

WHO'S IN AND WHO'S OUT?
INCLUSION AND EXCLUSION IN THE
FAMILY LAW JURISPRUDENCE OF THE
CONSTITUTIONAL COURT OF SOUTH AFRICA*

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1 Introduction

Traditionally, the law has tied the formal status of being married to an extensive range of rights, duties, benefits and burdens. Non-marital conjugal unions were largely 'invisible to law'.¹ This approach has, however, come under increasing attack on the grounds that it rests on illegitimate, moralistic disapproval of non-marital relationships, involves unfair discrimination on the ground of marital status and is out of touch with contemporary social practices and the increasing variety of non-traditional family forms. The formal approach has as a result come to be eclipsed in the Western world by a functional approach to family law. The focus tends now to be on the substance of different relationships and the needs of the parties to them, rather than their form or official status.²

It is recognised, in particular, that a variety of non-marital relationships can play the same social role as marriage and that the parties to them may provide the same kind of support to each other and be financially interdependent in the same way as married couples. It is also recognised that the gendered division of labour within the family means that women and children are at particular risk of being left economically vulnerable when such relationships end, just as they are at the end of a marriage. This has led to legal

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¹ This phrase is used by R Leckey 'Cohabitation and comparative method' (2009) 72 *Modern Law Review* 66.

² For discussion of this trend, see J Millbank 'The role of "functional family" in same-sex family recognition trends' (2008) 20 *Child and Family Law Quarterly* 1.

reform in most Western jurisdictions extending many, if not all, of the rights, duties, benefits and burdens of marriage to a range of non-marital domestic relationships so as to serve the similar needs of parties in these relationships and ameliorate the financial hardship suffered by weaker parties when the relationship ends through breakdown or death. The effect of these reforms is to diminish the legal significance of marriage.

There is, of course, room for disagreement among those who accept the functional approach as to exactly how non-marital domestic relationships should be regulated. Some take the view that those who desire protection should be required to register their relationships, in the interests of making their rights and duties more certain, ensuring that obligations are not imposed on them against their wishes, and putting third parties on notice about the existence of the relationship. On this view, a marriage-like, formalised manifestation of consent should be a prerequisite for protection.

Others, by contrast, resist an exclusive focus on formal undertakings, believing that registered civil partnerships or unions are not capable of solving all the problems in this area of the law. Although they agree that such partnerships should be available for those who reject the institution of marriage but desire an equivalent formal status, they argue that it is necessary also to protect those in long-term, informal domestic relationships. They point out that, in reality, many people will not register their relationships. The stronger party may withhold consent, or the parties may not understand the consequences of failure to register. Furthermore, it seems that few cohabitants enter into private arrangements to protect themselves and their children. It is argued that such people should not be left to fall through the cracks and that this warrants a presumptive regime on which rights and responsibilities are automatically triggered regardless of the partners' wishes when a relationship meets certain criteria, such as the birth of a child, financial interdependence and cohabitation for a specified period of time.

There are also further matters of detail about which adherents of the functional approach have different views. For instance, supposing that it is reasonable to ascribe certain rights and responsibilities on a presumptive basis, should a distinction nevertheless be drawn between registered and non-registered relationships, the former being treated in a way broadly analogous to marriage, but the latter being subject to a less onerous range of rights and duties? Should there, in other words, be a two-tiered system, on which civil partners have the same rights and duties as married partners but informal partners have lesser rights and duties, so that, for example, an automatic right to maintenance does not arise in the case of informal relationships? Furthermore, how important are the values of

autonomy and respect for free choice? In particular, should unmarried cohabiting parties who do not wish legal consequences to attach to their relationship be able to opt out of a presumptive regime and to make their own private arrangements in relation to financial matters? And if so, should there be safeguards against exploitation and how stringent should they be? These are complex questions, which this paper does not aim to resolve. Although I will make some comments which bear on their resolution, my concern is primarily with the functional approach in general and, in particular, with the Constitutional Court's attitude to it.

At first glance, it appears as if the Court has kept pace with the changes in family law outlined above. It consistently speaks the language of inclusivity and it has used the equality guarantee to invalidate legislation that failed to extend family-law style regulation to certain non-marital domestic relationships, in this way improving the situation of some cohabitants who have not entered or were not permitted to enter into civil marriages. In particular, in a range of cases it has extended legislative benefits enjoyed by the married to the parties to Muslim unions, both monogamous and polygynous, and to same-sex life partners.

I will argue, however, that the Court has not really embraced the functional approach and that there is a significant mismatch between the Court's inclusive rhetoric and a reality of exclusion. Although I agree with the outcome in the Muslim marriage cases and the same-sex cases, I will show that the reasoning in these cases contrives to avoid the issue of discrimination against the unmarried.

