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An Overview of Recent Legal Developments in South Africa with Regard to the Position of Lesbian and Gay Parents and Children with Specific Reference to the Adoption of Children*

J.A. Robinson

I. INTRODUCTION

A constitutional dispensation designed to innovate social, political, and legal structures that would be radically different from those of South Africa's past history¹ came into effect in South Africa on April 27, 1994. The *Constitution of the Republic of South Africa* 200 of 1993 (hereafter referred to as the Interim Constitution) not only recognized the injustices of the past, but also depicted the new South Africa as an open and democratic society based on human dignity, equality, and freedom. To this end, a Bill of Rights was entrenched in the Interim Constitution to provide legally enforceable backing.² In the new dispensation, any

* This contribution to some extent overlaps with articles published in the *Forum Iuris Internationalis, Franz Lutz Lecture Series* (Justus Liebig University Gießen, Germany) under the title "Children's Rights in the Constitution of South Africa" and J.A. Robinson, *The Best Interests of Children in Custody Litigation Where Homosexuality of a Parent is a Consideration*, 2005 J. JURID. SCI. 107.

1. The *Constitution of the Republic of South Africa* 200 of 1993 (S. AFR. (Interim) CONST. 1993) came into effect on this date. It effected radical changes in the sense that henceforth the franchise and associated political and civil rights would be accorded to all citizens without racial qualification and the doctrine of parliamentary sovereignty was now replaced by the doctrine of constitutional supremacy. This Interim Constitution was formally adopted as an Act of the pre-democratic Tri-cameral Parliament and was only meant to be a transitional constitution. One of its principal purposes was to set out the procedures for the negotiation and drafting of the final constitution. The *Constitution of the Republic of South Africa* 108 of 1996 (S. AFR. CONST. 1996) completes the negotiated revolution. This Constitution was drafted and adopted by an Elected Constitutional Assembly which had been afforded two years to produce a constitution that conformed to 34 constitutional principles agreed upon during the pre-1993 political negotiations. In *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* (1996) (First Certification Judgment) 1996 (4) SA 744 (CC) (S. Afr.) the Constitutional Court refused to certify that the Constitution conformed to the said principles and it was only in the so-called *Second Certification Judgment* 1997 (2) SA 97 (CC) (S. Afr.) that the Constitutional Court was prepared to find that the text was consistent with the constitutional principles. The Constitution was signed into law by President Nelson Mandela at Sharpeville on February 4, 1997. See JOHAN DE WAAL, IAIN CURRIE & GERHARD ERASMUS THE BILL OF RIGHTS HANDBOOK ch 1 (4th ed. 2001) [hereinafter DE WAAL ET AL.].

2. In the preamble to the Interim Constitution, it is specifically stated that the injustices of the country's past are recognized and that the Constitution is adopted as the supreme law of the country so as to heal the divisions of the past and to establish a society based on democratic values,

institution associated with the discrimination and repression practices of *apartheid* South Africa would be incompatible with the values embodied in the kind of society the country would henceforth aspire to be.³ The *Constitution of the Republic of South Africa* 108 of 1996 (hereafter referred to as the Constitution) echoes the values, principles, and norms of the Interim Constitution.

Institutionalized discrimination constituted a major characteristic of the political history of South Africa. Not only racial discrimination, but also sex discrimination (including discrimination based on sexual orientation) and age discrimination were inscribed into the social fabric of *apartheid* South Africa. Consequently, the principle of equal treatment and non-discrimination has been afforded a special place in the Constitution. Section 9 of the Constitution therefore expressly prohibits unfair discrimination, directly or indirectly, on grounds of, *inter alia*, sexual orientation, sex, and age.⁴

The change in the political dispensation in 1994 has definitely impacted the issue of gay/lesbian couples and children related to one (or both) of the partners in the relationship. In view of the fact that the new constitutional dispensation reflects radically new values and norms, a proper understanding of the legal status of such relationships is only possible if cognizance is taken of the legal-historical background of such relationships and children. It is also clear that constitutional prescriptions pertaining to such relationships on the one hand, and to children's rights within such relationships on the other, must form the focal point of this contribution. The contribution focuses on the influence of homosexuality of a parent in matters pertaining to adoption of children against the background of recent developments relating to the parent-child relationship.

social justice, and fundamental human rights. S. AFR. (Interim) CONST. 1993 pmb1.

3. J.D. Van der Vyver, *Constitutional Protection of Children and Young Persons*, in THE LAW OF CHILDREN AND YOUNG PERSONS IN SOUTH AFRICA 265, 267 (J.A. Robinson ed., 1997).

4. In fact, South Africa is the first state to expressly prohibit discrimination on grounds of sexual orientation in its constitution. A distinction needs to be drawn between sex and sexual orientation. 'Sex' is a biological term, whereas 'gender' is a social term. 'Sex' therefore refers to the biological and physical differences between men and women. Discrimination based on sex would therefore occur, for example, in situations in which pregnant women are discriminated against on that basis. Gender, on the other hand, refers to the ascribed social and cultural male and female roles. An example of gender discrimination would therefore be prejudicial treatment arising out of parenting roles. See DE WAAL ET AL., *supra* note 1, at 215.

II. THE PRE-1994 PERIOD

A. *Historical Background*

Before 1994, the Westminster system of government applied in South Africa, accompanied by the principle of sovereignty of Parliament. Therefore, courts of law did not have the competence to question the legality of parliamentary legislation. The famous dictum of Blackstone that “[w]hat the parliament doth, no authority upon earth can undo” indeed held true for the position in South Africa and had a marked influence on formal attitudes towards marriage and families.⁵

The concept of marriage, as it existed in this period, to a substantial extent reflected the position in Canon law and Roman Dutch law. Canon law, basically Roman law modernized and adapted to meet the needs of the medieval church, was received into Roman Dutch law.⁶ The Catholic Church of the Middle Ages was not only a spiritual institution. It was also a state with its own legislature and courts of law. The jurisdiction of the Church not only included all matters concerning the organization and property of the Church, but also matters connected with faith, sacraments, and sin.⁷ The Church’s jurisdiction overlapped to some extent with that of secular courts. The means by which the Church secured enforcement of its decrees was excommunication. However, judgments of ecclesiastical courts were enforced by Government *qua* the secular arm of the Church.

The sources of Canon law were primarily the Bible, the writings of Church fathers, Justinian’s codification of the *Corpus Juris*, the canons of Church councils, and the decretals of the popes.

The Church teaches, as a matter of revealed truth, that “Christ our Lord elevated the very contract of marriage between baptized persons to the dignity of a sacrament.” . . . Thus, the marriage contract between two

5. Perhaps the correct point of departure to understand the socio-legal background currently prevailing in South Africa is to reflect on the notions of Afrikaner nationalism and especially the religious inclination of the Afrikaner. The combination of these two factors provided a dominant consideration within the constitutional dispensation in the period before 1994. In the period stretching from the early 1930s, Afrikaner nationalism became a strong driving force in the country. In essence, though, Afrikaner nationalism was intertwined with the religious dogma of Jean Calvin. As such, it created a framework which had a definite impact on views held by the legislature and the courts on the nature of marriage and families. The constitutional exposition, as set out, held true until 1994. See W.J. HOSTEN, CARMEN NATHAN, A.B. EDWARDS & FRANCIS BOSMAN, INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY 315 (1977).

6. H.R. HAHLO & ELLISON KAHN, THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND 511 (1968).

7. *Id.* at 511.

married persons is a sacrament—"an outward sign instituted by Christ to give grace." The "outward sign" here is the mutual external manifestation of internal consent by the two parties to the marriage contract. . . . It is the contract of marriage which is the sacrament. An invalid contract is, in fact, a non-existent contract and hence cannot be a sacrament.⁸

The status created by marriage as a sacrament was instituted by God; it was a natural relationship whose ends and essential properties were determined by natural law. These ends and properties could not be varied by human legislation, either civil or ecclesiastical, or by the consent of the parties. "The primary end or purpose of marriage, as instituted by God, is the procreation and rearing of children."⁹

Roman Dutch Law embraced Montesquieu's philosophies that the powers of legislation, administration, and adjudication had to be separated and that each had to be entrusted to a different organ with the legislature supreme.¹⁰ The old ecclesiastical courts were abolished and the Reformed Church became the State Church of the Netherlands. By virtue of the *ius majestas circa sacra*, the Church was subject to control by government. Matters relating to doctrine and service were left solely to the decision of the clerical authorities, but all matters relating to the position of the Church in the community and the legal consequences of acts performed in church, including marriage, were henceforth the concern of the State.¹¹ Through the *ius supremae inspectionis*, government exercised supervision over the appointment of ministers in the Church.

