would simply parrot his neighbour . . . . If so, the principles of democracy . . . do not call for the enforcement of the consensus, for the belief that prejudices, personal aversions and rationalizations do not justify restricting another's freedom itself occupies a critical and fundamental position in our popular morality."

Generally, the promotion of morality in any society is to be welcomed. However,
when this is directed at the suppression of a minority class of persons like people of same-sex orientation, on ill-conceived bases, then it amounts to unjust discrimination plain and simple. There is no evidence of whatever nature that heterosexual behaviour is any more or less moral than homosexual behaviour.

c) **Homosexuality As A Disease Or Abnormality**

According to Van der Veen & Dercksen the belief that homosexuality is a disease is not only a deeply rooted conviction but was, until recently, officially accepted. Homosexuality was listed as a disease in all the major classifications, including the International Classification of Diseases (ICD) of the World Heath Organisation. Same-sex love came to be seen as a psychiatric deformation afflicting certain people only, who need to be cured. Furthermore, biased studies of group behaviour further acknowledged the conception of homosexuality as a deviation.

Van der Veen & Dercksen go on to state that with the medicalization of homosexuality, homosexual men and women were further stigmatised, to such an extent that many societies found it appropriate to legalise this stigma. Some people feared openness about homosexuality on the assumption that homosexuality was contagious. Open homosexuals would cause others, specifically children, to become homosexual.

Van der Veen & Dercksen state further that it was not until the late 1950's that large scale studies of non-patient homosexuals proved that homosexuality was not limited to
patients and lesbians and gay men were as capable as heterosexuals of leading a normal life. Gradually the idea began to take hold that homosexuality was a simple variation of affection and sexuality. However, many people still see homosexuality as a mental disease or a biological deviation. Many politicians and religious leaders nowadays use the mental illness model to justify their negative views on homosexuality.\textsuperscript{36}

d) \textbf{Physical And Psychological Harm to Children}

The theory is sometimes expressed without any factual basis that the danger exists that, being left alone with the child, the gay parent will sexually molest him or her. Added to this is the possibility that friends of the parent or visitors may engage in such activity. This is nothing more than a myth based on ignorance. According to Lind\textsuperscript{37} the vast majority of people involved in the sexual abuse of children are heterosexual men who live "traditional" family lives. Lind\textsuperscript{38} goes on to say that homosexual couples who undertake legal parenting responsibilities are unlikely to jeopardize their hard-won status by abusing their children.

According to Lind\textsuperscript{39} the concern that exposure to a homosexual lifestyle prejudices the social development of children is also insupportable, on two separate grounds. The first is empirical. What little research has been conducted into the family lives of adult homosexuals indicates that their children show no significant deviation in respect of their development (and particularly their gender-role identity) from that of children reared in single parent households.
The second is simply logical, continues Lind. Heterosexual children who are reared to view homosexuality as an acceptable alternative to heterosexuality are not, as a consequence of their upbringing, any more likely to be "converted" to homosexuality than are children reared in homosexual households likely to be "converted" to heterosexuality.

On the issue of children suffering torment by friends as a result of having homosexual parents, Lind argues that justifying a prejudice by reference to the prejudice itself cannot be an acceptable basis for pursuing discrimination of this kind. If homosexual parenting were legally acceptable, the source of ridicule itself would be significantly eroded by the increase of its social occurrence. Lind argues further that the most obvious parallel would be the prevention of mixed-raced marriages on the grounds that children would be ridiculed as "racial outcasts". Lind sounds the warning that South African history should warn us about proceeding along this path. The prejudice is traditional but irrational and unjustifiable.

The image of the gay parent is that of a frivolous pleasure seeker. However according to Bonthuys modern psychological research indicates that a parent's parenting skills are not necessarily affected by his or her sexual orientation. Furthermore, the research shows that children raised by homosexual parents are not necessarily likely to become homosexuals themselves. Most people who are homosexual were born and raised by heterosexual people and surrounded by heterosexual role models as they were growing up. There is accordingly no reason to believe that gay parents could succeed in making a child gay even if they wanted to. A child's interests is best served by the quality of
its upbringing and not by the sexual orientation of its parents. With the equality of the sexes now a forgone conclusion, little distinction is drawn between the maternal and paternal roles in a family. It can now no longer be said that a woman's place is in the kitchen and in the bedroom. There is therefore absolutely no reason why a man cannot play an equally effective maternal role, and a woman an equally effective paternal role to a growing child. Indeed in the recent case of *Van der Linde v Van der Linde*, in a child custody dispute, one of the enquiries to be addressed was whether the quality of a parental role was determined by gender. In expressing the enlightened view that the quality of a parental role is not simply determined by gender, the court voiced the view that the concept of 'mothering' which assumes the showing of unconditional love without necessarily expecting anything in return, is not just a component of a woman but also part of a man's being. There can accordingly be no necessary connection between being gay and being a good or bad parent. Neither does sexual orientation in any way reflect on parental abilities. There accordingly exists no basis for generalising that homosexuals make bad parents.

**CONCLUSION**

In 1987 in South Africa the committee for Social Affairs of the Tricameral President's Council issued a “Report on the Youth of South Africa” in which homosexuality was categorised as part of a general problem of promiscuity (along with “extra-marital sexual intercourse”, “prostitution” and “living together”). Homosexuality was classed as an “acquired behavioural pattern” and “a serious social deviation” which was damned as
irreconcilable with normal marriage". In the committee’s “evaluation and findings” it classified homosexuality as something by which “the potential in life” of “thousands of young people” was “being destroyed”:

“[T]here is cause for concern about the promising young people who fall prey to these evils [that is, inter alia, homosexuality] and have little chance of tasting the joys of achievements and of the realisation of one’s own potential.”

According to Thomas homosexuality has been called an “affliction of the body”, a “twist of the mind”, and a “cancer of the soul”. Yet same-sex orientation is not a habit, like smoking, which can be acquired but broken again if the will is strong. Nor is it a disease or vice which can be contracted or spread through association. Instead it is a condition, like having red hair or being left-handed, which persons do not choose and cannot change without harmful psychological consequences. Because people have tended to be pre-occupied with the narrowly genital aspect of gay or lesbian lives, they have ignored the much more important psychological feelings and emotions which comprise the homosexual temperament.
CHAPTER THREE

SOME INTERNATIONAL DEVELOPMENTS ON FAMILY LAW IN RELATION TO SAME-SEX MARRIAGES

With the exception of countless international academic articles calling for the equal treatment of people with same-sex orientation, the law and courts of other countries have generally displayed a lack of enthusiasm for such changes. Where developments and changes have occurred, they have been slow and almost hesitant. However the developments that have occurred are very encouraging. A distinct progressiveness in this area of family law can accordingly be anticipated.

What follows is an examination of some of the developments in some of the major first-world countries which really ought to be leading the world in developing the law in this field.

a) The United States of America

Although the case of Bowers v Hardwick did not deal specifically with the issue of same-sex marriage, and although the court’s decision became a major stumbling block for the gay rights movement, the powerful dissenting judgment in this case is much more progressive, and indeed has even been preferred and its reasoning followed in similar cases in South Africa.
Here Hardwick challenged the constitutionality of the state of Georgia’s sodomy laws in the Supreme Court. His challenge was rejected. In his dissenting judgment Judge Blackmun stated, inter alia,

"only the most wilful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare and the development of human personality. The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a nation as diverse as ours, that there may be many ‘right’ ways of conducting these relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of those intensely personal bonds . . . . The court claims that its decision today merely refuses to recognise a fundamental right to engage in homosexual sodomy; what the court really has refused to recognise is the fundamental interest all individuals have in controlling the nature of their intimate associations with others . . . ."  