As I will explain in Part 2, instead of using the guarantee of non-discrimination on the ground of marital status to challenge the idea that it is permissible for the legislature to single out marriage for special privileges, the Court extended the benefits of marriage to persons who have entered into Muslim unions by reasoning that such persons are, for the purposes of the laws in question, 'married'. In particular, the Court found that the word 'spouse' in the Intestate Succession Act 81 of 1987 (the 'ISA') and the phrase 'surviving spouse' in the Maintenance of Surviving Spouses Act 27 of 1990 (the 'MSSA') apply in the ordinary sense of the words to the parties to a monogamous Muslim union. And it protected the survivors of polygynous Muslim unions by reading words into the relevant legislation so as to cover multiple 'spouses'. A court that embraces the functional concept of family would have found that the Acts in question had drawn an arbitrary distinction between the married and the unmarried. The Constitutional Court chose instead to enlarge the legal concept of 'marriage' to include monogamous partners married by Muslim rites and it achieved protection for parties to polygynous

Muslim unions by requiring multiple Muslim ‘spouses’ to be treated like monogamous Muslim ‘spouses’.

Furthermore, as I will explain in Part 3, it appears that the main reason why the Court was willing to protect same-sex life partners was not because it is unfair for the legislature to confer special benefits on the married but because same-sex life partners were not permitted to access these benefits. Now that this situation has been reversed, the Court has hinted that there would be no constitutional impediment to the legislative withdrawal of benefits from same-sex life partners who do not avail themselves of the opportunity to marry. This line of reasoning is also evident in the Court’s approach to heterosexual cohabitants. In a case dealing with a challenge to the MSSA, it found that the legislative exclusion of survivors of heterosexual life partnerships from the benefits of the Act is not unfairly discriminatory on the ground of marital status, in part because there is no legal impediment to the marriage of the partners.

In Part 3, I argue against the Court’s approach on the grounds that it is both ‘marriage-centric’ and privileges religious unions above all other informal partnerships. As I will show, the Court has really only been concerned about certain kinds of legislative discrimination: discrimination against those whose religious marriages are not recognised by law and against those who would like to marry but have been unfairly deprived of this option. Instead of insisting that the guarantee of non-discrimination on the ground of marital status requires existing family-law style protection to be extended to all relationships that are comparable to marriage, the Court sees nothing wrong with legal discrimination against those who have chosen not to enter into civil marriages, except in the case of people who regard themselves as married in terms of their religious law. In such cases, it is willing to ignore the fact that there is no legal impediment to the parties entering into a formal marriage.

The Court makes no attempt to explain the reasoning behind this concession, which only makes sense on the supposition that the Court regards marriage in terms of religious law as morally superior to other kinds of informal partnerships: religious marriage, it appears, is better than no marriage. It seems that it is this unarticulated moralistic belief that leads the Court to resort to a one-off expansion of the concept of ‘marriage’ beyond the *de jure* concept so as to favour religious unions. I will argue that while it is desirable to extend the protections of marriage more generously, to do so in favour of only religious unions is unprincipled. Furthermore, the Court’s special solicitude towards religious unions serves to aggravate the unfairness of the Court’s moralistic and exclusionary approach to other functionally equivalent relationships.

I conclude the paper by arguing in Part 4 that there is no justification for involving the state in marriage and that marriage should cease to be an official status.

2 Muslim marriages

Muslim marriages are not recognised as valid marriages in South African law on the ground that such unions are potentially polygynous. The detrimental consequences of this have led the legislature to recognise Muslim marriages in a piecemeal way for certain purposes. The courts have also granted ad hoc relief in a series of cases, the latest of which is *Hassam v Jacobs NO (Hassam)*.³ The applicant, Fatima Hassam, had been married to Ebrahim Hassam in accordance with Muslim rites. Ebrahim subsequently married again, also according to Muslim rites, without Fatima's knowledge or consent. Ebrahim died intestate. Section (1) of the ISA makes provision for the surviving 'spouse' of someone who dies intestate to inherit the intestate estate or a portion of it. The executor of the estate refused to regard the applicant as a spouse for the purposes of the ISA. He contended that the word 'spouse' in the Act could not apply to the applicant because she was the survivor of a polygynous union.

Previously, in *Daniels v Campbell NO (Daniels)*,⁴ the Constitutional Court had dealt with a challenge to section (1) of the ISA, and also to section 2(1) of the MSSA, by the survivor of a de facto monogamous union solemnised in terms of Muslim rites. Section 2(1) of the MSSA confers on the survivor of a marriage dissolved by death a claim for maintenance against the estate of the deceased in certain circumstances, such a survivor being defined in terms of section (1) of the Act as the surviving 'spouse'. The applicant had been told by the Master of the High Court that she could not inherit from the estate of the deceased nor make a claim for maintenance against the estate because she was not lawfully married and was therefore not a surviving 'spouse'.