The marriage law of this period was prescribed in the Political Ordinance of 1580 and the Perpetual Edict of 1540. Both these instruments reflected the philosophies of the Reformation and to some extent secularized marriage law. Even though the doctrine of the sacramental nature of marriage was disclaimed, the idea of marriage being a divine institution in its general origin subsisted. The rules of Canon law, which had their foundation not in the sacrament or in any religious view of the subject but in marriage as a natural and civil contract, were retained.¹² Therefore, in view of Biblical texts it was accepted that marriage is a relationship between one man and one

8. Joseph M. Snee, S.J., *The Canon Law of Marriage: An Outline*, 35 U. DET. MERCY L. REV. 309, 311-12 (1958) (quoting 1917 CODE c.1012, § 1).

9. *Id.* at 313.

10. HAHLO & KAHN, *supra* note 6, at 528.

11. *Id.*

12. H.R. HAHLO, *THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE* 11 (3d ed.).

woman. It was especially the comparison of the relationship between a husband and a wife with that of Christ and His congregation that provided for the view of marriage as a relationship exclusively between one man and one woman.¹³

The exclusive definition of the nature of marriage as it existed in Roman Dutch law was received part and parcel into South African law. Besides numerous Roman Dutch texts, South African courts also referred often to the well-known English decision in *Hyde v Hyde and Woodmansee*,¹⁴ in which it is stated that “[m]arriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others.” The biblical justification for marriage as an exclusive relationship between one man and one woman was reflected *holus bolus* by the moral and legal climate predating the Interim Constitution.¹⁵

B. *The Institution of Marriage Before 1994*

South African courts have from time to time reconsidered the nature of marriage. The position the courts took, however, was a relatively simple one. In *Seedat’s Executors v The Master (Natal)*, the issue before the court related to a potentially polygamous union.

Bearing in mind the essential characteristics of marriage, it is clear that the union in question was not a marriage, as we understand it. It parties contracted, but forbidden by our own and fundamentally opposed to our principles and institutions. *And it is impossible for our Courts when dealing directly with the position of a party to such a union to say that she ever was the wife in the sense in which our law uses that term. . . .* It is a hard result . . . that a woman validly married in one part of the British Empire should not be treated as a wife in another part. *But relief can only properly be sought from the Legislature.*¹⁶

The monogamous form of marriage—though it was open to all population groups irrespective of race, nationality, or religion—was out of step with fundamental views held by groups of different cultural and religious backgrounds. The pressure exerted by this state of affairs led to various statutory enactments which, on an *ad hoc* basis, conferred some

13. See Ephesians 5:23–33.

14. L.R. 1 P. & D. 130, 130 (1866).

15. C.R.M. Dlamini, *The Role of Customary Law in Meeting Social Needs*, 1991 ACTA JURIDICA 71, 75 (1991).

16. 1917 A.D. 302 at 309 (S. Afr.) (emphasis added).

of the consequences—patrimonial and personal—on relationships resembling that of marriage. In this fashion it was intended to alleviate some of the harsh consequences that followed the non-recognition of unions which did not conform to Roman Dutch prescripts.¹⁷ In addition to the statutory measures mentioned above, it should be noted that Roman Dutch law already made provision for marriages that were void *ab initio* and that consequently possessed none of the consequences of a valid marriage to be accepted as putative. If the marriage had been solemnized with prescribed formalities (*quod matrimonium fuerit rite et solemniter secundum morem patriae contractum*) and at least one of the spouses had contracted the marriage in good faith (*quod adfuerit bona fides in facto ipsorum contrahendum, vel saltem unius eorum*) certain of the effects of a legal marriage would attach to it.¹⁸

Within the framework set out above, it was rather predictable how courts would deal with issues falling outside of the ambit of the marriage description reflected by Roman Dutch law. Contentious issues that came before the courts from time to time related to the position of same-sex partners—the question of whether people who had undergone a sex-change operation could conclude a marriage and the recognition of religious marriages. The court in all these instances applied the concept of marriage as reflected in Roman Dutch law: essentially it was a relationship between one man and one woman and no exception would be accepted.¹⁹

C. Constitutional Background to the Legal Position of Gay/Lesbian Parents and Children Related to Their Relationship

In the era of parliamentary sovereignty, Parliament was the supreme law-making authority in the state and all citizens and organs of state, *including the courts*, were subservient to Parliament.²⁰ As a result, there were no particular judicial constraints on Parliament. A court could only declare an act invalid if it had not been passed in accordance with the procedures for passing legislation that had been laid down in the

17. See generally Felicity Kaganas & Christina Murray, *The Contest Between Culture and Gender Equality Under South Africa's Interim Constitution* 21 J.L. & SOC'Y 409 (1994) (for a comprehensive exposition of such enactments).

18. HAHLO, *supra* note 12, at 11.

19. Respecting sex change operations, see *W v W* 1976 (2) SA 308 (W) (S. Afr.); *Simms v Simms* 1981 (4) SA 186 (D&C) (S. Afr.); with regard to Muslim marriage, see *Ismail v Ismail* 1983 (1) SA 1006 (A) (S. Afr.); *Seedat's Ex'rs v The Master* 1917 A.D. 302 (S. Afr.); in relation to same-sex relationships, see *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W) (S. Afr.).

20. See *Harris v Minister of the Interior* 1952 (2) SA 428 (A) (S. Afr.); *Minister of the Interior v Harris* 1952 (4) SA 769 (A) (S. Afr.).

Constitution—the courts could not review parliamentary legislation on substantive grounds.²¹ There was no provision for a court to declare an act of Parliament invalid on the grounds that it, for instance, violated fundamental human rights or that it was against the *boni mores*.

Contrary to the situation with regard to parliamentary legislation, courts were frequently called upon to adjudicate issues of common law on the basis of the *boni mores*. In *Olsen v Standaloft*²² the court conveyed that the *mores* is not a static concept; in fact, since they reflect the fundamental assumptions of the community, the *mores* vary from country to country and era to era:

Such flexibility may manifest itself in two ways: by closing down of existing heads of public policy and by the opening of new heads. There is no doubt that an existing head of public policy may be declared redundant

A final observation may be made as to the way in which the courts determine the content of public policy. Apart from reliance on previous precedents, this is done by *a priori* deductions from broad general principles. It is not the practice . . . for parties to lead sociological or economic evidence as to whether particular practices are harmful and it is doubtful to what extent such evidence would be regarded as relevant if it were adduced.²³

The reference to “deductions from broad general principles” may justifiably lead to the conclusion that the determination of the *boni mores* rested squarely within the discretion of a presiding judge. The possibility that was left for the personal inclinations of judges when they had to decide on *mores* pertaining to legal questions had been criticized severely. One author explains that the *mores* had clearly been tainted by the fact that judges had been mostly elderly, white males from Calvinistic backgrounds.²⁴ The correctness of this critique for purposes

21. See, e.g., *Harris v Minister of the Interior* 1952 (2) SA 428 (A) (S. Afr.).

22. 1983 (2) SA 668 (ZSC) (S. Afr.).

23. N.C. SEDDON & M.P. ELLINGHAUS, *CHESHIRE AND FIFOOT'S LAW OF CONTRACT* 331 (9th ed., 2008) (emphasis added).

24. In *Minister of Law & Order v Kadir*, the court pronounced as follows on the subject:

[A]s the judgments . . . illustrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which ‘shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people. . . . What is in effect required is that, not merely the interests of the parties inter se, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the court conceives to be society’s notions of what justice demands.

of this contribution is borne out by the decision in *Van Rooyen v. Van Rooyen*²⁵ as will be discussed *infra*.

D. Van Rooyen v. Van Rooyen

In *Van Rooyen* the mother of two children born from her marriage to the father of the children, and which marriage had been dissolved by a decree of divorce which incorporated an order that the father was to have custody of the children, applied for an order defining her rights of access to the children. The sole issue before the court revolved around the mother's involvement in a lesbian relationship and sharing a house and bedroom with a same-sex partner.

Holding that the application turned on the question of what was in the best interests of the two children,²⁶ the court conveyed that, "What the experts say is to me so self-evident that, even without them, *I believe that any right-thinking person would say that it is important that the children stay away from confusing signals as to how the sexuality of male and female should develop.*"²⁷

Against this background, the court argues that the mother can live in whatever way she likes, but insofar as the interests of the children require it, she must make a choice between persisting in lesbian activity and having access on a more broadly defined basis. The choice regarding her bedroom life, the court decides, is hers, but she cannot make a choice that limits what should appropriately be done in regard to children.²⁸ From this point of departure, the court argues that

[a]t an age where these children soon become 12, 13, 14, they are very quick to pick up the signals of a separate class of male or female typing. The signals are given by the fact that the children know that,

1995 (2) SA 1 (A) (S. Afr.) (emphasis added). In *Sasfin v Beukes* the court explains that, "judges are more to be trusted as interpreters of the law than as expounders of what is called public policy," but that it is nevertheless still left to the courts to determine whether a contract is contrary to public policy. 1989 (1) SA 1 (A) (S. Afr.). It then proceeds to explain that

one must be careful not to conclude that a contract is contrary to public policy because its terms . . . offend one's individual sense of propriety and fairness . . . the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.