Judge Blackmun concluded as follows:

"I can only hope that the court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our nation’s history than tolerance of non-conformity could ever do. Because I think the court today betrays those values, I dissent."  

In the earlier decision of People v Onofre the New York Court of Appeals ruled that New York’s sodomy law violated the United States constitution. The sodomy law at issue prohibited sodomy by unmarried people, a classification which the court found to violate the Equal Protection clause of the Fourteenth Amendment and the right of privacy of the Federal Constitution. The court’s decision focused on the rights of unmarried couples. The court showed no interest in differentiating between homosexual and heterosexual activity; rather, it generated a rule granting a right of privacy to both forms of coupling. Whereas the Court of Appeals expanded the right of privacy, the Supreme Court in Bowers eventually chose to constrict it.
In the case of *In re Adoption of Robert Paul P.* the court ruled that the attempt by a man to adopt his gay partner for financial, economic, and emotional reason was invalid. According to Arsenault this is an important case in the development of the court’s same-sex coupling jurisprudence for two reasons. First, in this decision the court recognised the special needs of gay and lesbian partners for security and predictability in their financial affairs, especially in terms of property acquired jointly during their life together. Whereas the *Onofre* decision recognised the right of privacy in the homosexual relationship, the present case recognised the need for a right to acquire and pass on property. Second, the court left the door wide open, it indeed extended an invitation, to the legislature to create an institution other than adoption that would lend lesbian and gay relationships a “non-matrimonial legal status”.

The next major case to advance the cause of people of same-sex orientation was that of *Braschi v Stahl Associates*. This was a case in which an unmarried partner asked whether he could succeed to his deceased partner’s rights in a rent-controlled apartment. According to Arsenault the court here discussed the purpose of rent-controlled laws to prevent coercive bargaining by landlords after a tenant’s partner’s death. Although the court could have stopped there, it continued instead to examine the relationship between Braschi and his partner. The court created a textbook of family characteristics, discussing long-term relationships characterized by an emotional and financial commitment and interdependence. The court looked at the manner in which Braschi and his partner conducted their everyday lives and held themselves out to society, the reliance placed upon one another, and the totality of the relationship as evidenced by dedication, caring and self-sacrifice.
In finding in Braschi’s favour the court recognised the sweeping societal, governmental, policy and fiscal implications of this broad definition of family. The court, in extending its gradual recognition of the rights of same-sex partners developed in Onofre and Robert Paul P., had finally granted same-sex couples recognition as family, at least for some purposes.

American courts have also been called upon to deal with the issue of same-sex coupling in the following less controversial contexts. It is submitted that these contexts are extremely relevant to family law generally and in fact are inextricably linked to the issue of same-sex marriage. The advances made in these contexts strengthen the acceptance of same-sex unions generally and make the case for the attainment of “legal” status for same-sex marriage far more realistic:

- *Bottoms v Bottoms* where the court awarded custody of a child to her lesbian mother, overturning the lower court’s decision awarding custody to the child’s grandmother;

- *In re Guardianship of Kowalski*, where the court awarded guardianship of a woman to her lesbian partner rather than the woman’s biological family after an accident left the woman severely brain-damaged;

- *In re Adoption of Caitlin*, where the court allowed lesbian partners to adopt each other’s biological children;
One of the most recent and celebrated American decisions is the Hawaiian case of *Baehr v Lewin.* Here the applicants, whose applications for marriage licences were denied solely on the ground that they were of the same sex, filed a complaint alleging that the denial of the licences violated their right to privacy and equal protection as guaranteed by the Hawaii Constitution. When the action failed in the First Circuit Court, the applicants appealed to the Hawaiian Supreme Court.

The main question facing the court was whether the existing boundaries of the fundamental right of marriage could be extended to include same-sex couples. The court adopted the principle set by Judge Goldberg in a 1965 judgment71 where he observed that

"judges 'determining which rights are fundamental' must look not to 'personal and private notions', but to the 'traditions and (collective) conscience of our people' to determine whether a principle is so rooted (there) . . . as to be ranked as fundamental. The inquiry is whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . ."72

Applying the foregoing principle, the *Baehr* court found that "the right to same-sex marriage was not so rooted in the traditions and collective conscience of the Hawaiian people that a failure to recognise it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions."73 The court eventually decided that the applicants did not have a fundamental constitutional right to

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same-sex marriage.

However the court decided further that the basis of the refusal by the relevant authorities to grant the applicants their licence to marry deprived them of access to a multiplicity of rights and benefits that are contingent upon "married" status. This violated the equal protection clause of the Hawaiian Constitution. Article 1, Section 5 of the Hawaii constitution provides that

"no person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." 

The court therefore stated that by its plain language, the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.

In terms of the Hawaiian Constitution a "strict scrutiny” analysis is applied to laws which classify on the basis of suspect categories or which impinges upon fundamental rights expressly or impliedly granted by the Constitution. In such a case the law would be presumed to be unconstitutional unless the state shows a compelling state interest which justifies such a classification and also that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights. Accordingly a statute restricting the marital relationship to a male and female is subject to a strict scrutiny test on an equal protection challenge. The Baehr court therefore remanded the matter to enable the respondent authority (Lewin) to present evidence in an effort to overcome the presumption that the relevant statute upon which he relied in refusing the applicants their
marriage license, was unconstitutional. According to Wolhuter, in the subsequent decision in *Baehr v Miike* the respondent's attempt to do so failed for lack of evidence. The court accordingly concluded that the Hawaii marriage legislation was unconstitutional. In the course of its judgment the court, relying on the considerable amount of American social-science research that was available on the issue, found as follows:

i) the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child;

ii) gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples;

iii) while children of gay and lesbian parents may experience symptoms of stress and other issues related to their non-traditional family structure, the available scientific data, studies and clinical experience suggest that children of gay and lesbian parents tend to adjust and develop in a normal fashion;

iv) if same-sex marriage is allowed, the children being raised by gay or lesbian parents may be assisted, because they may obtain certain protections and benefits (emotional and financial) that come with or become available as a result of marriage.

