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# SAME-SEX UNIONS REVISITED: THE CONCEPT OF MARRIAGE IN TRANSFORMATION

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## 1 Introduction

“Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They were both women.” Thus begins the judgment in the most recent but already celebrated decision in the *Fourie/Bonthuys* case<sup>1</sup> which confirmed the transformation of the common-law definition of marriage in South Africa.

Some three years ago at the conference of the Southern African Society of Legal Historians held in Stellenbosch, the issue of same-sex unions and what was then suggested was an outdated legal concept of marriage in the light of the new South African constitutional dispensation, was canvassed.<sup>2</sup> As was shown in the relevant paper, the notion of same-sex unions was by no means new or culturally unique. However, societal disapprobation of such unions, particularly during the so-called age of “enlightenment”, had led to homophobia and “gay-bashing” with the concomitant reaction of militancy on the part of affected groups. Subsequently, in more recent times, the position of same-sex couples has been ameliorated as the result of a greater or lesser degree of legal tolerance. Such tolerance was to eventuate in law reform measures either through the interpretative voice of the judge, in the light of a particular constitutional dispensation, or by the enactment of legislation that provided for legal recognition of the conjugal nature of the relationship of same-sex

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1 At the time of delivery of this paper the decision, not yet reported, had already been handed down by the Constitutional Court on 1 December 2005; Case CCT 60/04. However, it has since then been reported: *Minister of Home Affairs and Others v Fourie and Others* 2006 1 SA 524 (CC). Although not relevant in the context of this article, it may be noted that the Court admitted as *amicus curiae*, Doctors for Life, who made submissions to the Court as did the Marriage Alliance of South Africa, supported on affidavit by the Roman Catholic cardinal, Cardinal Wilfred Napier. On application by the relevant parties, the Court also determined that the case of *Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* set down to be heard in the High Court later, should be heard at the same time as the *Fourie/Bonthuys* case. In the Equality Project, the applicants challenged the constitutionality of s 30(1) of the *Marriage Act* 25 of 1961 that referred in the marriage formula only to opposite-sex couples.

2 See Church “Same-sex unions – Different voices” 2003 *Fundamina* 44.

partners. In comparative perspective examples were given of the liberalising decisions of certain of the courts in the United States of America and Canada. Notable examples of legislative recognition were the relevant statutes in the Scandinavian countries and in the Netherlands and Germany. Except for proposed legislation in the Netherlands, however, there was at that time no provision which determined that the traditional concept of marriage should encompass the same-sex union. Instead relief was granted to aggrieved partners either on an *ad hoc* basis in specific circumstances or by means of legislation that served to provide for the conclusion and consequences of such unions. These were generally regarded as special “civil unions” or “domestic partnerships” that operated alongside what was recognised as the legal institution of marriage. Moreover, it was pointed out that even where legal reform was effected there was often political resistance to such moves.<sup>3</sup>

In South Africa until recently the traditional notion of marriage as a legal institution was that it was the voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasted.<sup>4</sup> The celebrated common-law definition of heterosexual marriage held sway despite the fact that it was widely recognised that, particularly in modern industrialised societies, there had been “profound transformation” of the so-called traditional nuclear family and of the legal relationship between family members.<sup>5</sup> Nonetheless, as was shown in the earlier article, in the light of a new constitutional dispensation in which human rights are protected, particularly the right to equality and not to be unfairly discriminated against on account of sexual orientation as set out in section 9 of the Constitution, the Constitutional Court has, on an *ad hoc* basis, recognised the rights of same-sex partners in a series of decisions over the last decade.<sup>6</sup> It was clear in the light of the libertarian jurisprudence of the

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3 See Church (n 2) 57. Because of the federal dispensation in the USA, the position differs from one state to another. From the mid-1990s onwards – chiefly in reaction to the liberal decisions in various jurisdictions – many states enacted so-called “defense of marriage acts” (DOMA’s). The purpose of the legislation was to prohibit same-sex couples from marrying within the state and to provide for the respective state to refuse to recognise such marriages performed in other states. By 2004, DOMA’s had been enacted in some thirty eight states, four of which were incorporated in the constitution of the respective state. On the Federal level there is also a *Defense of Marriage Act* and in 2004 the President, George Bush, expressed support for proposed amendments to the US Constitution which would restrict marriage to a man and a woman. For such amendment to be passed, however, it would have to be approved by a two-thirds vote of both the House and the Senate and by three-quarters of the states; see, in general, the White Paper published by the American Bar Association as “An analysis of the law regarding same-sex marriage, civil unions and domestic partnerships” in 2004 *Family Law Quarterly* 339; see 3 below.