Id.

25. 1994 (2) SA 325 (WLD) (S. Afr.).

26. *Id.* at 326 B.

27. *Id.* at 328 J (emphasis added).

28. *Id.* at 329 F.

*contrary to what they should be taught as normal or what they should be guided to as to be correct (that it is male and female who share a bed), one finds two females doing this and not obviously for reasons of lack of space on a particular night but as a matter of preference and a matter of mutual emotional attachment. That signal comes from the fact that they know the bedroom is shared. It is detrimental to the child because it is the wrong signal. The wrong signals are given when . . . there are signs of emotional attachment.*²⁹

The decision in *Van Rooyen* has been criticized severely.³⁰ It is argued that the court *in casu* had made a moral judgment about what was normal and correct insofar as sexuality was concerned. Furthermore, there can be no doubt that the court regarded homosexuality as being abnormal *per se*.³¹ Bearing in mind that the decision was given before the Interim Constitution came into force, it is clear that the court's *a priori* deduction from general principles, which it considered to reflect the *boni mores*, led to this conclusion. It goes without saying, therefore, that the criticism leveled against the pre-1994 dispensation—that the convictions of male, Calvinist middle-aged judges sometimes dictated the very essence of the *mores*—indeed holds true.

29. *Id.* at 330 A–C (emphasis added).

30. The common law definition of marriage in South Africa for many years reflected the only legally recognized family form in South Africa. The institution of marriage carried with it a plethora of legal rights and obligations. It was (and still is) regarded as the cornerstone of society—a fixed traditional structure essential for the raising of children and a healthy family. In fact, marriage has enjoyed a uniquely privileged status. However, the argument has been made that lawmakers should abandon what has been described as “archaic, moralistic rules” so as to provide legal recognition to other forms of relationships. See SOUTH AFRICAN LAW REFORM COMMISSION, PROJECT 118: REPORT ON DOMESTIC PARTNERSHIPS 5 (2006), available at http://www.doj.gov.za/salrc/reports/r_prj118_2006march.pdf.

31. Belinda van Heerden, *Judicial Interference with Parental Power*, in BOBERG'S LAW OF PERSONS AND THE FAMILY 545 (2d ed. 1999) (explaining that in the absence of any empirical evidence to support the conclusion that children raised by gay or lesbian parents are exposed to any greater dangers or are more likely to suffer from psychiatric, social, gender-identity, or other disorders than children raised by heterosexual parents in comparable circumstances, this judgment smacks of blatant homophobia). This viewpoint has been echoed by a number of authors. See *id.* at n.173.

III. THE POST-1994 PERIOD—CONSTITUTIONAL PRINCIPLES AND
NORMS RELATING TO GAY/LESBIAN PARENTS AND CHILDREN RELATED
TO THEIR RELATIONSHIP

A. *Introduction*

As referred to in Part I, the new constitutional dispensation begun in 1994 radically impacted legal development in South Africa.³² The new constitutional dispensation deviated from the pre-constitutional era where Christianity and the world-view of the Afrikaner were favored.

South Africa is an open and democratic society with a non-sectarian state that guarantees freedom of worship; it is respectful of, and accommodatory towards, rather than hostile to or walled-off from, religion; acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world-view. The Constitution, then, is very much about the acknowledgement by the State of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination.³³

To illustrate the impact of the Constitution on the legal position of gay/lesbian couples and their children in South Africa, a general overview of constitutional principles and provisions will be given. Thereafter, the focus will fall on the progress of the debate with specific reference to the Constitutional Court's viewpoints on the subject.

B. *The Constitutional Grundnorm*

The *Grundnorm* of the Constitution—the basic norm which, in the case of a discrepancy between different constitutional interests, will override any other constitutional provision that comes into conflict with it—is a product of the country's past. It is constituted by the equal protection and non-discrimination provisions in the Constitution. The provision that South Africa is to be an open and democratic society based

32. See discussion *supra* Part I, ¶ 1.

33. *S v Lawrence* 1997 (4) SA 1176 (CC) at para 151 (S. Afr.).

on human dignity, equality, and freedom, makes it clear that in the case of a conflict of constitutional interests, human dignity and equality will be the primary considerations.³⁴

The provisions regarding equal protection and non-discrimination are found in section 9 of the Constitution. Amongst others, these provisions prohibit unfair discrimination on grounds of race, gender, sex, pregnancy, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. The legislature is also tasked to enact national legislation to prevent or prohibit unfair discrimination. Discrimination on one or more of the grounds set out above will be considered unfair unless it is established that the discrimination is fair.

Broadly speaking, it would appear that the constitutional position regarding discrimination reflects a teleological approach—the purpose of differentiating between categories must dictate the ethical propriety of the basis employed to differentiate between such categories. In other words, the “basis of the classification of groups of persons for the purpose of differentiating in law between these categories must be truly relevant with a view to the legal purpose to be served by the classification.”³⁵ Equal protection, therefore, does not *per se* mean actual equality in the arithmetical sense that would negate all differentiation between categories of people. If the classification is founded on a reasonable basis, and it is truly relevant to the purpose it is meant to serve, classification and differentiation for purposes of law may well fall within a definition of equal treatment. Of course, practicality and legal certainty must also prevail.

C. The Application of the Constitution

The constitutional provisions that have a direct bearing on the position of homosexuals are sections 8, 9, 39 and 36. Sections 28(1)(b), 28(1)(c), and 28(2) relate to the constitutional protection of children’s rights and will be considered below.

1. Section 8 read with section 39(2)—application of constitutional norms and principles

From the provisions of section 8(1), it is clear that the Bill of Rights, true to nature, binds all organs of state. The sub-section reads that the Bill “applies to all law, and binds the legislature, the executive, the

34. See *S v Makwanyane*, 1995 (3) SA 391 (CC) (S. Afr.); Van der Vyver, *supra* note 3, at 283.

35. Van der Vyver, *supra* note 3, at 289.

judiciary and all organs of state.”³⁶ As this provision is self-explanatory, no further attention will be paid to it except to indicate that “law” in these sections is to be interpreted broadly. What is designated by this provision, therefore, is that “law” means positive law which includes statutory law, common law and customary law in contradistinction to where law is simply translated as “Act” (“*wet*”).³⁷

Sections 8(2) and 8(3) also provide for the application of the Bill in the sphere of private law issues. As such, the phraseology in which the horizontal application of provisions of the Bill is couched is juxtaposed with the developmental function of the court in respect of the common law. Section 8(2) and 8(3) provides as follows in this regard:

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).³⁸

These sub-sections apply to all instances where the regulatory law, which either affords legality to the decision taken or act performed or which prohibits such conduct through private law proscriptions or sanctions, is part of the common law. A court is therefore obligated to

36. S. AFR. CONST. 1996 § 8(1).

37. Van der Vyver, *supra* note 3, at 268 n.23.

38. S. AFR. CONST. 1996 ss. 8(2)–(3). It is clear that in contradistinction to section 8(1), natural and juristic persons are only bound by the Bill of Rights to the extent that a provision of the Bill is applicable in view of the nature of the right and the duty imposed. Questions concerning the horizontal application of the Bill can therefore not be determined *a priori* and in the abstract. In fact, from the very wording of section 8(3) it appears that whether a provision of the Bill applies horizontally will depend on the nature of the private conduct in question and the circumstances of the particular case. The extent to which a provision is applicable can only be determined by reference to the context within which it is sought to be relied upon. If, however, the provisions of section 8(2) do find application, the duty to uphold, endure or execute the right vests in a natural or juristic person; similar to the position with regard to organs within the State structure as set out in section 8(1).

The purpose of a provision is an important consideration to determine whether it is applicable to private conduct or not. By the same token, the nature of any duty imposed by the right must also be taken into account. Private or juristic persons are often driven primarily by a concern for themselves while the State, on the other hand, should rather be motivated by a concern for the well-being of society as a whole. The application of the Bill should therefore not undermine private autonomy to the same extent that it places restrictions on the sovereignty of parliament.

consider the permissive or proscriptive rule applicable to conduct of the duty-bound person with two primary questions in mind: Does the concerned rule of the common law in any way frustrate the constitutionally protected right implicated by the decision or act of the duty bound subject? Does the concerned rule of the common law permit limitations of the constitutionally protected right which do not comply with the demands of the limitations provision of the Constitution?