The court accordingly found that it had not been proved that the public interest in the
well-being of children and families, or the optimal development of children will be adversely affected by same-sex marriage. 85

b) Canada

Until quite recently, homosexuals in Canada were legally invisible and subject to considerable discrimination and societal antagonism. 86 According to Bala 87 homosexuals have recently however become increasingly visible, gaining at least some degree of social acceptance and seeking recognition and protection through the political process and in the courts. In 1977 Quebec became the first province to make sexual orientation a prohibited basis of discrimination. By 1992, five other Canadian jurisdictions had added this category to their human rights legislation. 88

In terms of section 15 of the Canadian Charter of Rights and Freedoms,

“every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

Although sexual orientation is not specifically mentioned in the Charter, the Ontario Court of Appeal in Haig v Canada 89 considered whether the absence of sexual orientation from the list of proscribed grounds of discrimination in section 3 of the Canadian Human Rights Act was discriminatory and contrary to section 15. The factual context of the case concerned the dismissal of a Canadian Armed Forces Officer on the basis of his sexual orientation. The Ontario Court of Appeal held that the requisite
degree of social disadvantage to justify inclusion within section 15 was met by the
category of sexual orientation:

"The social context which must be considered includes the pain and
humiliation undergone by homosexuals by reason of prejudice towards
them. It also includes the enlightened evolution of human rights social
and legislative policy in Canada, since the end of the second world war,
both provincially and federally. The failure to provide an avenue of
redress for prejudicial treatment of homosexual members of society, and
the possible inference from the omission that such treatment is
acceptable, create the effect of discrimination offending section 15(1)
of the Charter."90

The court held that the Canadian Human Rights Act must be interpreted, applied and
administered as though it contained "sexual orientation" as a prohibited ground of
discrimination.

According to Stychin91 the general approach adopted by the courts and its specific
application to discrimination on the basis of sexual orientation suggests a willingness to
recognise emergent identities within constitutional discourse and to protect those who
so identify themselves through the equality guarantees of the Charter.

While overt discrimination against homosexuals on the basis of their sexual orientation
is now prohibited, the issue of their familial or spousal status is more controversial.
According to Bala,92 Canadian courts have recognised that upon termination of a same-
sex relationship, one partner who has contributed to the acquisition or preservation of
property by the other may have a claim based on a constructive trust, similar to a person
in an unmarried heterosexual relationship. The decision of Forrest v Price93 recognised
that this contribution might, at least in part, arise through the provision of domestic and
household services in a relationship the court characterized as committed, caring and

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loving, tantamount in all respects to a traditional heterosexual marriage.

In *Leschner v Ontario* in Ontario Human Rights Board of Inquiry ruled that the provincial government was obliged to extend "spousal" survivor pension benefits to the partners of its homosexual employees. The Board held that because the relevant legislation granted rights to persons of the opposite sex living in a "conjugal relationship outside of marriage" the failure to make similar provisions for same-sex couples violated the Charter of Rights' prohibition against discrimination, which, following *Haig v Canada*, included sexual orientation as a prohibited category of discrimination.

While Canadian courts are no longer willing to tolerate direct discrimination on the basis of sexual orientation, the majority judgments in *Layland v Ontario* and *Egan v Canada* indicate that same-sex partners are having real difficulty in achieving full legal recognition of the realities of their relationships. However, both decisions produced vigorous dissents, noting the essentially conclusory and circular nature of the majorities' reasoning that suggest that judicial attitudes may slowly be changing.

In Ontario, legislation enacted in 1992 to deal with substituted medical consent provides that same-sex partners are spousal equivalents if they have "lived together for at least one year and have a close personal relationship that is of primary importance in both persons' lives," marking an initial political step toward the statutory recognition of this important type of familial relationship.
The Supreme Court of Canada has yet to be called upon to decide whether the exclusion of same-sex couples from the institution of marriage is discriminatory.\textsuperscript{99}

c) \textbf{England}

With the exception of the Wolfenden Committee report in 1957 which led to the partial decriminalization of same-sex sexual acts between men,\textsuperscript{100} no significant advances have recently been made in English Law on the issue of same-sex unions. The case law in England on this point is scant. As far back as 1970 the judgment in \textit{Corbett v Corbett}\textsuperscript{101} set the precedent that marriages were only celebrated between a man and a woman.

Even the European Court of Justice has relatively recently upheld the principle that marriage should be a normal heterosexual relationship.\textsuperscript{102} According to Bruns \& Kannelly the European Convention on Human Rights, 1950, does not recognise the concept of a homosexual family and Article 12 of the Convention confers a right to marry solely on couples of the opposite sex.\textsuperscript{103} Article 12 however appears to be contradictory to Article 14 which, according to Bruns \& Kannelly, contains an implicit ban on discrimination based on sexual orientation.\textsuperscript{104} It is hoped that this unfortunate discrepancy will be cleared up by the European Court of Justice and that it will change its view in favour of same-sex marriages in the not too distant future.
d) **Other Countries**

i) In terms of contemporary Swedish, Norwegian and Danish law, registered same-sex partnerships are recognised. According to Wolhuter, in terms of the Swedish Registered Partnership Act of 1995, identical legal consequences to marriage attach to a same-sex partnership, subject to the proviso that registered partners may not “jointly or singly adopt children [or] . . . be appointed . . . to exercise joint custody of a minor” or have children conceived by artificial insemination. Thus no parental relationship may legally be formed as the result of gay partnerships, except in the case where one or both of the partners have children from previous heterosexual relationships. No legal relationship between a non-parent and a partner’s child is permissible. According to Wolhuter the Danish Registered Partnership Act of 1989 and the Norwegian Act on Registered Partnerships for Homosexual Couples of 1993 contain similar provisions. Pedersen states that the Danish Registered Partnership Act leads to a greater degree of equality between homosexuals and heterosexuals because conditions for both the legal effects and the dissolution of a registered partnership generally correspond to those of marriage.

ii) The Dutch Supreme Court decided in 1990 that there had been unjustified discrimination against homosexual couples when compared with heterosexual couples in respect of the right to marry. To date however the Dutch legislature has not been very keen to tackle this subject. In as much as the law does not
recognise homosexual marriages, some local community authorities in the Netherlands permit homosexual couples to register a "living together contract". Official registration of such a contract does not however, give the couple the status of spouses.
THE SOUTH AFRICAN POSITION

Even though the Marriage Act no. 25 of 1961 makes no mention of the requirement that spouses be of the opposite sex to conclude a legally binding marriage, the requirement that intending spouses be of the opposite sex is governed by our common law. Our courts have time and again endorsed this requirement. For instance in *W v W* Nestadt J stated:

"[T]o accede to the argument [that a marriage should be valid if a transsexual is found capable of fulfilling the essential marriage role of the sex he or she has assumed] would be to subvert the requirement of our law that a valid marriage requires the parties to be of the opposite sex."

Nestadt J followed the English decision of *Corbett v Corbett* in this regard. The facts and issues in *Corbett* were largely similar to those in *W v W*.

In *Simms v Simms* Howard J followed *W v W* in confirming that,

"marriage being the union of a man and a woman, two persons of the same sex cannot contract a valid marriage."

Sinclair rightly expresses the view that the traditional legal definition of marriage has become outmoded and unacceptable to a large proportion of the population. She states that it reflects neither the law, nor what society is saying and doing. And consequently it can no longer be insisted upon.

Both in *W v W* and in *Simms* the court held that a transsexual cannot change his/her original sex. Any subsequent marriage by a transsexual to a person of the transsexual's original sex would
therefore be void. Our law prohibiting same-sex marriages has, however, yet to be challenged in court by a couple of same-sex orientation. A same-sex marriage by definition includes a sexual relationship of a homosexual nature. Our courts indeed have a long history of naive judgments against sexual acts committed especially between males.\textsuperscript{116} These judgments serve to reflect the negative judicial and legislative attitudes on the subject of same-sex unions generally. It is from this daunting homophobic background that the struggle for the recognition of same-sex marriages has to emerge. It would appear that some of our judges have not yet been cured of their judicial homophobia. The relatively recent decision of \textit{Van Rooyen v Van Rooyen}\textsuperscript{117} springs to mind. Here Judge Flemming decided that a lesbian mother who lived with her partner would be sending the “wrong signals” to her children if they were exposed to her lesbian relationship. Here, with respect, Judge Flemming made a moral judgement on homosexuality that was clearly baseless and served merely to exhibit his own bias against homosexuality.