4 As stated by Innes CJ in *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 61.

5 See Sinclair assisted by Heaton *The Law of Marriage* Vol 1 1996 Ch 1.

6 In this regard the striking down of discriminatory provisions has ranged, eg, from matters of adoption by unmarried same-sex partners in *Du Toit and Another v Minister for Welfare and Population Development and Others* [2002] 10 BCLR 1006 (CC), to those relating to financial benefits previously denied to same-sex but enjoyed by opposite-sex

Constitutional Court that it would only be a matter of time before same-sex partners would apply to have their unions recognised *qua* marriage. Thus some three years after the first hearing of their application, such prayer for recognition by Ms Fourie and Ms Bonthuys would be granted by the Supreme Court of Appeal<sup>7</sup> and subsequently confirmed by the Constitutional Court.<sup>8</sup>

I would like to focus on the approach of these courts respectively in the context of what hitherto has been the traditional concept of marriage in South Africa and to compare this approach with the conservative approach in the earlier Constitutional Court judgment in the case of *Volks v Robinson*.<sup>9</sup> There has also been notable change in the legal dispensation in many countries over the last few years.<sup>10</sup> For the purpose of this article, however, I will refer only briefly to this and instead focus on legislative reform in New Zealand and the United Kingdom that came into effect more recently.<sup>11</sup>

## 2 Background: Brief history of the litigation

In 2002 the parties, Ms Fourie and Ms Bonthuys, approached the Pretoria High Court for an order declaring that the common law had developed in accordance with the Constitution<sup>12</sup> so as to encompass a same-sex union in the definition of marriage and also for a mandamus ordering the Minister of Home Affairs and the Director-General to register their intended marriage as a valid marriage in terms of the *Marriage Act*.<sup>13</sup> I will not here go into the pleadings and the reasoning of the Court in this case: the procedural issues involved have been dealt with elsewhere.<sup>14</sup> Suffice it to say, however, that despite prompting by the presiding judge, they did not challenge the constitutionality of the common-law definition or the discriminatory provisions under the *Marriage Act*. The Court

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marriage partners in eg *Satchwell v President of the RSA and Another* [2002] 9 BCLR 810 (CC).

7 [2005] 1 All SA 273 (SCA).

8 See n 1 above.

9 [2005] 5 BCLR 446 (CC).

10 Many types of civil unions exist. Some are identical to marriage except in name, while others have all the rights accorded to married couples and are called "registered partnerships" and sometimes "domestic partnerships". In 2001 the Netherlands recognised same-sex marriage as equal in status to opposite-sex marriage in addition to its 1998 "registered partnership" law that could apply to both same-sex and opposite-sex couples. Belgium did likewise in 2003. From June 2003 to June 2005 courts in eight provinces in Canada had extended marriage to include same-sex couples. Gay marriage is also legal in Massachusetts in the USA; see further 3 below.

11 The *Civil Union Act* 102 of 2004 (NZ) and the *Civil Partnership Act* 2004 (UK) that came into effect on 25 April and 5 December 2005 respectively.

12 Constitution of the Republic of South Africa, 1996.

13 25 of 1961.

14 See Jacqueline Church "Same-sex marriage: A matter of procedure?" 2003 *De Rebus* 39.

dismissed their application. Subsequently the parties approached the Constitutional Court for leave to appeal against the High Court decision. This was turned down: the applicants had not challenged the constitutionality of the relevant legal provisions. In view of the fact that the judicial development of the common law was in issue, the interests of justice required that the matter first be canvassed in the Supreme Court of Appeal. The parties were therefore enjoined to approach that tribunal first.