If the answer to either of these questions is yes, a court has an obligation to “develop” the common law in order to give effect to the constitutionally protected right and/or to bring the limitation of that right as sanctioned by the common law in conformity with the limitation demands of the Constitution.³⁹ It is also clear that development of the

39. The form of application in section 8(2) reflects the so-called indirect application of the Bill of Rights. In this instance a dispute is resolved by interpreting a statute or developing the common law so as to promote the spirit, purport, and objects of the Bill through the operation of ordinary law. When the Bill is directly applied, however, the question is whether there is any inconsistency between the Bill and the law or conduct in question. If so, such law or conduct unjustifiably violates the Bill and a remedy provided for by the Constitution will be given to the applicant. *See DE WAAL ET AL., supra* note 1, at 167.

Remedies flowing from a direct application of the Bill to law and conduct are provided for in sections 38, 172(1), 8(3) and 39(2). These sections provide as follows:

Section 38: Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

Section 172(1): When deciding a constitutional matter within its power, a court –

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make an order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Section 8(3) has been referred to already. *See supra* text accompanying note 37.

Section 39(2): When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (*See infra* text accompanying note 42.)

Prima facie there appears to be an overlap between the provisions of sections 39(2) and 8(3). On closer scrutiny, however, it is clear that there is a marked difference in the sense that section 8(3) establishes a law creating power, whereas the competence vested in a court by s 39(2) in regard to the common law is one of applying its normal power of interpretation *in favorum libertatis* with the spirit, purport and objects of the Constitution as a substantive directive. *See Van der Vyver, supra* note 3, at 274. Van der Vyver warns, though, that the distinction between law creation in terms of section 8(3) and development through interpretation pursuant to section 39(2) is difficult to define with any degree of precision. The language of section 8(3) indicates the power of the court to add to the common law provisions that would afford protection of constitutionally defined rights which the common law as such would otherwise not have provided. It furthermore adds to the common law limitations of constitutionally protected rights in their application to natural and juristic persons which will conform with the limitation provisions of the Constitution in all instances where the common law confinement of such rights falls short of the constitutional limitation conditions and requirements.

The provisions of section 172(2)(a) of the Constitution should also be borne in mind. This section provides that the Supreme Court of Appeal, a High Court or a court of similar status

common law in terms of section 8(2) entitles a court to read constitutional rights into the common law which the common law would otherwise not have protected.⁴⁰ The court may also rewrite common law limitations pertaining to a particular right which is now also protected by the Constitution so as to equate those limitations with the constitutional conditions for, and requirements of, such limitations.⁴¹

Section 39(1) and (2) must be read in conjunction with sections 8(2) and (3). These subsections determine as follows:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum—
 - (a) must promote the values that underlie a democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum

may make an order concerning the constitutional validity of an Act of Parliament. However, such an order will have no force unless it is confirmed by the Constitutional Court.

40. *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C) (S. Afr.); *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) (S. Afr.); *Carmichele v Minister of Safety & Security* 2001 (4) SA 938 (CC) (S. Afr.).

41. *Van der Vyver*, *supra* note 3, at 271. *Van der Vyver* points out that courts are given law-creating powers which by far exceed those exercised previously by the High Court in respect of the common law. The fact that implementation of section 8(3) powers amounts to the courts usurping the function of the legislature and as such violates the separation of powers, which constitutes a salient component of the new constitutional dispensation is, however, of no relevance after the decision of the Constitutional Court in *In re Certification of the Amended text of the Constitution of the Republic of South Africa, 1996* 1997 1 BCLR 1 (CC) (S. Afr.). *See supra* note 1. Having endorsed the revised Constitution, the Constitutional Court afforded incontestable sanction to these powers. It is furthermore important to note that whereas in the past principles of natural justice served as a criterion of the judicial developmental function, the courts must now look to the Constitution to find the norm of rights protection, and of the limitation of rights that must be incorporated into the common law.

It has been held in a number of cases, however, that in exercising their powers to develop the common law, judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary. In *Du Plessis v De Klerk*, the court held that

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

1996 (3) SA 850 (CC) at para 61 (S. Afr.) (quoting *R. v Salituro* 1992 (8) C.R.R. 173); *see also Carmichele v Minister of Safety & Sec.* 2001 (4) SA 938 (CC) at para 36 (S. Afr.); *Petersen v Maint. Officer, Simon's Town Maint. Ct.* 2004 (2) SA 56 (CPD) (S. Afr.).

must promote the spirit, purport and objects of the Bill of Rights.

Section 173 of the Constitution provides that all higher courts have the inherent power to develop the common law, taking into account the interests of justice. All courts are obliged to promote the spirit, purport, and object of the Bill of Rights when developing the common law. It follows implicitly, therefore, that where the common law deviates from the spirit, purport, and objects of the Bill, the courts have an obligation to develop it by removing that deviation. The obligation of courts to develop the common law is not purely discretionary. On the contrary, the reading together of these two sections conveys that where the common law, as it stands, is deficient in promoting the section 39(2) objectives, courts are under a general obligation to develop it appropriately. However, while “general obligation” does not mean *per se* that a court must in each and every case where the common law is involved embark on an independent exercise to determine whether the common law is in need of development and, if so, how it is to be developed under section 39(2), it may happen that there may be circumstances where a court will be obliged to raise the matter on its own and require full argument from the parties.⁴² Where the common law has to be developed beyond existing precedent, there are two stages to the inquiry the court has to undertake, even though they cannot be separated hermetically. First, the court must consider whether the existing common law requires development in accordance with the objectives of section 39(2). Should this inquiry lead to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives.⁴³

The prescripts of the common law as interpreted in *Van Rooyen* clearly conflict with section 8 and 39(2), which enact the constitutional obligation of South African courts to develop the common law with regard to homosexual persons so as to bring it in line with the provisions of the Constitution. While the Constitution’s status as the supreme source of the *mores* of the community is confirmed by these provisions, courts are entrusted with the task of interpreting constitutional values and applying such values to develop the common law.

42. *Carmichele v Minister of Safety & Sec.* 2001 (4) SA 938 (CC) at para 39 (S. Afr.).

43. *See* cases cited *supra* note 38.

2. *Section 9—the equality clause*

Section 9 of the Constitution entails the so-called equality clause. In terms of this provision, everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. However, to promote the achievement of equality, legislative and other measures designed to protect or advance persons (or categories of persons) disadvantaged by unfair discrimination may be taken. The state is therefore forbidden to unfairly discriminate directly or indirectly against anyone on a number of grounds set out in section 9(3). These include, *inter alia*, sex and sexual orientation. Private persons are also forbidden to discriminate unfairly on these grounds. In terms of section 9(5), discrimination on one of the grounds will be deemed unfair unless it is established that the discrimination is fair.⁴⁴

In *Harksen v Lane NO*,⁴⁵ the Constitutional Court set out the stages of an inquiry into a violation of the equality clause:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This

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

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

1997 (4) SA 1 (CC) at para 41 (S. Afr.).

45. 1998 (1) SA 300 (CC) (S. Afr.).

requires a two stage analysis:

(b)(i) Firstly, does the differentiation amount to “discrimination?” If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to “discrimination,” does it amount to “unfair discrimination?” If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2). [now sections 9(3) and 9(4)]

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provisions can be justified under the limitations clause.⁴⁶

In essence, the criterion set out above means that there is a preliminary inquiry as to whether the impugned provision or conduct differentiates between people or categories of people. Of course, if there is no differentiation, there is no question of a violation of the provisions of section 9. However, if a provision does differentiate, a two-stage analysis must be applied. The first stage ((a) above) concerns the right to equal treatment and equality before the law and aims at determining whether the provision has a rational basis—if there is a rational connection between the differentiation in question and a legitimate state purpose that it is designed to further or achieve. If the conclusion is negative, the impugned provision violates section 9 and fails the first stage. If, on the other hand, the differentiation is shown to be rational, the second stage of the enquiry ((b) above) is activated. A differentiation that is rational may, however, constitute unfair discrimination when such differentiation relates to the specific grounds on which it is forbidden to discriminate unfairly. In principle, both unfair discrimination and differentiation without a rational basis can then in terms of section 36⁴⁷ be justified as limitations of the right to equality.⁴⁸

46. *Id.* at paras. 41–53.

47. *See* accompanying text *supra* note 47.