In the much more enlightened judgment of Ackerman J in \textit{S v H}\textsuperscript{118} the Judge acknowledged that

“there is a growing body of opinion . . . which questions fundamentally the sociological, biological, religious and other premises on which the proscription of homosexual acts between consenting adult men which takes place in private, have traditionally been based.”\textsuperscript{119}

Having regard to the “changing public attitudes regarding homosexual relationships and self-expression”,\textsuperscript{120} the Judge found that a custodial sentence was not an appropriate sentence for consensual, adult, private sodomy taking place under circumstances which pose no threat to any legitimate societal interest. The Judge was obviously influenced by the fact that in the run-up to the Interim Constitution broad consensus developed among role-players on the elimination of discrimination against homosexuality, and the strong possibility that this would be entrenched

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in the future Constitution. Judge Ackerman however could not take the bold step of holding the sodomy laws to be discriminatory as the Constitution was not in operation then.

Homosexual people are currently subject to a plethora of legal restrictions in South African law. The notorious Sexual Offences Act No. 33 of 1957 criminalizes various forms of sexual behaviour between men. As far as the formation of parental relationships is concerned, the resort that could be had by gay couples to adoption, artificial insemination, or surrogacy is severely restricted. In terms of Section 17(a) of the Child Care Act No. 74 of 1983 gay couples may not adopt children together. Although they may do so as single individuals, their partners may not adopt the child as a “spouse” as envisaged in Section 17(c) of the Act. Legally therefore the adopted child would have only one parent.

According to Lind,

“while becoming a parent is practically fairly easy for lesbians, the law has intervened to make it more difficult. No-one who is not a medical practitioner may remove or supervise the removal of ‘a gamete from the body of a living person for the purpose of the artificial insemination of another living person’. Thus self-help insemination is unlawful.”

Lind, further states that

“surrogacy is the only method available to a gay man hoping for a child who is genetically related to him. However surrogacy is fraught with legal difficulty. Surrogacy agreements are unlikely to be enforced. The commissioning father also does not become the legal parent of the child. In law the surrogate and her spouse are the parents of the child. In order for a gay man to establish a legal tie between himself and “his” child, he is obliged to adopt the child.”

Another example of the harshness of the law towards same-sex couples, is that, while some of the consequences of marriage may be appropriated independently (by will, contract, or power
of attorney), there are others which are definitely beyond the reach of same-sex couples.\(^{125}\)

These include:

- immigration rights
- taxation benefits
- dependent’s actions
- rights and responsibilities in respect of children reared by the couple jointly
- the right to enter hospitals, prisons and other places restricted to “immediate family”
- the right to obtain health insurance, dental insurance, bereavement leave and other employment benefits as a “spouse”
- the right to automatically make medical decisions in the event your “spouse” is injured or incapacitated (otherwise, parents, adult children or siblings are given the right)
- the right to automatically inherit your “spouse’s” property in the event he or she dies without a will (otherwise, it goes to parents, children and siblings).

South Africa’s new constitutional dispensation however heralds a new era in the quest for equality. The South African Constitution\(^ {126}\) is unequivocal in its acceptance of different forms of sexual orientation and commits the country to non-discrimination on this ground. The Constitutional Court\(^ {127}\) in the certification of the Final Constitution, accepted that

> “in general, states have a duty, in terms of international human rights law, to protect the rights of persons freely to marry and to raise a family.”

The court indicated however that

> “a survey of national constitutions in Asia, Europe, North America, and Africa shows that the duty on the states to protect marriage and family rights has been interpreted in a multitude of different ways.”\(^ {128}\)
The court accordingly stated that

"there has by no means been universal acceptance of the need to recognise the rights to marriage and to family life as being fundamental in the sense that they require express constitutional protection.""\textsuperscript{129}

The Constitutional Court therefore endorsed the constitutional assembly’s decision not to include right-to-marriage provisions in the Final Constitution. The court went on to state that the new text (the Final Constitution) would clearly prohibit any arbitrary state interference with the right to marry or to establish and raise a family.\textsuperscript{130} It also held that

"[the new text] enshrines the values of human dignity, equality, and freedom, . . . [and that] everyone has the right to have their dignity respected and protected. However these words may come to be interpreted in future, it is evident that laws or executive action resulting in enforced marriages, or oppressive prohibitions on marriage or the choice of spouses, would not survive constitutional challenge."\textsuperscript{131}

The advent of our Constitution has undoubtedly forever changed the law, and with it, the lives of the South African gay community. Section 9(1) of the Bill of Rights provides:

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

Section 9(3) goes on to provide that:

"The state may not unlawfully discriminate directly or indirectly against anyone on one or more grounds including . . . sexual orientation . . . ."

In my view the common-law prohibition of same-sex marriages clearly infringes the right to equality generally. Albertyn & Kentridge\textsuperscript{132} distinguish formal equality from substantive equality. While formal equality guarantees all people equal rights within a just social order, substantive equality requires that we examine “the actual social and economic conditions of groups and individuals in order to determine whether the Constitution’s commitment to equality is being upheld.”\textsuperscript{133} The inclusion of sexual orientation as one of the listed grounds on which
people may not be unfairly discriminated against in terms of Section 9(3) of the Constitution accordingly amounts to formal equality for people of same-sex orientation. Substantive equality, in this context, however, would demand, for one, that people of same-sex orientation be allowed to marry and enjoy all the legal consequences of a traditional heterosexual marriage.\(^{134}\) Substantive equality, in other words, requires the eradication of all barriers to the achievement, by people of same-sex orientation, of true equality. Albertyn \& Kentridge assert that

> "a formal understanding of equality risks undermining the deepest commitments of the Constitution. A substantive conception of equality, on the other hand, is supportive of [the Constitution's] fundamental values."\(^{135}\)

Albertyn \& Kentridge suggest that:

> "it is . . . incumbent on us to read [the equality clause] of the Bill of Rights as setting out a substantive conception of equality."\(^{136}\)

According to Grant, a failure to extend marriage to same-sex couples negates the essential nature of the right to equality, since it is from this legal institution that many of the benefits flow.\(^{137}\)

Same-sex couples who are denied the natural-law right to marry (each other) are specifically unfairly discriminated against on the ground of sexual orientation.\(^{138}\) People of same-sex orientation form a constitutionally protected class and their inferior treatment by the law in the realm of family law generally constitutes unfair discrimination and violates the equality clause of our Constitution.

The possible argument that gay and lesbian people are not really unfairly discriminated against because they are indeed allowed to marry - so long as they do so with a person of the opposite sex,\(^{139}\) is a weak and circular argument as it, firstly, fails to appreciate the very essence and
nature of same-sex orientation and, secondly, relies exclusively on the age-old definition of marriage as being necessarily a different-sex institution. It would be fair to say that reliance on the definition of marriage as a different-sex institution is linked inextricably to the idea of procreation and the survival of the species. The procreation argument has been discredited elsewhere in this dissertation.