In *Daniels*, the majority had found that the words 'spouse' in the ISA and 'surviving spouse' in the MSSA can be read so as to include a party to a Muslim union that is monogamous. The majority held that this is the 'ordinary meaning' of the word 'spouse'.⁵ The majority also relied on the duty to read legislation, where possible, in ways that give effect to the fundamental values of the Constitution. It said that 'the constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving the word "spouse" a broad

³ *Hassam v Jacobs NO & Others* 2009 5 SA 572 (CC).

⁴ *Daniels v Campbell NO & Others* 2004 5 SA 331 (CC).

⁵ *Daniels* (n 4 above) para 18.

and inclusive construction'.⁶ Finally, the majority held that the central question was not whether the applicant was lawfully married to the deceased, nor whether she had the option to enter into a civil marriage, but whether the objectives of the Acts would be furthered if the surviving partners of de facto monogamous Muslim marriages were included within their coverage.⁷ The majority had no difficulty in finding that they would, saying that the purpose of the Acts was primarily to protect widows made vulnerable by the gendered division of labour in the family and by other social practices, and noting that the survivors of Muslim unions need the same protection against being left destitute on the death of their partners as widows in civil marriages.⁸ The majority therefore made an order declaring that the words 'spouse' and 'surviving spouse' in the two Acts include the surviving partner to a de facto monogamous Muslim marriage. This made it unnecessary to consider the constitutional validity of the provisions.

In *Hassam*, however, the Court was not willing to read the word 'spouse' in the ISA to include the survivor of a polygynous Muslim marriage. Nkabinde J, who delivered the judgment of a unanimous Court, said that while 'there was no undue strain on the language' to regard the widow in *Daniels* as a 'spouse', it would be 'a significant departure from the ordinary, commonly understood meaning of the word, as it is used in the Act' to read it as including multiple spouses.⁹

The fact that the ISA did not protect persons in the position of the applicant was, however, found to be discriminatory on a number of the grounds listed in section 9 of the Constitution, and therefore to be presumptively unfair. The Court found that it treated widows married in terms of the Marriage Act more favourably than widows married in terms of Muslim rites. It treated widows of monogamous Muslim marriages more favourably than those of polygynous Muslim marriages. And it treated widows of customary marriages more favourably than widows of polygynous Muslim marriages. Yet, the Court observed, widows of polygynous Muslim marriages need the protections of the ISA as much as these other widows. Furthermore, the Court stated that the Act worked to the detriment of Muslim women and not Muslim men because women are not allowed to have more than one husband in terms of Muslim personal law. The grounds of discrimination were therefore, the Court concluded, religion, marital status and gender.¹⁰ Finally, the Court went on to find that

⁶ *Daniels* (n 4 above) para 21.

⁷ *Daniels* (n 4 above) para 25.

⁸ *Daniels* (n 4 above) paras 22-23.

⁹ *Hassam* (n 3 above) para 48.

¹⁰ *Hassam* (n 3 above) paras 31, 34.

the discrimination was not justifiable under the limitation clause.¹¹ The legislation was therefore invalid. The Court cured the unconstitutionality by reading in the words 'or spouses' after each use of the word 'spouse' in the ISA.

Some aspects of this reasoning are puzzling. First, once the Court had swallowed the camel in *Daniels*, by finding that the word 'spouse' as used in the legal context of the ISA and MSSA can apply to parties to unions that are not recognised by law, it is not clear why the Court strained at the gnat in *Hassam* and refused to find that the word can apply where the deceased is survived by more than one spouse. This is especially odd given the fact that in the cases dealing with intestate succession under customary law, the Court found that the ISA *can* be read to protect more than one spouse and in its order laid down various rules explaining how the estate should be divided in such a situation.¹² It is true that this was in the context of dealing with customary polygynous marriages, which are legally recognised, but the fact that Muslim marriages are not legally recognised was not an obstacle to the inclusive interpretation of 'spouse' in *Daniels* and it therefore cannot explain the restrictive approach to 'spouse' taken in *Hassam*.

Secondly, although the Court was right to find that Fatima Hassam had been discriminated against, it is not clear that the Court satisfactorily explained the kind of discrimination at work. For one thing, it is hard to follow the Court's reasoning behind its finding that the Act discriminated on the ground of gender. The Court found to this effect because of the fact that women are not permitted to have more than one husband in terms of Muslim personal law. This led the Court to conclude that the Act did not detrimentally affect Muslim men and therefore that it discriminated on the ground of gender. But the ISA did operate to the detriment of men in polygynous Muslim unions. After all, if Fatima Hassam was not Ebrahim's spouse, then Ebrahim was not her spouse and if Fatima had died intestate, Ebrahim would not have been entitled to inherit under the ISA.