48. DE WAAL ET AL., *supra* note 1, at ch. 7.

3. *Section 36—the limitation of constitutionally protected rights*

Section 36(2) provides that a limitation of a constitutionally protected right must comply with the prescriptions of section 36(1) or with the dictates of any other provision of the Constitution. In terms of section 36(1) the limitation of a constitutionally protected right must adhere to the following requirements: the limitation must be sanctioned by law of general application; the limitation must be reasonable; the limitation must be justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and also less restrictive means to achieve the purpose. It is to be noted that “law of general application” reflects a broad definition of law, including limitations sanctioned by statutory provisions and the common law.⁴⁹ The requirement of reasonableness was held to mean that “a law or action limiting a right to freedom must have a reasonable goal and the means for achieving that goal must be reasonable.”⁵⁰

The further qualification that limitations of a fundamental right must be justifiable in an open and democratic society clearly envisages a society that differs fundamentally from the one associated with apartheid South Africa. In fact, the true nature of this requirement only comes to the fore when cognizance is taken of the provisions of section 7(1), which in essence elevate the democratic values of human dignity, equality, and freedom to the status of being the ultimate normative sources of the rights enshrined in the Bill; and of section 39(1), which compels a court to promote the values that underlie an open and democratic society based on human dignity, equality, and freedom when interpreting the Bill.⁵¹

The structure of the inquiry as set out above appears to be quite systematic—one first considers whether there has been a violation of the

49. Van der Vyver, *supra* note 3, at 277.

50. See *Coetzee v Gov't of the Republic of S. Afr.* 1995 (4) SA 631 (CC) (S. Afr.).

51. In *Coetzee v Gov't of the Republic of S. Afr.*, the Constitutional Court held that “[w]e need to locate ourselves in the mainstream of international practice” to establish what is meant by this requirement. 1995 (4) SA 631 (CC) at para 51 (S. Afr.). It is furthermore illuminating to bear the Preamble of the Constitution in mind. Specific reference is made to the motivation for the Constitution *qua* supreme law of the country to achieve the following: (1) Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; (2) Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; (3) Improve the quality of life of all citizens and free the potential of each person; and (4) Build a united and democratic South Africa to take its rightful place as a sovereign state in the family of nations.

right to equality before the law and then considers whether there is unfair discrimination. If the right to equal treatment has been violated there will be no need to consider whether there has been a violation of the non-discrimination right.⁵²

D. The Interpretation of the Constitutional Principles with Regard to Homosexual Relationships

The societal approach towards homosexuality is progressively changing. This is reflected in jurisprudence in which constitutional norms and values are applied to the issue of homosexuality. In a number of cases relating to the crime of sodomy, the courts reflected on the changed *mores* in clear terms. In *S v M* the court held that “the majority of people who have normal heterosexual relationships, may find acts of sodomy unacceptable and reprehensible. We cannot close our eyes, however, to the fact that society accepts that there are individuals who have homosexual tendencies and who form intimate relationships with those of their own sex.”⁵³ In *S v H* the court was very critical of the phrase “normal heterosexual relationship” as employed in *S v M* on the basis that it “implies that homosexual relationships are abnormal in a sense other than the mere fact that they are statistically in the minority.”⁵⁴ The court then proceeds as follows:

In my respectful view the use of the word “normal” in this context is unfortunate, as it might suggest a prejudgment of much current psychological and sociological opinion which is critical of various conventions and assumptions regarding human sexuality. It may also suggest a wrong line of enquiry when coming to re-evaluate the status of homosexual relationships. I would suggest that a more fruitful legal enquiry might be directed at concepts of privacy and autonomy and the issue whether private intimacy *per se* between consenting adult males can ever cause harm to society any more than private heterosexual intimacy between consenting adults.⁵⁵

52. *See, e.g.*, National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (6) BCLR 726 (W) (S. Afr.). In this case the court held that it need not inevitably perform both stages of the enquiry. This was because the first-stage rational basis inquiry would be unnecessary in a case in which the court holds that the discrimination is unfair and unjustifiable. This simply means that in those cases in which a court finds that a law or conduct unjustifiably infringes sections 9(3) or 9(4) there is no need to consider whether the law or conduct is in violation of section 9(1).

53. 1990 (2) SACR 509 (E) (S. Afr.) (emphasis added).

54. 1995 (1) SA 120 (C) at 124C (S. Afr.).

55. *Id.* at 124E.

The court further accepts with approval the approach followed in *Bowers v Hardwick*,⁵⁶ which held that the assertion that traditional Judeo-Christian values proscribed particular conduct could not provide an adequate justification for certain statutory enactments. The state had no license to impose the judgments of religious groups that condemned the behavior at issue on the entire citizenry. The court *in casu* further conveyed that the legitimacy of secular legislation rather depended on whether the state could justify its law beyond its conformity to religious doctrine.

In *Brink v Kitshoff* the court decided that section 8 was adopted to recognize that discrimination against people who were

members of disfavored groups could lead to patterns of group disadvantage and harm, and that such discrimination would be unfair in the sense that it would build and entrench inequality amongst different groups in the South African society. The drafters of the Constitution realized that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination.⁵⁷

Against this background it was held in *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁵⁸ that the desire for equality is not a hope for the elimination of all differences. However, “the experience of subordination—of personal subordination, above all—lies behind the vision of equality.” To understand “the other,” the court held, one must try as far as is humanly possible to place oneself in the position of “the other.” The court stressed that the determining factor regarding unfairness of discrimination is the impact of the discrimination on the members of the affected group.⁵⁹

56. 478 U.S. 186 (1986).

57. 1996 (4) SA 197 (CC) (S. Afr.).

58. 1999 (1) SA 6 (CC) (S. Afr.).

59. The approach to this determination is a nuanced and comprehensive one in which various factors come into play which, when assessed cumulatively and objectively, will assist in elaborating and giving precision to the constitutional test of unfairness. Important factors to be assessed in this regard (which do not constitute a closed list) are: (1) The position of complainants in society and whether they have suffered in the past from patterns of disadvantage. (2) The nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in their fundamental human dignity or in a comparably serious respect, but is aimed at achieving a worthy and important societal goal as . . . the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. (3) With due regard to (1) and (2) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably

The progressive approach regarding sodomy as set out above is also reflected in a number of cases relating to the consequences pertaining to gay/lesbian relationships. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the court referred to the changing *mores* as affirmed in the so-called sodomy cases and moved on to the nature of same-sex relationships.⁶⁰ It stated that the sting of the discrimination against gays and lesbians is reflected in the message that it conveys that they, whether viewed as individuals or in their same-sex relationships, do not have inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals in their relationships.

This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth to all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.⁶¹

Against this background, the court concludes that a statutory enactment exempting “spouses,” and not partners, in a permanent same-sex relationship from certain statutory provisions is discriminatory against such partners. Accepting that the provision *in casu* was aimed at achieving the societal goal of protecting the family life of “lawful marriages,” the court considers the impact of being excluded from these protective provisions of same-sex partners.⁶² In its deliberations, the court conveys that marriage creates a *consortium omnis vitae*, “a physical, moral, and spiritual community of life,” and that “over the past

serious nature. See *Nat'l Coal. for Gay & Lesbian Equal. v Minister of Justice* 1999 (1) SA 6 (CC) at para 19 (S. Afr.).

60. 2000 (2) SA 1 (CC) at para 41 (S. Afr.).

61. *Id.* at para 42.

62. *In casu* the decision dealt with section 25 of the Aliens Control Act 96 of 1991. An application was brought for an order declaring this article to be inconsistent with the provisions of the Constitution on the basis that it discriminated against partners in a same-sex relationship, in that section 25(5) of the Act provided for an exemption from the provisions of section 25(4) for a spouse of a person permanently and lawfully resident in South Africa. By implication this exemption did not extend to partners in same-sex life partnerships.

decades an accelerating process of transformation has taken place in family relationships, as well as in societal and legal concepts regarding the family and what it comprises. The impact of the failure in the statute to also exempt partners in a same-sex relationship is therefore to reinforce harmful and hurtful stereotypes of gays and lesbians.”⁶³

Section 10 of the Constitution recognizes and guarantees that everyone has inherent dignity and the right to have his or her dignity respected and protected. The court therefore comes to the following conclusion:

[G]ays and lesbians have a constitutionally entrenched right to dignity and equality; sexual orientation is a ground expressly listed in section 9(3) of the Constitution and under section 9(5) discrimination on this ground is unfair unless the contrary is established; prior criminal proscription of private and consensual sexual expression between gays arising from their sexual orientation and which had been directed at gay men, has been struck down as unconstitutional; gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, *eros* and charity; they are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household; they are individually able to adopt children and in the case of lesbians, to bear them; in short, they have the same ability to establish a *consortium omnis vitae*; and finally, they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying, and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.⁶⁴

63. The court refers to two typical arguments that bolster the prejudice against gay and lesbian sexuality. In the first place, gays and lesbians are classified as exclusively sexual beings (compared to perception of heterosexual people who, along with many other activities in their lives, occasionally engage in sex). In the second place, the argument is found that gays and lesbians cannot procreate in the same way as heterosexual people and therefore should not be allowed to adopt children. In this regard the Court points out that gays and lesbians are indeed individually permitted to adopt children in terms of the Child Care Act 74 of 1983 and that nothing prevents a gay or lesbian couple, a partner of which has adopted a child, from treating such child in all ways, other than strictly legally, as their child. They can indeed love, care, and provide for the child as though it was their joint child. Nat'l Coal. for Gay & Lesbian Equal. v Minister of Home Affairs 2000 (2) SA 1 (CC) at paras. 49–50 (S. Afr.); see also cases cited *infra* note 86.