Labuschagne suggests that a right to enter into a same-sex marriage can be inferred from Section 8 of our Interim Constitution read together with certain other sections of the same Constitution.

Section 8 of our Interim Constitution (the equality clause) has been retained in substantially the same form in section 9 of our Final Constitution in so far as it is relevant to discrimination on the grounds of sexual orientation. Labuschagne is furthermore of the view that eventual recognition of same-sex marriages is inevitable as a result of mainly four processes operative in human societies, which he describes as follows:

a) de-religionization - the process which continuously erodes the sacred and mystical foundations of marriage;

b) de-concretization - the process which is directed at discrediting the anatomical-concrete view of sexual orientation and exposing the abstract and intangible nature thereof;

c) individualization - the process whereby marriage is developed from being a group concern to being an individual concern. According to this process, group morality is
giving way to individual or private morality; and

d) humanization - this process generates understanding, compassion and sympathy for human predicaments. According to this process same-sex marriages are gradually elevated to socio-juridical acceptance.

Even authors with conservative views on same-sex marriage, like Visser & Potgieter,\textsuperscript{146} accept that our Bill of Rights may possibly be relied on as support for the recognition of these marriages.

The equal treatment of all people and their right to enjoy the full benefit of every aspect of the law forms one of the cornerstones of our Constitution. Indeed, one of the constitutional principles\textsuperscript{147} provides that

\begin{quote}
"the Constitution shall prohibit racial, gender, and all other forms of discrimination and shall promote racial and gender equality and national unity" (my emphasis).
\end{quote}

The preamble to our Constitution is a powerful projection of its intention, "in recognising the injustices of our past," to "establish a society based on democratic values, social justice and fundamental human rights."\textsuperscript{148} It would be shortsighted to think that this refers merely to racial equality. Every conceivable form of unfair discrimination, subject to the provisions of the limitation clause, is subject to constitutional scrutiny.

The Constitution very much furthers the cause for same-sex marriages by providing in section 9(5) that
As the common-law prohibition of same-sex marriages amounts to discrimination on the basis of, especially, sexual orientation, such discrimination would be deemed to be unfair and the onus would lie on the state authority opposing same-sex marriages to satisfy the court that the limitation clause can save the prohibition of same-sex marriages from unconstitutionality. In order to be successful the state authority would have to convince the court of the following:

a) The law prohibiting same-sex marriages is one of general application.

b) The prohibition is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

   i) the nature of the right;
   ii) the importance of the purpose of the prohibition;
   iii) the nature and extent of the prohibition;
   iv) the relation between the prohibition and its purpose; and
   v) less restrictive means to achieve the purpose.

It is submitted that it would be no easy task for the party opposing same-sex marriages to convince the court that this right, namely not to be discriminated against on the basis of sexual orientation, when applied to a proposed same-sex marriage, ought to be limited.
The interpretation clause of the Constitution enjoins our courts to have regard to international law when interpreting the provisions of our Bill of Rights, and also to have regard to the promotion of the values that underlie an open and democratic society based on human dignity, equality and freedom. International law, however, has not been particularly encouraging on this point. It is accordingly noteworthy that the South African Constitution is the first in the world to expressly include sexual orientation as one of its listed grounds on which unfair discrimination is prohibited. The significance hereof is that the constitutional assembly, when drafting both the Interim and the Final Constitutions intentionally departed from the worldwide practice of not expressly including sexual orientation in their Constitutions. The sensible conclusion to be drawn from this is that couples with same-sex orientation would be afforded true and proper protection by our law, and not be treated in the "mickey mouse fashion" of foreign jurisdictions. I submit that the constitutional assembly must have foreseen that in the near future the common-law prohibition of same-sex marriages would inevitably be challenged but they nevertheless included sexual orientation as one of the listed grounds upon which the state may not unfairly discriminate, in effect enjoining our courts to jealously guard this right.

In my view all these facts bode well for a petitioner wanting to challenge the common-law prohibition of same-sex marriage. Furthermore any prohibition of adoption, joint custody, foster parenthood, artificial insemination or surrogacy arrangements by homosexual couples on unjustifiable and improperly substantiated grounds would accordingly be constitutionally challengeable. Where the spirit, purport and objects to our Bills of Rights and the basic values underlying our Constitution are in conflict with the view of public policy as expressed and applied prior to the commencement of the Constitution, then the values underlying the Bill of Rights must prevail.
According to Stoddard\textsuperscript{153}

"marriage is the political issue that most fully tests the dedication of the people who are not gay to full equality for gay people, and it is also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men. Marriage is much more than a relationship sanctioned by law. It is the centrepiece of our entire social structure, the core of the traditional notion of 'family'. Even in its present tarnished state, the marital relationship inspires sentiments suggesting that it is something almost supra human. Lesbian and gay men are denied entry into this noble and sacred institution. The implicit message is this: two men or two women are incapable of achieving such an exalted domestic state. Gay relationships are somehow less significant, less valuable."

This attitude is clearly in breach of the ideal of an inclusive society which our Constitution is committed to and in fact amounts to a denial to homosexuals of the right to be treated with human dignity. "Everyone has inherent dignity and the right to have their dignity respected and protected."\textsuperscript{154}

It has been suggested that the prohibition on same-sex marriages is inconsistent with the right to privacy,\textsuperscript{155} which finds expression both in Section 13 of the Interim Constitution and Section 14 of the Final Constitution.

Hohengarten\textsuperscript{156} states that the right to privacy, which in the United States encompasses the right to marry, concerns choices about familial relationships. He states\textsuperscript{157} that its connection with sexual conduct is merely secondary, derived from this primary concern. The thinking is that the right to privacy is the right of the individual to make his own decisions concerning his familial relationships, including whom to marry and whether or not to have children. It is neither the business (to put it bluntly) nor the duty of the state to involve itself in these decisions. I, however, cannot help feeling that perhaps the privacy argument, when applied so as to suggest that the prohibition of same-sex marriages is inconsistent with it, has been stretched a bit too far.

The relationship between the right to privacy and the right to marry appears to me to be far too
tenuous for the one concept to have any significant influence on the other. Of course the recognition of the right to privacy must of necessity amount to the decriminalisation of all types of consensual homosexual conduct in private.158 Where however one goes so far as to equate the right to privacy with the right to enter into a same-sex marriage, it creates the impression that same-sex marriage is acceptable provided it remains a "secret" matter to be shared only by the parties involved. According to Cameron159 this may also serve to re-enforce the idea that same-sex marriage is shameful or improper and that it is tolerable so long as it is not exposed to public scrutiny.

Katz160 argues that a claim for equality by people of same-sex orientation is more one of neutrality than of equality. Katz161 proposes that the state should maintain a posture of neutrality whenever matters involving questions of sexual orientation or gender preference are concerned. While accepting that there is no basis on which to justify laws which treat homosexuals differently, Katz feels that

"the road to equality - whether of status or of treatment - may not lead through the equal protection clause, but through the Constitutional guarantee of the right to privacy."162

While I agree that the treatment of matters involving the issue of sexual orientation by the state ought to be done from a "posture of neutrality", this can only be achieved once people of same-sex orientation are perceived to be equal in every respect to people of opposite-sex orientation. In other words once they have achieved substantive equality. The fact of the matter is that people of same-sex orientation have been discriminated against and treated in an inferior manner by the state and society at large. Even prior to its constitutional entrenchment, the right to privacy, always formed part of our law.163 Yet nobody interpreted it so as to achieve equality for
people of same-sex orientation. However the equality clause of the Constitution and the
prohibition on unfair discrimination on the ground of sexual orientation only became law with
the adoption of the Interim Constitution. While I feel that an argument could possibly be made
against the prohibition of same-sex marriages on the basis of the right to privacy, a far more
convincing case would emerge if one relied rather on the equality provisions relating to unfair
discrimination on the basis of sexual orientation.