There the appeal was heard in the context of the constitutional imperatives contained in sections 8(3), 9(3) and 173 of the Constitution<sup>15</sup> and in part upheld. Although all five judges held that the exclusion of same-sex couples from the common-law definition of marriage constituted unfair discrimination, two separate judgments were delivered. In the majority judgment delivered by Justice Cameron, the Court found that it had an obligation to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights.<sup>16</sup> Referring to the equality jurisprudence that had emanated from the Constitutional Court over the last decade and which included judgments protecting the minority disadvantaged group of gay and lesbian people, Cameron stressed that all persons have the same inherent worth and dignity as recognised in the Constitution and that same-sex partners were as entitled to found their relationship in a secure manner as were opposite-sex partners. The capacity to marry enhanced the dignity of a couple choosing to spend their life together. While legislative amendment had ameliorated the position in this regard, the exclusionary definition of marriage amounted to unfair discrimination and consequently needed to be developed in accordance with the Constitution as “a union of two persons to the exclusion of all others for life”.<sup>17</sup> He, however, held that the discriminatory formula embodied in the *Marriage Act*<sup>18</sup> was peremptory in terms of the legislation and the Court was not empowered to “read in” other words. Thus although the Court was prepared to alter the common-law definition to one which defined marriage as the

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15 As set down in the Bill of Rights, s 8(3) determines that when applying a provision of the Bill of Rights in order to give effect to a right, a court “must apply or if necessary develop the common law to the extent that legislation does not give effect to that right”. S 9(3) determines that the state “may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”. In terms of s 173, the Constitutional Court, the Supreme Court of Appeal and the High Court have the “inherent power to regulate their own process and to develop the common law taking into account the interests of justice”.  
16 In terms of s 39(2).

17 At 290[49] of the report; apparently the majority considered such union to be more lasting than what was formerly the case in terms of the common law.

18 Act 25 of 1965. In terms of s 30(1) the marriage formula refers to lawful “wife” and “husband” and obviously excludes partners of the same sex. Clearly this discriminates against them.

voluntary union of two persons for life (including same-sex couples), the celebration of such marriage could take place in terms of the *Marriage Act* only after the offending formula had been amended by the legislature.<sup>19</sup> The celebration of a same-sex marriage other than a secular one would therefore have to be by a church sympathetic to such unions.

A minority judgment was handed down by Justice Farlam who, in characteristic fashion, gave an interesting historical resume of the legal position of same-sex unions. In his judgment he went further than the majority did. He held not only that the common-law definition should be expanded to include same-sex marriage, but also that the necessary amendment be read into the default formula<sup>20</sup> provided for in the *Marriage Act*. At the risk of oversimplification and without going into the various interpretative devices canvassed by the judge, the argument briefly was as follows:

The *Marriage Act* does not expressly approve of the common-law definition of marriage and consequently cannot be regarded as placing a “legislative imprimatur” on such definition. However, it was clear that the formula was framed on the assumption that such definition was correct, as it was in fact in 1838 and 1961. Once it was recognised that the definition no longer applied since it had been expanded to embrace same-sex unions, the Court was entitled to modify the formula in line with the changed definition. This, Farlam determined, was well settled law.<sup>21</sup>

However, in view of the comprehensive recommendations of the South African Law Commission regarding various options which might be embodied in legislation on domestic partnerships,<sup>22</sup> the judge determined that the order should be suspended for two years to enable Parliament to enact the

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19 At 285[28] of the report. The judge determined that the default formula which a marriage officer puts to a couple and which requires each partner to answer whether the other was accepted as a “lawful wife (or husband), could not be changed for two “principal reasons”: First, this would go further than what the process of statutory interpretation could “appropriately countenance” and, secondly, the words because of their nature and the role assigned to them by the statute, were “not susceptible to the suggested interpretative process”. As discussed below Farlam JA was to follow a more progressive and laudable approach.

20 As Justice Farlam explains at 301[77] and 318[132] of the report, the formula in the 1961 legislation is historically based on the Cape Orders in Council of September 1838 and April 1840 and subsequently embodied in the relevant laws of the Transvaal and Orange Free State.

21 At 381[135] of the report reference was made to the dictum of Schreiner JA in *Durban City Council v Gray* 1951 3 SA 568 580 (A): “[I]t is within the powers of a court to modify the language of a statutory provision where this is necessary to give effect to what was clearly the Legislature’s intention.” Clearly in the case of the marriage formula the legislature’s intention was to provide a formula for use of those capable of marrying and wishing to do so. Once it was established that same-sex marriage was possible the formula could be changed to reflect this.