64. Nat'l Coal. for Gay & Lesbian Equal. v Minister of Home Affairs 2000 (2) SA 1 (CC) at para 50 (S. Afr.).

The rights to equality and dignity go to the core of the constitutional democratic values of human dignity, equality, and freedom. The forming and sustaining of intimate personal relationships in same-sex fashion are for many individuals essential for their own self-understanding and for the full development and expression of their human personalities. The omission of such partnerships in the present case is therefore found to limit the right to enter into a permanent personal relationship with another at a deep and serious level.⁶⁵

IV. THE APPLICATION OF THE CONSTITUTIONAL PRINCIPLES AND NORMS TO GAY/LESBIAN PARENTS AND THEIR CHILDREN

A. Recognition of New Family Structures

The concept of family has undergone major changes in view of constitutional principles and norms. An accelerating process of transformation has taken place in family relationships, as well as in the societal and legal concepts regarding the family and what it comprises.⁶⁶ This observation is borne out by the following argument of the Constitutional Court in *Dawood v Minister of Home Affairs*:

The importance of the family unit for society is recognized in the international human rights instruments . . . when they state that the family is the “natural” and “fundamental” unit of our society. *However, families come in different shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognizing the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.*⁶⁷

The decision in *Dawood* hardly comes as a surprise. In fact, one can describe it as a logical conclusion of a line of reasoning that has been developing over the last decade. The founders of the Constitution deliberately refrained from including a provision recognizing the family as the basic unit of society. In *In re Certification of the Constitution of the RSA* the Constitutional Court explained that a survey of international instruments conveyed that in general, states have a duty, in terms of international human rights law, to protect the rights of persons to marry freely and to raise a family.⁶⁸ The duty on states to protect marriage and

65. *Id.* at para 58.

66. *Id.* at para 47.

67. 2000 (3) SA 936 (CC) at para 31 (S. Afr.) (emphasis added).

68. 1996 (4) SA 744 (CC) (S. Afr.).

family life has been interpreted in a multitude of different ways. By no means has there been universal acceptance of the need to recognize the rights to marriage and to family life as being fundamental in the sense that they require express constitutional protection.⁶⁹ The court then proceeded to explain that the absence of marriage and family rights in many African and Asian countries reflects the multi-cultural and multi-faith character of such societies.

Families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms. They thereby avoid disagreements over whether the family to be protected is a nuclear family or an extended family, or over which ceremonies, rites or practices would constitute a marriage deserving of constitutional protection. . . . These are seen as questions that relate to the history, culture and special circumstances of each society, permitting of no universal solutions.⁷⁰

It is also clear from the decision that the Constitutional Court refrained from providing a definition of a family. In its views of the nature of gay/lesbian relationships the Constitutional Court has also made it clear that from a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. It was held in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*⁷¹ that a view to the contrary would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence their relationship or become so anytime thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It may even be demeaning to a couple who voluntarily decides not to have children or sexual relations with one another; this decision is entirely within their protected sphere of freedom and privacy.

The approach of the Constitutional Court has served as the basis for a number of decisions radically deviating from the approach in *Van Rooyen*. In *Ex Parte Critchfield* the court concluded that

69. *Id.* para. 98.

70. *Id.* para. 99.

71. 2000 (2) SA 1 (CC) para. 51 (S. Afr.).

[i]n a society such as ours which proscribes discrimination on the basis of sexual orientation, these encounters can be viewed in no more serious a light than conventional adultery. . . . [I]n my view, *the Court should not be particularly concerned with the sexual predilections of litigants when it comes to custody matters*. It encourages a voyeurism in public life that demeans us all. It is an entirely different matter where such predilections pose an actual or potential threat to the welfare, psychological or physical, of young children.⁷²

In *V v V* it was found that the court in *Van Rooyen* had made a moral judgment about what was normal and correct with regard to sexuality and about homosexuality, which it found to be abnormal *per se*.⁷³ Referring to the limitations allowed by the Constitution on fundamental rights, the court explains that there may well be situations where a court will override the equality clause in the best interests of the child, but it would then consider the reasonableness of such limitations. The court concluded, therefore, that an order by a court discriminating against a lesbian mother who applies for access rights to her children that is based solely on her sexual orientation will not easily pass constitutional muster. In the same way a court cannot take cognizance of racism or religious intolerance when it decides on the access of the mother to her children, it cannot take cognizance of prejudice in the society. To do that would be to unreasonably limit, or perhaps even negate, the essential content of the right not to be discriminated against on the ground of sexual orientation.

The Constitution “does allow for fundamental rights to be limited by law of general application where the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality, and where it does not negate the essential content of the right.”⁷⁴ While it is clear that “currently existing bigotry and its consequences [does not in itself] create a valid reason to limit the constitutionally guaranteed rights of a gay or lesbian parent,” it is

equally clear that while the child is growing up there may be strong recrimination from peers and other parents against such child when it becomes known that his or her parent is gay or lesbian. The child may also become confused by the parent’s unwillingness to conform to a generally accepted norm. There is in terms of the equality clause indeed nothing abnormal or wrong about a homosexual relationship, but it may be in the best interests of a child to discriminate against its homosexual

72. 1999 (3) SA 132 (W) (S. Afr.) (emphasis added).

73. 1998 (4) SA 169 (C) (S. Afr.).

74. See discussion *supra* Part III.C.

parent if that would be the only way in which the child would be spared unnecessary suffering.⁷⁵

B. Evaluation of South African Jurisprudence Relating to Lesbian Gay Parents and Children

One can discern three different standards for how the homosexuality of a parent should be applied by a court in respect of lesbian gay parents and children. The first standard is the so-called *per se* approach. This standard generally holds that a homosexual parent is unfit as a matter of law. The court does not have to consider any factors concerning the child's best interests, but can categorically deny custody to the homosexual parent. The second standard is the *presumption of harm* or *middle ground* approach. In determining the fitness of the homosexual parent, the court following this approach will conclude that declaring a lesbian mother unfit as a matter of law is improper, and that other factors affecting the best interests of the child must also be considered. However, even though the parent is not *per se* considered to be an unfit parent, the court presumes that the child will suffer because of the social stigma attached to the parent's homosexuality. This approach condemns the homosexual conduct but not the homosexual person. Applying this approach, a court may find a homosexual parent unfit because the social stigma attached to homosexuality may be detrimental to the child. Consequently, the court will often forbid the child to have contact with the parent's homosexual lifestyle.⁷⁶ The third standard is the *nexus* approach. This approach resolves many of the problems of the first mentioned standards and takes a parent's sexual preference into consideration as only one of many factors. Homosexuality will only be held against a parent if there is a nexus between the parent's sexual preference and the possible harmful effects on the child. The application of this standard requires that the homosexuality of a parent has an adverse effect on the child before it may be taken into account. The nexus standard does not consider homosexuality by itself or the homosexual behavior as a valid consideration for denying custody; it only considers the parent's sexual orientation when it has an adverse effect on the child's best interests.⁷⁷ It needs no elaboration that the *per*

75. Pierre De Vos, *The Right of a Lesbian Mother to Have Access to Her Children: Some Constitutional Issues* 111 S. AFR. L.J. 687, 691 (1994).

76. Katja M. Eichinger-Swainston, Note, *Fox v. Fox: Redefining the Best Interest of the Child Standard for Lesbian Mothers and Their Families* 32 TULSA L.J. 57 (1996); Eileen P. Huff *The Children of Homosexual Parents: The Voices the Courts Have Yet To Hear* 9 AM. U.J. GENDER SOC. POL'Y & L. 695, 699 (2001).