Furthermore, although the Act did discriminate on the ground of marital status, in my view the Court was wrong to find that this was because the Act differentiated unfairly and unjustifiably among different kinds of *widows*. The truth is that the legislation did not draw an arbitrary distinction among the married. It drew an arbitrary distinction between the married and the unmarried. Fatima Hassam was discriminated against because she had shared her life with her

¹¹ *Hassam* (n 3 above) paras 41 - 43.

¹² *Bhe & Others v Magistrate, Khayelitsha & Others* (Commission for Gender Equality as Amicus Curiae); *Shibi v Sithole & Others*; *South African Human Rights Commission & Another v President of RSA & Another* 2005 1 SA 580 (CC).

partner in an intimate, long-term union that was the functional equivalent of a civil marriage and she had been left vulnerable on its dissolution for the same reasons that widows are generally left vulnerable, namely, the subordination of women within the family. But the Constitutional Court did not see it like this. It did not see her relationship as *sufficiently similar* to a marriage to require the same protections as the legislature had conferred on the married. Instead, it insisted that her relationship was a marriage and it saw its task as the narrow one of eliminating discrimination between the 'widows' of different kinds of marriages. By seeing the issue through the prism of marriage, it stayed within the confines of the formal approach, as I will show in the next section.

3 The more things change, the more they stay the same

The rights and obligations that traditionally accompany marriage serve important social goals, such as supporting care-giving, protecting vulnerable parties and providing for an equitable distribution of property at the end of long-standing, mutually supportive relationships, especially where one party has played the role of breadwinner, while the other has played the role of care-giver. Marriage is, however, a blunt instrument for achieving these goals. Conferring special rights, duties, benefits and burdens on married people is radically under-inclusive with respect to the underlying goals and the status of being married is a very poor proxy for serving these needs. How, then, can the formal approach be justified? How can it be legitimate for the state to support marriage by conferring certain socio-economic benefits, responsibilities and privileges on married persons but not on those in comparable domestic relationships?

The justification offered for the special treatment of the married has traditionally been moralistic and religious. Certain kinds of intimate and family relationships are seen as morally superior to their functional equivalents and it is thought appropriate to use the law to encourage such relationships by bestowing more favourable treatment and the stamp of legitimacy on those who enter into them by acquiring an official licence from the state. Conversely, it is argued that extending the benefits of marriage to those in non-marital domestic relationships will undermine the institution of marriage and associated family values. Legal marriage and its privileges were traditionally reserved for monogamous, heterosexual and, in the case of apartheid South Africa, same-race unions, intended to persist for life. The less favourable treatment extended to those who entered into other kinds of domestic relationships, such as cohabitation

outside marriage, polygamous relationships, same-sex relationships and mixed-race relationships, was accompanied by moral disapproval and social stigma and even, in some cases, by criminal punishment.

There are, though, two major problems with this kind of moralistic justification for the formal approach. First, even if one grants, for the sake of argument, that intimate relationships in a traditional marriage setting are morally superior to other kinds of intimate relationships, seeking to encourage people to marry by conferring special benefits on the married artificially distorts decision-making and therefore strikes at the value of autonomy or the idea that we should do our moral deliberation for ourselves. Jeremy Waldron makes this point in the context of discussing Joseph Raz's idea that it is legitimate for the state to tax morally unworthy activities and subsidise morally worthy activities. Waldron argues that measures of this kind prevent people refraining from unworthy activities and partaking in worthy activities for 'the right reasons'.¹³ As Waldron says, a state that respects autonomy leaves its citizens to make their own choices on the basis of the merits of the relevant considerations.¹⁴ By contrast, if the state provides a substantial inducement to an activity which is thought to be morally desirable, '[w]e would then worry because people were responding not to the nobility of the activity, but to the bribe that was being offered for pursuing it.'¹⁵ This raises concerns about autonomy because instead of allowing people to make up their own minds on the merits of the activity, the government does the 'moral thinking' for them¹⁶ and then 'adjust[s] the payoffs so that [people] will accept it more easily'.¹⁷ This is to treat them as children.¹⁸

Secondly, the idea of legally privileging a particular form of intimate relationship for moralistic reasons is increasingly out of step with a world in which the ideology of marriage is no longer widely accepted and it is especially out of place in a society of acknowledged diversity such as South Africa, where it is accepted that the state is not entitled to side with sectional religious or moral views. The Constitutional Court invoked the need to respect pluralism and diversity in support of its decisions in *Hassam* and *Daniels*. The *Hassam* Court described as 'inimical' the 'attitude of one group in our pluralistic society imposing its views on another.'¹⁹ And in *Daniels*, Moseneke J expressly embraced the functional view of family, saying:

¹³ J Waldron 'Autonomy and perfectionism in Raz's *Morality of Freedom*' (1989) 62 *Southern California Law Review* 1145.