The landmark case of *S v K*164 has added fresh impetus to the argument against the prohibition
of same-sex marriages. Although this case did not deal specifically with the issue of same-sex
marriage, the issues it addresses strike as close to home as can be. The facts of the case are as
follows: The accused was charged in the Knysna Magistrate's court with the crime of sodomy
which was allegedly committed on the 10 January 1997 when the Interim Constitution was still
in force. The crime had taken place by mutual consent between the accused and a fellow inmate
while they had been held in custody at a Knysna prison. The accused pleaded guilty to the
charge of sodomy and was convicted by the Magistrate and sentenced. On review to the Cape
Provincial Division the matter was heard by Judges Farlam and Ngcobo.

Judge Farlam appears to have researched the relevant issues well. He traced the history of the
crime of sodomy from as far back as the third century AD up to and including the provisions
of the Interim Constitution.

The learned Judge acknowledged that modern research has demonstrated that:

“during the High Middle Ages in Europe (from the tenth to the fourteenth
centuries) homosexual relations were treated with tolerance and understanding.
From the fourteenth century onwards there was what Ian Corbett calls “an
extraordinarily rapid change of mind. The Christian church began to equate homosexual activity with heresy and those accused of it were dealt with in the ecclesiastical courts.165

What is salient here is that same-sex unions did not start out as being sinful or unlawful.

The court also referred to Corbett's view that the church was born in the classical Europe of Greece and Rome, and it accepted the positive values of this culture.166 Many Roman emperors were gay, most notably Hadrian, and there was no distinction in Roman law at the time between heterosexual and homosexual matters; rape and violence were punished equally, homosexual prostitution was accepted (and taxed) and boy prostitutes had the right to a legal holiday.167

Farlam J confirmed that, as far as could be discovered, consensual sexual acts between females do not constitute a crime in our common law.168 The implication here therefore is that this behaviour is acceptable.

Judge Farlam further stated:

"[S]ection 8(2) of the Interim Constitution and section 9(3) of the 1996 Constitution, with their specific reference to sexual orientation as a proscribed ground of unfair discrimination, clearly evince an intention on the part of the framers of the Constitution to expand the grounds of tolerance and understanding so that sexual activity between consenting adults is no longer subject to criminal sanction. I do not think that it is necessary to invoke the constitutional entrenchment of the right to privacy to come to this conclusion."169

The Judge went on to hold that the presumption of unfair discrimination contained in section 8(4) of the Interim Constitution and section 9(5) of the Final Constitution (which are similarly worded) was not and, indeed, could not be rebutted.170
In considering whether the unfair discrimination could be saved under the limitation clause, the Judge stated:

“It is difficult to see how any discrimination which has already been stigmatised as ‘unfair’ (which is what I consider the present discrimination to be) can ever be regarded as permissible to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality.”

The Judge however went on to survey the international position on this matter and finally concluded that he was satisfied that the criminal proscription of sodomy occurring between consenting male adults cannot be justified. Judge Farlam, with the concurrence of Judge Ngeobo, accordingly set aside the accused’ conviction and sentence.

What makes this judgment a landmark decision is that, by necessary implication, it decriminalizes most, if not all, of the so-called homosexual offences applicable in South Africa. Whether or not the crime of sodomy remains a part of our law is an issue that is extremely relevant to that of same-sex marriage. Admittedly the decriminalization of homosexual sexual activity by itself will not necessarily lead to the sudden legal approval of same-sex marriages. However for as long as certain homosexual sexual activity remained punishable by law, the legal acceptance of same-sex marriages would be that much more difficult to attain. The decriminalization of homosexual sexual activity is accordingly the second (the first obviously being the Constitution) ray of light at the end of the tunnel for the attainment of same-sex marriages.

One of the most encouraging aspects of this judgment is also the court’s approach to the issue. The court proceeded from the basis of equality rather than privacy. The court could very easily have found that what people of same-sex orientation did in the privacy of their closet was
nobody's business but their own. But the court specifically chose to deal with the matter in
terms of the equality provisions of the Constitution. This very specific choice by the court speaks
volumes about our judiciary's changing attitude towards people of same-sex orientation. The
court's decision in treating the same-sex orientation issue in terms of equality adds immense
weight to the struggle of gays and lesbians for equal treatment in family life.

The Constitution promises a new deal for South Africa's gay community and the judgment in
$S v K$ is the first sign of our Constitution starting to deliver on its promise.
CHAPTER FIVE

CONCLUSION, PERSONAL VIEWS, AND RECOMMENDATIONS

We must accept that customs change with an evolving social order. In South Africa especially, the advent of our Final Constitution has served to cut across the social and racial spectrum of the country, imposing on us the duty to extricate ourselves from our traditional prejudices and begin to breed a culture of human rights. This culture includes tolerance and respect for difference within our society.

The time is ripe for the concept of equality among different peoples to be viewed no longer merely in terms of race or gender, as has traditionally been done, but in terms of sexual orientation as well. For far too long has the homosexual community been ostracized, rejected, and discriminated against, especially in the area of family law. None of the arguments which society has in the past used to justify its objection to homosexuality have proven to have any merit in them whatsoever. These arguments have always been spurious, irrational and based on widespread ignorance and misinformation.

If one considers that interracial marriages were illegal for approximately forty years since 1949, one can be forgiven for thinking that our era of enlightenment had arrived with the abolishment of the Prohibition of Mixed Marriages Act. When the law however continues not to recognise same-sex marriages on spurious grounds, it makes one seriously question whether or not the law is based on justice for all people. People of homosexual orientation are denied the right to form
families (in the traditional sense of the word), as a result of discrimination against them on the ground of a characteristic over which they have no choice whatsoever. Will it now require a further forty years before society realises that it is morally wrong to treat people in this manner? One cannot, however, legislate away prejudice; only the persistent appeal to reason and to justice against the powerful pull of irrationality and bigotry can achieve that. The history of the struggles against slavery, religious intolerance, sexual inequality, and racial discrimination gives ground for believing that reason and justice eventually triumph over the darker side of human nature. 173

If we are truly committed to building a just and democratic society, then it is wrong to pick and choose which forms of oppression we are going to fight against. Every person should have the right to be treated with dignity and respect. In other words, it should not matter whether people are white or black, male or female, young or old, able-bodied or disabled, heterosexual or homosexual. Singh 174 rightly states that:

“homosexuality in a democratic and open society requires acceptance and understanding, not judgment, censure and condemnation. Intolerance under an apartheid regime had become the cornerstone of the South African ethos. Now, rather than seeking to perpetuate this evil, our courts should strive to alleviate it. It is incumbent on the legal system to remove barriers to full participation by all people. The legal recognition of homosexual equality in matters of family would, ideally, confirm South Africa’s commitment to full and equal justice for all people. In order to defend its prohibition, the state must now offer neutral reasons for denying same-sex marriage, which can no longer rest on traditional moral disapproval of homosexuality. These reasons must be those that can be subjected to rational empirical analysis and must be plausible.”