77. Eichinger-Swainston, *supra* note 76, at 59; Huff, *supra* note 76, at 700.

se standard finds no place in the new constitutional dispensation in South Africa. No further attention will therefore be paid to this approach.⁷⁸

Van Rooyen appears to reflect a *middle ground* approach in that the court does not condemn the lesbian mother, but does condemn her lesbian conduct. The order of the court in terms of which the children may not have contact with the mother's lesbian lifestyle rests on this conclusion. The *middle ground* approach is also evident in the plaintiff's argument before the court in *V v V*⁷⁹ and the court's apparent acceptance of the argument. The plaintiff was prepared to allow defendant (who had been involved in a lesbian relationship) supervised access to the children only. Unsupervised access was only to be granted if a psychiatrist certified that it was in the best interests of the children that defendant had access to them, and then only under the condition that no other person slept under the same roof (apparently referring to the mother's lesbian partner).

The court took as its starting proposition the idea that the child's rights are paramount and need to be protected, and further, that situations may well arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents' rights. The court then appeared to take the following part of an article of De Vos as basis for its argument:

Section 33(1) [of the Interim Constitution] allows for these rights to be limited by law of general application, where the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality, and where it does not negate the essential content of that right.

Does this mean that a more subtle justification for the same order would be constitutionally valid? In other words, will currently existing bigotry and its consequences be a valid reason to limit the constitutionally guaranteed rights of the lesbian mother? The argument could be formulated as follows: *There is nothing inherently wrong or abnormal about a lesbian relationship. But while the child is growing up, there will be strong social recrimination from peers and other parents against the child as it becomes known that his or her mother is a lesbian.* The child might also become confused and distressed by his or her mother's unwillingness to conform to a generally accepted norm. It might therefore be in the best interests of the child to discriminate against the lesbian mother, because that will be the only way in which

78. The court's explanation that children should be kept away from signals that are contrary to what is considered normal or correct may even reflect the *per se* standard.

79. 1998 (4) SA 169 (CPD) (S. Afr.).

her children could be spared unnecessary suffering.⁸⁰

From the court's reference to the Canadian decision in *R v Oakes*⁸¹ that a discriminatory order against a lesbian mother in an application for access rights to her children that is solely based on her sexual orientation will not easily pass constitutional muster, it is clear that the court distances itself from the *per se* approach. The *Oakes* decision, however, elaborates on this basis, seemingly accepting the *nexus* standard. It states that in the same way that the court cannot take cognizance of racism or religious intolerance when it decides on the access of the mother to her children, it cannot take cognizance of prejudice in the society. To do that, the *Oakes* decision holds, would be to unreasonably limit, or perhaps even negate, the essential content of the right not to be discriminated against on the ground of sexual orientation.

On the evidence before it, the court found that the children were not so embarrassed by the situation of their mother that it prevented them from having friends stay with them at their mother's house overnight, even when the mother's partner was there. In fact, in the opinion of the court the defendant was a "good and suitable mother." It may be concluded, therefore, that the court appeared to be vacillating between the *nexus* and *middle ground approaches*. The part of De Vos' argument referred to by the court falls squarely within the framework of the *middle ground approach*. Referring to *Oakes* without further elaboration may, on the other hand, be indicative of the court's acceptance of the *nexus approach*.

As previously quoted, in *Ex Parte Critchfield* the court concluded that:

[i]n a society such as ours which proscribes discrimination on the basis of sexual orientation, these encounters can be viewed in no more serious a light than conventional adultery. . . . [I]n my view, *the Court should not be particularly concerned with the sexual predilections of litigants when it comes to custody matters*. It encourages a voyeurism in public life that demeans us all. It is an entirely different matter where such predilections pose an actual or potential threat to the welfare, psychological or physical, of young children.⁸²

Critchfield clearly reflects the *nexus* standard. This standard takes the parent's homosexuality into account as one of many factors in

80. De Vos, *supra* note 75, at 691–92 (emphasis added).

81. [1986] 26 DLR 200 (Can.).

82. 1999 (3) SA 132 (W) (S. Afr.) (emphasis added).

determining what is in the best interests of the child. The homosexuality of the parent will be held against him or her only if there is a clear *nexus* between his or her conduct and any harmful effects on the child. The court's remark that it should only be concerned with the sexual predilections of litigants when it comes to custody matters and where it poses an actual or potential threat to the welfare of children, bears out on this approach.

C. Conclusion

It is suggested that the *nexus* standard applied in *Critchfield* better reflects the constitutional values and norms expressed by the Constitutional Court in the decisions regarding homosexuality and families as set out above. This standard does not focus on anyone's morality, but rather on the best interests of the child. Where homosexuality of a parent becomes an issue in litigation, the correct approach, it is suggested, is to establish whether there is a nexus between behavior that may be detrimental to the best interests of the child and the effect of the behavior on the child. In this way the best interests of the child are protected without infringing on the parent's sexual privacy.

V. THE APPLICATION OF THE CONSTITUTIONAL BACKGROUND TO THE ADOPTION OF CHILDREN

The exposition in paragraphs III(D) and IV(A) above makes it abundantly clear that the Constitutional Court has acknowledged that:

- (1) the concept of family has changed to comply with modern day demands;
- (2) the mere fact of homosexuality does not prevent same-sex life partners from forming a family and that their relationship may establish a *consortium omnis vitae*;
- (3) statutory provisions prohibiting same-sex life partners from jointly adopting a child postulate infringements of the Constitution and are therefore invalid (thereby acknowledging that homosexual parents and adopted children may form a family in the legal sense of the word);
- (4) it would be unconstitutional to regard homosexuality *per se* as a ground justifying a negative attitude towards a parent in litigation pertaining to children—in fact, gays and lesbians can meet the constitutional requirements for the exercising of parental care as well as any heterosexual person can; and
- (5) gays and lesbians may be considered to be the primary caregivers

of children in their custody when living together in a family relationship.

This change in attitude is borne out specifically by the decision in *Du Toit v Minister of Welfare and Population Development*,⁸³ in which the court found that the status of the applicants as unmarried persons, which precluded them from adopting siblings jointly, was inextricably linked to their sexual orientation. This decision related primarily to section 17(a) of the Child Care Act 74 of 1983,⁸⁴ which provides that a child can be adopted, *inter alia*, by a husband and a wife jointly; it does not provide for the joint adoption of children by partners in a permanent same-sex life partnership.⁸⁵ The evidence before the court showed that the applicants who were same-sex life partners were eminently suitable to jointly adopt a child.⁸⁶ They approached the High Court because of the Children's Court's decision to award custody and guardianship in terms of section 17(a) only to one applicant despite both applicants having been recommended jointly as suitable parents. The applicants argued that section 17 unfairly discriminated against gay and lesbian parents on the grounds of sexual orientation and marital status and that the absolute prohibition of joint adoptions by same-sex parents cannot be in the best interests of adoptive children who are placed in the families of adoptive parents involved in permanent same-sex life partnerships.

The court repeatedly reiterated its recognition of the changed concept of the family.

Recognition of the fact that many children are not brought up by their biological parents is embodied in s 28(1)(b) of our Constitution which guarantees a child's right to "family care or parental care." Family care includes care by the extended family of the child, which is an important feature of South African family life. It is clear from s 28(1)(b) that the Constitution recognises that family life is important to the well-being of all children. Adoption is a valuable way of affording children the benefits of family life which might not otherwise be available to them. . . . *However, we must approach the issues in the present matter*

83. 2003 (2) SA 198 (CC) (S. Afr.).

84. In terms of section 17(b) of the Act, a widower, widow, unmarried person, or divorced person can adopt a child. This is adoption by a single applicant.

85. "Husband" and "wife" refers only to marriages ordinarily recognized by the common law and legislation between heterosexual spouses.

86. The first applicant stated that she had played a significant role in the upbringing of the children and that the children regarded her as their mother. She was their principal source of emotional support due to the fact that the second applicant's career as a judge of the High Court placed severe strains on her time. The evidence clearly showed that the children have developed well and that they were aware of applicants' lesbian life style.

*on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change.*⁸⁷

From this perspective the court proceeded to conclude that the impugned provisions excluded from their ambit potential joint adoptive parents who were unmarried, but were partners in a permanent same-sex life partnership and who would otherwise meet the criteria set out in the Child Care Act. Their exclusion, the court held, defeated the very essence and social purpose of adoption which is to provide for the stability, commitment, affection, and support important to a child's development, which can be offered by suitably qualified persons. Excluding same-sex life partners from adopting children jointly was clearly in conflict with the constitutionally entrenched principle of the best interests of the children in these circumstances. The provisions therefore deprived the children of the possibility of a loving and stable family life. This, the court stated, was a matter of grave concern given the social reality of parentless children in the country.⁸⁸

87. *Du Toit v Minister of Welfare & Population Dev.* 2003 (2) SA 198 (CC) at paras. 18–19 (S. Afr.) (emphasis added).