¹⁴ Waldron (n 13 above) 1146.

¹⁵ Waldron (n 13 above) 1147.

¹⁶ Waldron (n 13 above) 1152.

¹⁷ Waldron (n 13 above) 1149.

¹⁸ Waldron (n 13 above) 1149.

¹⁹ *Hassam* (n 3 above) para 25.

The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However, we must approach the issues in the present matter 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.²⁰

Yet, notwithstanding the functional rhetoric, the reasoning of the Court in *Hassam* and *Daniels* makes clear that the Court was willing to extend the protections of marriage to Muslim unions not for the reason that such unions are functionally comparable to marriage but because it thought that they deserved the honorific of 'marriage'. It seems that the Court regarded these unions as deserving of protection because they have been made under religious authority. Presumably this is because, in the eyes of the Court, religion adds the requisite gloss of respectability to sexual intimacy. This led it to add its own blessing to Muslim unions, bestowing on them the title of 'marriages'.

No doubt, expanding the concepts of spousal status and widowhood caters for the religious diversity of South African society and counters the traditional prejudice and discrimination against non-Christian religions. In that respect, the decisions clearly represent an advance. Overall, though, there is much more at stake than the equal treatment of the different religions and it is the bigger picture that the cases of *Daniels* and *Hassam* miss. By insisting that the parties to Muslim marriages are 'really' married, the Court is able to sidestep the more serious discrimination enshrined in the ISA and MSSA: the fact that they discriminate against the unmarried. The Court's approach does not force the legislature to protect all legally unrecognised unions that play the same social role as marriage. Instead, it merely enlarges the size of the in-group, by including those whose religious marriages have, in the Court's eyes, entitled them to join the group of 'widows' and for this reason to deserve the privileges granted by the legislature to those who are married.

The same mismatch between functional rhetoric and a reality of exclusion informs the Court's same-sex jurisprudence. The Court has read words into a number of statutes that failed to extend the benefits of marriage to same-sex life partners or, in some cases, to same-sex life partners who have undertaken reciprocal duties of

²⁰ *Daniels* (n 4 above) para 77.

support.²¹ The Court has also invalidated both the common law definition of marriage, as a union between persons of the opposite sex, and the formula in the Marriage Act 25 of 1961, which refers to ‘wife (or husband)’. The Court found that the definition and the formula constitute unfair discrimination on the ground of sexual orientation.²²

In making these decisions, the Court once again appeared to affirm the functional concept of family. For instance, in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (‘*National Coalition (2)* case’), in which the Court invalidated a provision which facilitated the immigration into South Africa of the spouses of permanent South African residents but not the same-sex life partners of permanent South African residents, Ackermann J wrote of an ‘accelerating process of transformation [that] has taken place in family relationships as well as in societal and legal concepts regarding the family and what it comprises’.²³ After spelling out the way in which marriage ‘creates a physical, moral and spiritual community of life, a consortium omnis vitae’,²⁴ Ackermann J went on to explain how the same kind of consortium can be realised by same-sex life partnerships and also stated that marriage is merely one form of life partnership.²⁵ Ackermann J concluded that the impugned provision was unfairly discriminatory on the ground of both marital status and sexual orientation, because it made marriage a prerequisite for the benefit and because gay men and lesbians are unable to enter into a valid marriage in harmony with their sexual orientation.²⁶

Ackermann J’s analysis has been questioned on the basis of its rather idealistic portrayal of heterosexual marriage and the apparent implication that the same-sex relationships that deserve protection are those that emulate this very particular and contested conception of marriage.²⁷ It is not necessary to pursue this point, however, because it now appears that the Court’s primary concern in the same-sex cases was not, in fact, the similarities between heterosexual marriage and same-sex life partnerships, and the attendant

²¹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa & Another* 2002 6 SA 1 (CC); *Du Toit and Another v Minister of Welfare and Population Development & Others* 2003 2 SA 198 (CC); *J and Another v Director General, Department of Home Affairs & Others* 2003 5 SA 621 (CC); *Gory v Kolver NO & Others* 2007 4 SA 97 (CC).

²² *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 1 SA 524 (CC).

²³ *National Coalition (2)* (n 21 above) para 47.

²⁴ *National Coalition (2)* (n 21 above) para 46.

²⁵ *National Coalition (2)* (n 21 above) paras 53, 35.

²⁶ *National Coalition (2)* (n 21 above) para 40.