Some people of same-sex orientation are however against entering into traditional marriages. 175 Ettelbrick, a strong anti-marriage proponent, feels that marriage will not liberate lesbians and gay men but will constrain them, make them more invisible, force their assimilation into the mainstream, and undermine the goals of gay liberation. 176 She further states:
"[A]ttaining the right to marry will not transform our society from one that makes narrow, but dramatic, distinctions between those who are married and those who are not married to one that respects and encourages choice of relationships and family diversity." 177

She feels that marriage runs contrary to two of the goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships. 178 In this most thought-provoking article, Ettelbrick’s standpoint is that the gay community will only truly be liberated when they are respected and accepted for their differences and the diversity they provide to society and that seeking the right to marry by itself will not take them there. 179 De Vos 180 also expresses the view that marriage, as it is presently structured, is a problematic institution in that it facilitates the oppression of women and subordinates men and women who choose not to marry. De Vos however acknowledges that marriage enjoys great symbolic significance in society and the recognition of same-sex marriages may facilitate greater social acceptance of same-sex relationships in general. 181

After examining various arguments for and against gay marriage, Wolhuter 182 expresses the view that although opponents of gay marriage raise worthy concerns, the quest for the recognition of gay marriages must continue. Wolhuter states that

"[t]he accommodation of the difference between homosexual and heterosexual persons necessitates the recognition that, by virtue of their structural powerlessness, the effect of social prejudice and stigmatization is experienced more profoundly by gays and lesbians than similar social prejudice would be experienced by members of more dominant social groups." 183

There will always be arguments for and against marriage as an institution. People are individuals and they will always be affected by, and treat, a marital relationship individually. Marriage will work for some people and not for others, irrespective of their sexual orientation. That is the nature of the marital relationship.
At this stage of our social order, lesbian and gay people ought to have the right to marry, for no other reason, than to elevate their relationship to a "first-class" status, which is how society generally perceives a traditional marriage relationship to be. While Paula Ettelbrick may disagree with me, I believe that forcing society to deal with the issue of same-sex marriages is the start of persuading them to shed their prejudices on the issue.

According to Hohengarten, 184 marriage provides a legal framework for a committed relationship between two adults, a framework that cannot be duplicated by other legal forms. When two individuals marry they enter into a legally binding relationship with each other. This relationship is binding because the state imposes significant conditions on exiting it; a spouse cannot simply walk away from the marriage. Marriage thus offers a legal medium through which two adults can make a mutual commitment to stay together. This mutual commitment functions as a relatively stable basis upon which they can structure aspects of their life together and their joint interactions with third parties. Marriage allows a couple to overcome the deep-seated individualism of contemporary life and to operate, for many purposes, as a unit. Marriage is important for same-sex couples' freedom of intimate association because it is a formalised legal status that recognises their union and commitment. 185 186

The unconventional lifestyle of homosexuals is no justification for the continuation of the status quo. People cannot truly be regarded as being free if society imposes unjust, unnecessary and unreasonable limits on them. It is high time that society accepted that there is nothing intrinsically wrong about homosexuality. Lesbians and gay men are born with the sexual and emotional preference that they possess. It is as much a part of their psyche as heterosexuality is to heterosexuals. It is not something that can or even should be "cured". What ought to
happen is that lesbians and gay men be respected for who they are and treated as equals in every sense of the word.

For lesbian and gay people, nothing less than the full recognition of their right to marry would truly give effect to the promise of our Constitution that they will not be discriminated against on the ground of their sexual orientation.

Legally recognised cohabitation for people of same-sex orientation may be a viable proposition. This would entail legal recognition of same-sex unions along the lines of registered partnership arrangements which exist in countries like Sweden, Denmark, and Norway.

However, while such a development would greatly improve the present social and familial situation of lesbians and gay men, I do not believe that it will be enough. By implication, lesbian and gay people would not enjoy full and equal rights as two heterosexual spouses would. If they did then there would be nothing to distinguish marriage from this type of cohabitation. Besides, our law relating to the rights and social status of cohabitants generally would need to change swiftly to bring it in line with that of marriage. And if legally recognised cohabitation is brought in line with marriage, then what compelling reason can there be for excluding gays and lesbians to the institution of marriage itself?

While the next logical step for heterosexual cohabitants may be to strive for full recognition by the law for their relationship, I do not consider that this can be sufficient for same-sex cohabitants. The ultimate recognition for same-sex couples would be for the law to allow them to marry (in the traditional sense of the word) their partners. Anything less than the right to
marry would amount to mere legal tolerance of same-sex couples and not to full recognition and acceptance of them as individuals in their own right. What is being advocated here is egalitarianism among individuals, irrespective of their sexual orientation. Should lesbians and gay men choose not to marry, and many of them probably would, then that would be their prerogative.

The fact that same-sex marriage may be anathema to certain sectors of the community - for whatever reason - does not entitle the members of that community to dictate to the state and to impose their beliefs on others who do not subscribe thereto. Accordingly there should be equal treatment of people of different sexual orientation and unfair discrimination must not be allowed.¹⁸⁷

People of same-sex orientation are entitled to an equal place in the sun and it is a blight upon so-called civilised society that these people are stigmatised and that the less courageous have to live a lie, while the more courageous are social outcasts.¹⁸⁸

To conclude I would recommend the following:

a) The anti-homosexual attitudes which are deeply embedded in our culture and which have led to social prejudices against homosexuals must be eradicated. It is the duty of the law to take the lead in doing so. When eventually called upon to do so, our courts should be courageous enough to make a finding in favour of same-sex marriages, whereafter other advanced legal systems will hopefully follow suit.
b) Judges who continue to suffer from judicial homophobia must recuse themselves from matters involving such issues, alternatively they must educate themselves with a view to overcoming their homophobia.

c) The institution and legal definition of "marriage" must be reformulated to include admittance by gay couples.

d) Children ought to receive proper sex-education at school level, which must include education on homosexuality as an accepted alternative form of sexual orientation. This would help to rid our future generations of the prejudices that most of us possess today.

e) The government must speak out explicitly and publicly against the different forms of anti-homosexual discrimination. The subject of homosexuality and gay rights must be publicised and debated, rather than continue to be whispered about behind closed doors.

f) Local churches must join the struggle against homophobia by becoming open and affirming communities of new life and commitment for all people, regardless of their sexual orientation. The church in accordance with the Christian ethos of unconditional love and justice must affirm the basic human right of lesbians and gay men to marry.

The recognition and protection by the law of same-sex marriages would be a benediction for the many millions of lesbians and gay men of this land. It would however continue to amount to blasphemy for the still many narrow-minded and unenlightened people who cling to their
prejudices unreasoningly. As Archbishop Desmond Tutu\textsuperscript{189} has stated,

"we reject [gay and lesbian people], treat them as pariahs, and push them outside the confines of our church communities, and thereby we negate the consequences of their baptism and ours. We make them doubt that they are children of God, and this must nearly be the ultimate blasphemy."
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6. Ruth Simpson From the Closet to the Courts - The Lesbian Transition 170.
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10. Ibid.
12. Ibid.
14. 291 Minn. 310, 191 NW 2d 185 (1971) at 186.
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18. Ibid.
19. Ibid.
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23. 316 U.S. 535 (1942) at 541.
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53. Ibid.