22 See SALC Discussion Paper 104 Project 118 *Domestic Partnerships* Vols 1 & 2.

appropriate legislation. In my opinion this was a sound judgment. Nonetheless both the State and the aggrieved parties (for obvious reasons) were not happy and the matter went on appeal to the Constitutional Court.<sup>23</sup>

Here, Justice Sachs who delivered the judgment re-iterated that over the last decade the Court had highlighted the fact that there are a multitude of family formations evolving in South Africa and it was therefore inappropriate to entrench any one as the sole legally acceptable one. He explained how both here and abroad gays and lesbians had been marginalised and harassed and this was clearly against the constitutional imperatives which enjoined tolerance and respect for the dignity of all. The exclusion of same-sex couples from an institution which should serve and protect a secure intimate relationship was not only discriminatory but resulted in material deprivation and injury. In an open and democratic society contemplated by the Constitution there must be mutually respectful co-existence. For the state to acknowledge that partners in same-sex unions should enjoy the same legal status, entitlements and responsibilities as did partners in the conventional marriage, in no way infringed on the rights of religious organizations. No minister of religion could be compelled to solemnise a marriage if such a marriage would not conform to the tenets of the religion concerned: "The two sets of interests involved do not collide", he declared, "they co-exist in a constitutional realm based on accommodation of diversity."<sup>24</sup> Countering the argument that allowing same-sex unions the status of marriage would serve to "devalue" the institution, Sachs declared that such view is not only demeaning to same-sex couples but that the inclusion of their union as part of the institution of marriage could serve to strengthen it. Although international law protected the marriage of heterosexual couples it did not exclude equal recognition of the rights of same-sex couples to enjoy the status, entitlements and responsibilities accorded by marriage to heterosexual couples.

The conclusion was that the exclusion of same-sex couples from the institution of marriage was discrimination in terms of section 9(3) of the Constitution. The problem was not what was included in the common-law definition and the relevant statutory provision, but what was left out. In the result the Court ordered that (1) the common law definition of marriage was declared to be

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23 In the meantime the Lesbian and Gay Equality Project had brought a challenge to the *Marriage Act* as well as to the common-law definition to Court and this was to be heard later. In the event the Equality Project applied for direct access to the Constitutional Court for the matter to be heard together with the *Fourie/Bonthuys* appeal and cross appeal. This was granted. The Court also granted Doctors for Life and the Marriage Alliance to be heard as *amici curiae*; see n 1 above.

24 At 65[98] of the decision handed down in December 2005.

inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and benefits coupled with responsibilities it accords to heterosexual couples, and (2) the omission from section 30(1) of the *Marriage Act* of the words “or spouse” after the words “or husband” was inconsistent with the Constitution. The *Marriage Act* was declared invalid to the extent of this inconsistency.

While Justice O’Reagan agreed with the findings of the main judgment on unconstitutionality she dissented on the remedy agreed upon by the majority and the subsequent final order. She held that the relief sought as set down in the majority judgment should take immediate effect.

Nonetheless, the majority determined that the declarations of invalidity be suspended to allow Parliament to correct the defects. Sachs J, with whom the majority concurred, declared that given the great public significance of a sensitive matter and the importance of a firmly-anchored foundation for the achievement of equality it was appropriate that Parliament be given the opportunity to map the best way forward. This was desirable particularly in the light of the recommendations for reform by the South African Law Commission. One option was simply to amend the relevant legislation. Another possibility and one suggested by the South African Law Commission was a new generic *Marriage Act*<sup>25</sup> (to be called the *Reformed Marriage Act*) to give recognition to all marriages, including those of same- and opposite-sex couples irrespective of religion, race or culture. At the same time the current *Marriage Act* would not be repealed but renamed as the *Conventional Marriage Act*. The *status quo* would be retained and legal recognition would be available only to opposite-sex couples. These Acts would aim to give effect to both the constitutional equality and freedom of religion provisions contained in sections 9 and 15 respectively. Ministers of religion or religious institutions would have the choice to decide in terms of which statute they wished to be designated as marriage officers. The state would then designate its marriage officers in terms of the *Reformed Marriage Act*.