88. *Id.* at paras. 21–22. The Court found that the non-recognition as a parent, in the context of her relationship with the second applicant and their relationship with the siblings, perpetuated the fiction of family homogeneity based on the one mother/one father model. The failure by the law to recognize the value and worth of the first applicant as a parent to the siblings was, the court found, demeaning and limited her right to dignity.

In *J v Director-General, Department of Home Affairs*, the constitutionality of section 5 of the (now repealed) Children's Status Act 82 of 1987 was considered. 2003 (5) SA 621 (CC) (S. Afr.). This Act dealt with, *inter alia*, the status of children conceived by artificial insemination. *In casu* the second applicant gave birth to twins, a boy and a girl. They were conceived by artificial insemination. The male sperm was obtained from an anonymous donor and the female ova were obtained from the first applicant. Both applicants wanted to be registered and recognized as parents of the twins. There was no legal impediment with regard to the second applicant as the "birth-mother" being registered as a parent under the regulations in terms of the Births and Deaths Registration Act 51 of 1992. However, these regulations only made provision for the registration of one male and one female parent. Children's Status Act 82 of 1987 § 5(1)(a):

Whenever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial insemination.

The Court in essence followed the line of reasoning of *Du Toit* but went on to say that just as the legal consequences of marriage are many and complex, the mutual relationship between parent and child is complex, valuable and multi-faceted. In the same vein as it was not appropriate for Courts to determine the details of the relationship between partners to same-sex (or heterosexual relationships), so little was it for them to work out the relationship between any such partners and

Although the court did not specifically refer to any of the approaches relating to homosexuality of a parent and children, it is clear that it did follow the *nexus* approach as explained above. The court relied strongly on the report of a social worker, who recommended both applicants as suitable parents and also declared that it would be in the best interests of the children to be adopted by the applicants jointly. The court also pointed out that in terms of the Child Care Act, the children's court may not grant an adoption unless it is satisfied, *inter alia*, that

- (a) the applicants are possessed of adequate means to maintain and educate the child;⁸⁹
- (b) the applicant or applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child;⁹⁰ and
- (c) the proposed adoption will serve the interests and conduce to the welfare of the child.⁹¹

In terms of the Child Care Act, children's courts are charged with overseeing the well-being of children by examining the qualifications of applicants in adoption applications. The provisions of the Act, the court found, offered a coherent policy of child and family welfare by creating children's courts and establishing overall guidelines to advance the welfare of children. They are able and well equipped to prevent abuses.

Against this exposition of the role of the children's court to advance the welfare of the child and its reliance on the report of the social worker indicating that the joint adoption would be in the best interests of the children, there can be no doubt that the court in *Du Toit* was not prepared to follow either the *per se* or the *middle ground approach*. In fact, it availed itself comprehensively of the evidence that the sexual behavior of the parents would not have a detrimental effect on the well-being of the children.

At the time of writing of this article, the Child Care Act is still in existence as only certain sections of the Children's Act⁹² have come into operation. The Child Care Act has not been repealed as yet. It should be noted, though, that chapter 15 of the Children's Act, which deals with the adoption of children, is in line with the exposition in *Du Toit* and the

their children. *Du Toit v Minister of Welfare & Population Dev.*, 2003 (2) SA 198 (CC) para. 26 (S. Afr.).

89. Child Care Act 74 of 1983 § 18(4)(a).

90. *Id.* at § 18(4)(b).

91. *Id.* at § 18(4)(c).

92. Children's Act 38 of 2005.

other decisions discussed *supra*. In terms of this chapter the purposes of adoption are to protect and nurture children by providing a safe, healthy environment with positive support and to promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime.⁹³ Children may also only be adopted if the adoption will be in the best interests of the child⁹⁴ and if the child is adoptable.⁹⁵ An adoption social worker must make an assessment whether a child is adoptable.⁹⁶

Section 231 of the Children's Act deviates radically from the provisions of the Child Care Act in respect to people who may adopt a child. It provides that a child may be adopted jointly by a husband and wife; *partners in a permanent domestic relationship*; or persons sharing a common household and forming a permanent family unit.⁹⁷ A child may also be adopted individually by a widower or widow; divorced or unmarried person; a married person whose spouse is the parent of the child or *by a person whose permanent domestic life-partner is the parent of the child*;⁹⁸ by the biological father of a child born out of wedlock; or by the foster parent of the child.⁹⁹

It is important to note from the previous paragraph that homosexuality is nowhere mentioned as a ground that disqualifies a person as a prospective adoptive parent. This is also borne out by section 231(2), which provides that a prospective parent must be fit and proper to be entrusted with full parental responsibilities and rights in respect of the child; willing and able to undertake, exercise and maintain those responsibilities and rights; over the age of 18; and properly assessed by an adoption social worker to ensure that the person is fit and proper, and willing and able as explained above.¹⁰⁰ The adoption social worker may take the cultural and community diversity of the adoptable child and prospective adoptive parent into consideration in his or her assessment of the prospective adoptive parent. A prospective adoptive parent also may

93. *Id.* at § 229.

94. *Id.* at § 230(1)(a).

95. *Id.* at § 230(1)(b).

96. *Id.* at § 230(2). A child is adoptable in terms of this section if he/she is an orphan and has no guardian or caregiver who is willing to adopt the child; if the whereabouts of the child's parent or guardian cannot be established; if the child has been abandoned; if the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; or the child is in need of permanent alternative placement.

97. *Id.* at § 231(1)(a).

98. It is important to note that section 13 of the Civil Union Act 17 of 2006 provides that the legal consequences of marriage apply with such changes as may be required by the context to a civil union.

99. Children's Act 38 of 2005 § 231(1)(b).

100. *Id.* at § 231(2).

not be disqualified because of financial reasons—he or she may apply for means-tested social assistance. A person unsuitable to work with children is not a fit and proper person to adopt a child.¹⁰¹

Sections 239 and 240 further bear out on the consideration of an adoption application. Section 239 prescribes, *inter alia*, that the adoption social worker must furnish the court with a report which contains information that the child is adoptable and that the adoption will be in the best interest of the child. In terms of section 240 a court must take all relevant factors into account, which may include the religious and cultural background of the child, the child's parent, and the prospective adoptive parent. It must also consider the report of the adoption social worker and may only make an order for the adoption of a child if such will be in the best interest of the child and if the prospective adoptive parent complies with the requirements set out in section 231.

It certainly is not argued that the grounds listed in section 231 constitute a *numerus clausus*. In fact, it is abundantly clear that the intention of the legislature is to convey discretion on the children's court to ensure that the best interests of the child will prevail, while at the same time not discriminating unfairly against homosexual persons who either jointly or individually want to adopt the child. It is submitted that the provision allowing a married person whose spouse is the parent of the child¹⁰² along with the reference to partners in a domestic life-partnership who may adopt a child conveys unambiguously that the legislature also chose the *nexus standard*—the homosexuality of the prospective adoptive parent or homosexual behavior will only be taken into consideration if it will have an adverse effect on the child's best interests. It is also submitted that this approach is in line with the reasoning of the Constitutional Court in its interpretation of the Constitution in the various decisions discussed above.

VI. CONCLUSION

The South African Constitution “is not merely a formal document regulating public power. It also embodies . . . an objective normative value system.”¹⁰³ This system is rooted in the democratic values of human dignity, equality, and freedom as embodied in the Bill of Rights entrenched in the Constitution. In *S v Makwanyane* the Constitutional Court considered the weight to be attached to public opinion in

101. *Id.* at § 231(2)(3), (4)(5)(6).

102. Civil Union Act 17 of 2006.

103. Carmichele v Minister of Safety & Sec. 2001 (4) SA 938 (CC) para. 54 (S. Afr.).

contentious matters relating to dignity, equality, and freedom.¹⁰⁴ The court was even prepared to assume that public opinion would favor the death penalty in extreme cases of murder. However, the court held that the question before it was not what the majority of South Africans believed to be a proper sentence, but on the contrary, what the Constitution allowed. It further held that a court should not allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that such choices would find favor with the public.¹⁰⁵ The development of the constitutional position of *lesbigay* marriage and the relationship between such parents and children certainly bear testimony to this approach—the very reason for establishing the new constitutional order and for vesting the power of judicial review of all legislation and the common law in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of society. It is only if there is a willingness to protect the worst and weakest amongst us that all of us can be secure that our own rights will be protected.¹⁰⁶

104. 1995 (3) SA 391 (CC) (S. Afr.).

105. *Id.* para 87.

106. *Id.* para 88.