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56. S v H 1993 (2) SACR 545 (C) and S v K 1997 (9) BCLR 1283 (C).

57. Bowers v Hardwick supra at 210 to 212.

58. At 214.

59. 415 N.E. 2d 936.


64. Ibid.

65. Ibid.


67. 478 N.W. 2d 790 (Minn 1991).


70. 852 P. 2d 44, 48 - 49 (Haw 1993).


72. Baehr supra at 57.

73. Ibid.

74. Baehr supra at 59.

75. Baehr supra at 60.

76. Baehr supra at 46.

77. Lorraine Wolhuter op cit 404.

78. No. 91 - 1394 3 December 1996 (Hawaii Circuit Court) (unreported).

79. Lorraine Wolhuter op cit 404.


81. Ibid.
82. Ibid.
83. Ibid.
84. Ibid.
85. Ibid
86. Nicholas Bala “Canada : Growing Recognition of the Realities of Family Life” 274.
87. Nicholas Bala op cit 275.
88. Ibid.
90. At 504.
92. Nicholas Bala op cit 275.
95. Ibid.
98. Nicholas Bala op cit 277.
100. S v K 1997 (9) BCLR 1283 (C) at 1292
101. [1970] 2 All ER 33 PDA.
102. In Rees v United Kingdom (1987) 1 FLR 111 and Cossey v United Kingdom (1991) 2 FLR 492. The facts of these cases were not materially distinguishable from each other. In the Cossey case, the European Court of Human Rights confirmed its earlier judgment in Rees that the right to marry, guaranteed in Article 12 referred to the traditional
marriage between persons of the opposite biological sex and the main function of the Article was to protect marriage as the basis of the family.

103. Karen Bruns & Vallance Kannelly "The Legal Definition of Marriage" 496.

104. Ibid.

105. Lorraine Wolhuter op cit 408.

106. Ibid.

107. Ibid.


110. Ibid.

111. 1976 (2) SA 308 (W) at 314.

112. Note 101 supra.

113. 1981 (4) SA 186 (D).

114. Sinclair op cit 311.

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116. See for instance: Baptie v S 1963 (1) PH H96 (N) where it was stated that "it is now well understood as a result of the recent advances in medical knowledge that offences of this kind, involving perversity are offences which have a background in the disordered mental condition of the perpetrators and that they can usually be cured by psychiatric treatment"; S v Mafiya 1972 (4) SA 565 (O) where the court was of the view that homosexuals should, where possible, be helped to overcome their difficulty, and not be punished with a jail sentence; and S v K 1973 (1) SA 87 (RA) where it was stated that
“in many of these cases, the desire to commit these unnatural offences stems from some form of mental disease.”

117. 1994 (2) SA 325 (W).
118. 1993 (2) SACR 537 (C).
119. At 546
120. Ibid.
121. Lorraine Wolhuter op cit 394.
122. Ibid.
123. Craig Lind op cit 490.
124. Ibid.
125. Craig Lind op cit 486.
128. Ibid.
129. Ibid.
130. At 1297.
131. Ibid.
133. Ibid.
134. Lorraine Wolhuter also makes this point op cit 410 and goes further at 411 to state that

“in order to ensure the attainment of substantive equality in the context of marriage in general, it is necessary to excise patriarchal and other
culturally specific symbols and accretions from the traditional concept of marriage. Marriage should thus be reformulated as the legal institutionalization of a union between two persons that gives rise to prescribed proprietary and contractual consequences, rights of inheritance and parental rights."


136. Ibid.

137. Brenda Grant “Comments and Cases on Same-Sex Marriage” 573.

138. This viewpoint is supported by authors like Brenda Grant op cit 568; Lorraine Wolhuter op cit 410; Tshepo L. Mosikatsane “The Definitional Exclusion of Gays and Lesbians from Family Status” 556; Angelo Pantazis op cit 575; and June D. Sinclair op cit 299-300.

139. This was part of the reasoning by the majority decision in Layland v Ontario (1993) 104 DLR (4th) 214 at 223.

140. Brenda Grant also makes this point op cit 568-569.

141. See page 7-8.


144. Namely section 10 (human dignity), section 14 (religion, belief and opinion), section 17 (freedom of association), and section 30 (rights of children).

145. At 533.


147. Constitutional Principle no III, as listed in Schedule 4 to the Interim Constitution (Act 200 of 1993). In terms of Section 71 of the Interim Constitution it is obligatory that the
provisions of the Final Constitution comply with the Constitutional Principles adopted and listed in Schedule 4 to the Interim Constitution. Prior to the certification of the Final Constitution, as adopted by the constitutional assembly, the Constitutional Court was charged with the duty to ensure that the text of the Final Constitution complied with the Constitutional Principles.

148. Preamble to the Constitution.

149. Section 36 of the Constitution.

150. Section 39 of the Constitution.

151. For instance Layland v Ontario (1993) 104 DLR (4th) 214. Here, two men, who had lived together in a homosexual relationship for five months applied for a marriage licence. The city clerk refused to issue a licence on the ground that marriage between persons of the same sex was illegal. Upon review to the General Division of the Ontario Court, the majority of the court held that while no statutory provision defined marriage in a way that excluded a union of persons of the same sex, at common law it was the union of a man and a woman and this definition was universally accepted. A purported marriage between two people of the same sex was accordingly void.

152. This was the view of the court in the case of Rylind v Edros [1996] 4 All SA 557 (C) at 596 e.


154. Section 10 of the Final Constitution.

155. See for instance: Tshepo L. Mosikatsana op cit 556; Angelo Pantazis op cit 574; William M. Hohengarten "Same-Sex Marriage and the Right to Privacy" 1496; Michael P. Katz

156. William M. Hohengarten op cit 1524.

157. Ibid.

158. Edwin Cameron op cit 464.

159. Ibid.


161. Ibid.


163. David Jan McQuoid-Mason *The Law of Privacy in South Africa* 86.

164. Note 56 supra.

165. *S v K* supra at 1288.


167. Ibid.

168. *S v K* supra at 1289.

169. *S v K* supra at 1290.

170. *S v K* supra at 1291.

171. Ibid.

172. *S v K* Supra at 1311-1312.

173. Peter Ashman op cit 5.


175. See generally: Pierre de Vos “Same-Sex Marriage, the Right to Equality and the South African Constitution” 357; Tshepo L. Mosikatsana op cit 557; Thomas B. Stoddard op
cit 13; Paula L. Ettelbrick “Since When is Marriage a Path to Liberation?” 20.


177. Ibid.

178. Ibid.


181. Ibid.

182. Lorraine Wollhuter op cit 393.

183. Ibid.

184. William M. Hohengarten op cit 1498.

185. Ibid.

186. The following authors also make similar points: Pierre de Vos op cit 360-361; June D. Sinclair op cit 311-312; Thomas B. Stoddard op cit 15; Tshepo L. Mosikatsana op cit 556; Angelo Pantazis op cit 571-572.

187. Alick Costa “Polygamy, other Personal Relationships and the Constitution” 917.

188. Alick Costa op cit 918.

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