Whatever remedy was chosen, however, it would have to ensure that the principle of equality in respect of same-sex and opposite-sex couples was maintained.

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25 This is what Professor Wintemute of the University of London calls the “full equality issue”; see his note on “International trends in legal recognition of same-sex partnerships” 2004 *Law Quarterly Review* 577 585.

Should Parliament not correct the defect within the allotted time, section 30(1) of the *Marriage Act* 25 of 1961 will automatically be read as including the words “or spouse” in the relevant provision so as to enable same-sex couples to conclude a marriage in the same way as opposite-sex couples.

The progressive approach taken in the *Fourie/Bonthuys* decision is in sharp contrast to that of the majority decision in the earlier *Volks v Robinson*<sup>26</sup> where the majority of the Court was not prepared to recognise co-habitation as akin to marriage for purposes of a claim to maintenance by the survivor in a permanent life partnership. The matter was before the Constitutional Court on appeal from the decision from the Cape High Court. The proceedings in the Court *a quo* had been initiated by Mrs Robinson who had been a partner in a permanent life partnership for some sixteen years until the death of her partner, Mr Shanding. Although there was no obstacle to marriage (the former Mrs Shanding had died of cancer) the parties had not married. Following the death of her partner, Mrs Robinson submitted a claim against the estate for maintenance in terms of the *Maintenance of Surviving Spouses Act*.<sup>27</sup> The executor, one Volks, rejected it because she was not a “survivor” as provided for in the Act. She then approached the Court for an order declaring that she was so entitled, alternatively declaring that the relevant provision was unconstitutional and that this could be cured if a directive was included determining that the word “survivor” be read as including “the surviving partner in a permanent life partnership”. The Court *a quo* upheld her claim, finding that her relationship with Shanding had been a “monogamous permanent partnership” substantially similar to marriage. The exclusion of such permanent life partners from the legislative provisions violated their rights to equality and dignity and was therefore unconstitutional. The executor appealed to the Constitutional Court and the appeal was successful.

The various judgments handed down will not be discussed here, but it is interesting to note that in two dissenting judgments upholding her claim (those of Sachs and of Mokgoro and O’Reagan) the reasoning was along the lines of the subsequent *Fourie/Bonthuys* decision.

However, particularly in the judgment of Ngcobo J who concurred with the majority but who wrote a separate judgment, a conservative approach is reflected. In his view the conventional concept of monogamous, opposite-sex marriage is still sacrosanct. As in the *Fourie/Bonthuys* decision it was argued

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26 *Volks v Robinson* [2005] 5 BCLR 446 (CC).  
27 of 1990.

for the claimant that discrimination against her on the ground of her marital status was unfair in terms of section 9(3) of the Constitution. While accepting that to deny her claim would be discrimination against Mrs Robinson, the judge determined that such discrimination was not unfair. The Constitution, he argued, protected the right to marry and the institution of marriage and this accorded with the relevant international human rights instruments. The protection of marriage was a legitimate area in which the law might involve itself. This meant it could afford protection to married persons and not to unmarried persons. Furthermore, the respective partners could have married had they chosen to do so. Their entitlement to protection depended upon their own decision.

In my opinion the reasoning in the dissenting judgments and particularly that in the judgment of O'Reagan with which Mokgoro agreed, was more in accordance with the constitutional precepts and the principle of proportionality and contextualism as laid down in the *Harksen*<sup>28</sup> decision. In the circumstances the order of invalidity was suspended in the light of the possibility of a new legislative dispensation in accordance with the recommendations of the South African Law Commission.

Be that as it may, after *Fourie/Bonthuys* there is no doubt that the law relating to family relationships has "opened up" and the concept of marriage has "transformed": this despite the fact that the aggrieved couple still have a period of waiting before their union can be formalised.

### **3 The position in other countries: A brief resumé**

As already mentioned, there has been legal change in many countries regarding the unions of same-sex couples, and in some instances such unions are equated with the conventional institution of marriage. A detailed analysis, however, is beyond the scope of this article. Since the most recent changes are reflected in the relevant legislation in New Zealand and the United Kingdom, I would like to focus on these after giving a brief resumé of the development in other jurisdictions in so far as this reflects extension of the traditional concept of marriage to include same-sex couples.