²⁷ P de Vos ‘The “inevitability” of same-sex marriage in South Africa’s post-apartheid state’ (2007) 23 *South African Journal on Human Rights* 452.

legislative discrimination on the ground of marital status. Instead, it was the discrimination on the ground of sexual orientation, arising from the fact that lesbians and gay men were, at the time the cases were heard, not legally entitled to marry. It seems, in other words, that the real reason why the Court was willing to extend protection to same-sex life partners was not because it is unfair to give special privileges to the married but because the law prevented same-sex partners from accessing these privileges.

This conclusion is supported by the fact that the Court has been insensitive to the issue of discrimination on the ground of marital status when faced with the legislative exclusion of heterosexual life-partners from protections granted to married persons. In *Volks NO v Robinson (Volks)*,²⁸ to which I will return shortly, the Court found that section 2(1) of the MSSA, which confers benefits on surviving 'spouses', and therefore not on the survivors of heterosexual life partnerships, did not unfairly discriminate on the ground of marital status against the survivors of such partnerships. In coming to this conclusion, the Court reasoned that heterosexual life partners do not have maintenance obligations arising by operation of law and they have the right to marry.

That the Court's primary concern in the same-sex cases was not discrimination on the ground of marital status but discrimination on the ground of sexual orientation is also confirmed by a surprising comment in the case of *Gory v Kolver NO*,²⁹ in which the Court extended inheritance rights under the ISA to the survivors of same-sex life partnerships. In this case, the Court anticipated a problem that would arise should Parliament pass legislation permitting same-sex marriage but not at the same time amend the statutes into which the Court has read words so as to extend the protections of marriage to same-sex life partnerships. Since rights such as the right to inherit on intestacy are not enjoyed by opposite-sex life partners, the effect of not amending the statutes would be that same-sex life partners would continue to enjoy the benefit of the Court's revisions of the statutes, and therefore be treated more favourably under the law than opposite-sex life partners, notwithstanding the fact that both would now be able to marry. Foreseeing this anomaly, the Court stated that 'once [the] impediment [to same-sex marriage] is removed, there would appear to be no good reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples in respect of intestate succession'.³⁰ It further stated that it would be up to Parliament to decide how to eliminate the inequality between heterosexual and same-sex cohabitants once same-sex couples are

²⁸ *Volks NO v Robinson & Others* 2005 5 BCLR 446 (CC).

²⁹ *Gory v Kolver NO & Others* 2007 4 SA 97 (CC).

³⁰ *Gory* (n 29 above) para 29.

permitted to marry. The Court reiterated a paragraph from the *National Coalition (2)* case, in which it had said:

whether the remedy a court grants is one striking down ... or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits.³¹

Read with *Volks*, this seems to suggest that Parliament might deal with the inequality by 'levelling down' rather than 'levelling up': instead of extending the rights conferred by the Court on same-sex life partners so as to protect opposite-sex life partners, Parliament might take away the rights of same-sex life partners, should they not take advantage of the opportunity to enter into a marriage or civil union.³²

Now that the Civil Union Act 17 of 2006 has been passed, the problem anticipated by the Court has eventuated. It is hard, however, to accept the Court's solution to the problem – the idea that the newly-created in-group might justifiably become an out-group again, now that its members have no 'excuse' for not formalising their relationships. One obvious difficulty with this retrograde idea is the fact, remarked on by several commentators, that many same-sex life partners may have well-grounded fears about entering into a marriage or civil union, given the existence of widespread homophobia.³³ It insults the situation of people with such fears to say that they have chosen not to avail themselves of the benefits of marriage and therefore cannot complain of discrimination if their relationships do not attract these benefits.

Furthermore, even if we confine ourselves to couples who have no reason to fear publicising their domestic arrangements, it is reasonable to ask why their relationship should have to assume a particular legal form in order to attract appropriate rights and duties. What rational basis is there for withholding needed protection just because the parties concerned are not married or have not entered into a civil union (even if, since *Daniels* and *Hassam*, the group of people who are 'married' is larger than before and includes those who regard themselves as married according to their religious law)? Only those who accept the moralistic assumption that cohabitation outside legal or religious marriage is a morally inferior arrangement which the state is entitled to discourage will think this justifiable – an

³¹ *National Coalition (2)* (n 21 above) para 76; *Gory* (n 29 above) para 30.

³² See also *de Vos* (n 27 above) 462.

³³ *De Vos* (n 27 above) 463-4. See also MC Wood-Bodley, 'Intestate succession and gay and lesbian couples' (2008) 125 *South African Law Journal* 54-5.

assumption that is incompatible with the constitutional values of respect for diversity and pluralism.