Legal recognition and regulation of the relationship of same-sex couples in the United States of America has been generally conservative and in many

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28 *Harksen v Lane* NO 1998 1 SA 300 (CC); see too Lind "Domestic partnerships and marital status discrimination" 2005 *Acta Juridica* 108.

jurisdictions constitutional challenges to the exclusion of same-sex couples from the institution of marriage have been unsuccessful. Notable exceptions, in Hawaii, Alaska, Vermont and Massachusetts, have raised widespread attention and commentary.<sup>29</sup> The most recent progressive decision handed down in this regard was that in the Massachusetts Supreme Judicial Court in the case of *Goodridge v Department of Public Health*,<sup>30</sup> which determined that the state of Massachusetts in its Constitution could not limit marriage to opposite-sex couples. The reasoning was similar to that in the South African Constitutional Court decision in its decision in the *Fourie/Bonthuys* case as already outlined.

With regard to Europe and other countries there have also been many changes in the last decade relating to the status of same-sex unions.<sup>31</sup> However, it is chiefly in Belgium and the Netherlands that the traditional concept of marriage has been expanded to embrace same-sex unions.<sup>32</sup> The Netherlands became the first Western country to legalise gay and lesbian marriages. Since 2001 citizens of that country or those who have a valid residency title may marry and adopt children. In addition both opposite- and same-sex couples may enter a registered partnership instead of marriage. In Belgium, since 2003, one partner needs to be a citizen or legal resident in order to conclude a same-sex marriage and in that country too, couples may choose to enter a registered partnership.

#### **4 Aspects of the new dispensation in New Zealand and the United Kingdom**

The legislation in both these jurisdictions is comprehensive and I will focus mainly on provisions which relate to a change in the traditional concept of marriage. I begin with New Zealand since the New Zealand statute came into effect before that of the United Kingdom.

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29 See generally White Paper (n 3) and Blumberg "Legal recognition of same-sex conjugal relationships" 2004 *UCLA Law Review* 1555; see too Church (n 2) 56-58.

30 440 Mass 309, 798 NE 2d 941. See too Wintemute "The Massachusetts same-sex marriage case: Could decisions from Canada, Europe and South Africa help the SJC?" 2004 *New England Law Review* 505 which has the case as an appendix. For a conservative and critical view of the case and its implications in which views similar to those expressed by the majority of the court in *Volks v Robinson* as discussed above, are held, see the case note on *Goodridge* in the 2004 *Harvard Law Review* 2441-2447

31 Registered Partnerships Acts in the Scandinavian countries include those in Denmark (1989); Norway (1993); Sweden (1995); Iceland (1996) and Finland (2002). In France the Civil Solidarity Pact (PACS) (1999) can be entered into by same- and opposite-sex couples, while in Germany the *Life Partnership Act* 2000 became effective in August 2001. Its status is similar to the registered partnerships of the Scandinavian countries; see Church (n 2) 53-55.

32 Reference to the relevant provisions in the Civil Codes and to a translation of the Dutch law by Kees Walldijk of the University of Leyden may be made online at

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The *Civil Union Act*<sup>33</sup> in New Zealand has been described as a copy of the *Marriage Act* with “marriage” replaced by “civil union”. In this regard the legislation is more radical than the United Kingdom legislation. Its companion, the *Relationships (Statutory References) Act*, was passed to remove discriminatory provisions from other legislation. The legislation promoted by the Labour MPs was treated as a conscience issue by most parties, to the left and right, and was passed by sixty five votes to fifty five. It is interesting to note in this regard that forty five members of the Labour Party voted for and six were against the proposed legislation; while of the members of the more conservative National Party three members voted for the legislation and twenty four against; of the Green Party nine members were for the legislation and none was against it, and for the Maori Party no one was for the change and one member was against it.