Yet precisely this assumption was made by the Constitutional Court in *Volks*, in which it held, by a majority of 7:3, that the survivor of a permanent heterosexual partnership was not entitled to claim reasonable maintenance from her deceased partner's estate in terms of section 2(1) of the MSSA, since she was not a surviving 'spouse'. It further held that this did not amount to unfair discrimination against such survivors, notwithstanding the fact that the law failed to provide them with any alternative remedy. It was not disputed that the survivor in question, Mrs Robinson, met the criteria for being a permanent life partner. Her relationship with her partner was not casual. She had lived together with him in a monogamous, stable and committed relationship for 16 years. She and her partner had undertaken mutual duties of support. They had therefore entered into a 'consortium omnis vitae' of the kind described in such romantic detail in the *National Coalition (2)* case. Furthermore, as with many women in domestic partnerships, Mrs Robinson had played the role of care-giver and home-maker while her partner had played the role of bread-winner. This had left her in a vulnerable position on his death and she had difficulties in supporting herself.

The majority nevertheless adopted the formal, not the functional, approach. It reasoned that the intention of the MSSA was to extend the maintenance obligations of parties to a marriage beyond the death of one of the parties. Since unmarried cohabitants do not have such maintenance obligations – a state of affairs unquestioningly assumed by the majority to be constitutionally unproblematic³⁴ – the majority concluded that the MSSA's failure to impose such an obligation on the estate of an unmarried cohabitant after death is not unfair.³⁵

In a separate concurring judgment (with which five of the other majority judges also concurred), Ngcobo J also emphasized the fact that cohabiting life partners can marry if they wish and are therefore able to avail themselves of the protective regime which applies to married people.³⁶ He did not, however, explain why it is reasonable for the legislature to require people to marry in order to be eligible for protection. It seems that he made the moralistic assumption, referred to above, that it is legitimate to use legal protection as a carrot/stick, with the aim of pressuring people to conform to norms

³⁴ This was pointed out in both dissenting judgments: *Volks* (n 28 above) paras 118, 151.

³⁵ *Volks* (n 28 above) paras 56-58.

³⁶ *Volks* (n 28 above) paras 91-92.

of respectability designed to channel sexuality in directions that society considers desirable.

The views of the majority were trenchantly criticised in the joint dissenting judgment of Mokgoro and O'Regan JJ and the separate dissenting judgment of Sachs J. These judges found – correctly, in my opinion – that section 2(1) of the MSA unfairly discriminates against the unmarried. However, surprisingly, none of the minority judges mentioned the increasingly unprincipled nature of the decisions in this area of the law and, in particular, the difficulty of reconciling the majority's reasoning in *Volks* with the Court's earlier decision in *Daniels*. The majority in *Volks* likewise avoided this issue, apparently seeing no need to distinguish *Volks* from *Daniels*. Furthermore, in the subsequent judgment of *Hassam*, a unanimous Court felt no need to explain how its decision was reconcilable with *Volks*. The truth, however, is that it is very hard to see how these cases form a coherent set.

Consider the following similarities between the cases. First, the deceased 'husbands' in *Daniels* and *Hassam* were like Mrs Robinson's partner in not having a duty to support their partners arising by operation of law. Secondly, in all three cases, no legal impediment had prevented the applicants from entering into a civil marriage. In all likelihood, the applicants in *Daniels* and *Hassam* had no real choice in the matter. However, the same was true of Mrs Robinson, whose partner, like many men in domestic partnerships, had refused to marry her. Thirdly, in *Daniels*, the Court said that the central question was not whether the applicant was lawfully married to the deceased, nor whether she had the option to enter into a civil marriage, but whether the remedial objectives of the ISA and MSA would be furthered by reading the relevant provisions so as to include Muslim widows in their coverage. The *Hassam* Court likewise referred to the fact that the needs of Muslim widows in polygynous Muslim marriages are indistinguishable from the needs of widows in other marriages, in the course of finding that their exclusion from the benefits of the ISA was unconstitutional. By contrast, the *Volks* Court focused on form, not function – the absence of a valid marriage – and ignored the fact that the needs of the survivors of permanent heterosexual life partnerships are indistinguishable from those of the survivors of civil and religious marriages.

The Court was therefore willing to extend protection to someone in the position of Fatima Hassam and Juliega Daniels, but not to someone in the position of Ethel Robinson, notwithstanding the absence of a valid marriage in all three cases; the fact that all three had the option to enter into a valid marriage; the absence of a duty of support arising by operation of law in all three cases; the fact that a party to a polygynous religious union is like a heterosexual life-

partner in not being, according to the Court, a ‘spouse’ in the ordinary meaning of the word; the functional similarity of Muslim marriages and permanent heterosexual life-partnerships; and the equivalent economic needs of their survivors from the perspective of the purposes of the relevant legislation. The only discernible difference between the cases is the presence or absence of religious rites but it is hard to see how this could be a relevant difference and to make the outcome turn on it seems arbitrary.