Further statistics South African readers might find interesting – particularly in the light of proposed legislative changes – are: The New Zealand public narrowly supported the Bill with polls indicating around fifty six per cent in favour; three months after the Act came into effect, a HeraldDigiPoll survey revealed that the majority of New Zealanders (who expressed opinion either way) were happy with the legislation and when asked whether they were happy with the way the law allowing civil unions was working, forty six per cent said they were, thirty six per cent were unhappy and eighteen per cent were undecided or refused to comment. By the end of June 2005 seventy four couples had solemnised their relationship in a civil union and of those couples only ten were heterosexual.

Which brings me to an important point, namely that, as is the case in the Netherlands and Belgium, a civil union may be entered into by couples of the same sex or by opposite-sex couples. Furthermore, while the “conventional” marriage is still recognised, the civil union is equated with it in all but name.

Some other features briefly are: There are two types, namely one solemnised by a Registrar of Civil Unions in a Registry Office, and one by an authorised Civil Union Celebrant at a place other than a registry office. During the ceremony and before at least two witnesses, each party must make a clear

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<http://www.juridat.be/cgi-loi/legislation.pl>; see Bailey “Samesex relationships across borders” 2004 *McGill Law Journal* 1013.

33 Information regarding the position in New Zealand was obtained online at [http://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Births-Deaths-and-Marriages-Civil-Union?Open](http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Civil-Union?Open) Document while the statute itself may be downloaded online; [http://www.legislation.govt.nz/libraries/contents/om\\_isapi.dll?clientID=768382951](http://www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=768382951) (18 January 2006).

statement to the other that they acknowledge that they are freely joining in a civil union with each other.

To enter a civil union both parties must be at least sixteen and if either party is sixteen or seventeen, consent must be obtained from the relevant parent, guardian or Family Court Judge.

A procedure is determined for changing an existing marriage into a civil union and relationships are recognised as civil unions in other countries if this is listed in the regulations. This provision, intended to counter conflict-of-laws problems, is an important one and should be emulated in any proposed South African legislation.

The legislation for the United Kingdom is the *Civil Partnership Act* of 2004 that only came in effect on 5 December 2005.<sup>34</sup> I will give only the briefest of overviews of the legislation here, in line with the explanatory notes. In the manner of the English common law the legislation is detailed. Provision is also made for the application in Scotland and Northern Ireland with the relevant changes that were determined beforehand.

The purpose of the Act is to enable same-sex couples to obtain legal recognition of their relationship by forming a civil partnership. They may do so by registering as civil partners provided (1) they are of the same sex; (2) they are not already in a civil partnership or are *lawfully married*;<sup>35</sup> (3) they are not within the prohibited degrees of relationship; and (4) they are both aged sixteen or over (and if either of them is under eighteen and the registration is to take place in England, Wales or Northern Ireland, the appropriate consent has been obtained).

The Act also sets out the procedure in detail as well as the legal consequences of forming the civil partnership and the rights and duties of partners. Property and financial arrangements are provided for; so too is the position of children and parental rights. The Act furthermore determines how the partnership may be dissolved in the United Kingdom. Finally it covers important aspects concerning the conflict of laws as well as the jurisdiction of English courts in the recognition and dissolution of civil partnerships formed or dissolved at home

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34 Hot off the press in this regard is Gray & Brazil *Blackstone's Guide to the Civil Partnership Act*: this is a 2006 publication which includes a copy of the Act.

35 Although in terms of the UK Act the traditional concept of marriage by opposite-sex parties has not been transformed in the same way as it has in South Africa in terms of the decisions discussed, the civil partnership is equated with marriage in much the same way as the civil union is in New Zealand.

and abroad and in cases where one or both parties are citizens of the United Kingdom or where they are both foreign nationals.

What is important to note for the purposes of this article, however, is that the concept of the conventional or traditional marriage is not changed, although identical or similar provisions as those contained in the *Matrimonial Causes Act* 1973, apply to the civil partnership as an additional form of conjugal union.

## **5 Conclusion**

As far as South Africa is concerned, it is clear that transformation in the concept of marriage has already taken place and has been recognised by the Constitutional Court; the measure of popular acceptance of this, however, awaits the debates of the representatives of the people in Parliament. In this regard important research has already been done in comparative perspective by the South African Law Commission and this will no doubt assist in the framing of proposed legislation.

An important aspect in regard to the recognition of same-sex marriage is the implication of this in the context of private international law and this will require careful and sound research before legislative change is effected.