The unmistakable implication is that those whose reasons for not entering into a valid marriage are not religious are second-class citizens and less worthy of respect. To be sure, the different religions are treated more even-handedly in the new South Africa – which is, of course, an improvement – but, as in the old South Africa, religion continues to occupy a privileged position. The Court thinks that it is permissible for the state to deny appropriate legal protections to those who cohabit if they have not entered into a marriage or civil union or their union does not have the sanction of religion. The same message is sent as was sent in the case of *S v Jordan*:³⁷ despite the lip-service paid to the constitutional values of tolerance and pluralism, those who live ‘in sin’ in South African society are, like sex workers, outsiders, and it is thought justifiable to exclude them from the favoured inner circle. Aggravating the politics of exclusion is the fact that men benefit disproportionately from these moralistic attitudes to cohabitation, while women are disproportionately disadvantaged, as are the children born to such relationships.

In fact, there is even reason to doubt that all religions would be treated equally generously by the Court. Would the Court have found that the concept of a ‘spouse’ in the ISA and MSSA applies to parties married according to the rites of a fringe religion or one of which the judges disapprove? The answer is ‘probably not’. The cases are quick to make the point that Islam is a ‘major’ religion, which suggests that parties who regard themselves as married in terms of the laws of a disliked or a fringe religion might be met with a more chilly reception should they claim that they are entitled to the benefits conferred on lawfully married parties or that they have been unfairly excluded from a legislative regime that protects the lawfully married.³⁸ This hypothesis is also supported by the case of *Prince v President of the Law Society of the Cape of Good Hope*,³⁹ in which the Court was notably unaccommodating to the religious freedom claims of Rastafarians.

³⁷ *S v Jordan & Others* 2002 6 SA 642 (CC).

³⁸ See, for instance, *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA) para 20.

³⁹ *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC).

One cannot help but wonder how the Constitutional Court would respond should it be faced with an intestate succession case or a claim for maintenance against a deceased estate brought by a surviving party to a polygynous or polyandrous life-partnership, or by a survivor of a long-standing, polyamorous group 'marriage', involving multiple men and women, whether heterosexual, gay or lesbian, whose non-sexually-exclusive domestic arrangements are not dictated or endorsed by a religious or cultural tradition. As an example, one can think of 'hippie-type' communal family arrangements.

South Africans live in a society that proclaims, in Sachs J's words, the 'right to be different' and the 'right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others'.⁴⁰ This kind of rhetoric would seem to imply that long-term, polygamous and polyamorous relationships characterised by mutual support and financial interdependence are entitled to the same protection as the legislature confers on marital relationships, regardless of whether such arrangements have the imprimatur of religion or culture. To say otherwise would seem to announce that people who live in a stable, long-term, mutually supportive conjugal relationship with more than one person in the absence of religious or cultural reasons for doing so are not worthy of the same protection and respect.

It seems, indeed, that if it is discriminatory for the legislature to confer protection on married parties while withholding it from the parties to polygynous religious and customary unions, withholding protection from parties to secular polygamous or group arrangements would be even less justifiable, for they are not bound up with oppressive systems of religious and customary law that confer inferior status on women and they do not use religion to justify polygyny as a male right or forbid women from having multiple partners. Furthermore, they are much more likely to be freely chosen by all parties and to distribute family roles and responsibilities in a fairer way. If they raise concerns about the exploitation and subordination of women, they certainly do not do so to the same extent as polygynous religious and customary unions.

Yet the Court is unlikely to agree. The package of *Daniels*, *Hassam*, the same-sex cases and *Volks* suggests that the Court's embrace of 'difference' is limited to a very narrow range of domestic relationships that are not civil marriages. These are relationships that are assimilable to marriage either because they are religious unions, the parties to which the Court regards as 'spouses', or because they are relationships between the same-sex 'would-be married', who

⁴⁰ *Fourie* (n 22 above) para 61.

were not permitted to marry at the time the cases were decided. This constricted, marriage-model approach is hard to square with Moseneke J's statement in *Daniels* that 'family life as contemplated by the Constitution can be provided in different ways and ... legal conceptions of the family and what constitutes family life should change as social practices and traditions change.'⁴¹

4 Taking the state out of marriage

If we were really to take seriously the right not to be discriminated against on the ground of marital status, we would ask why the state should take any interest at all in marriage. Without purporting to do justice to the complexities of this issue, I will end with some brief comments on this matter. I have argued in this paper that while it is important for the state to support care-giving, protect vulnerable parties and provide for an equitable distribution of property at the end of long-standing, mutually supportive relationships, tying such protection to the formal status of being married is radically under-inclusive with respect to these social goals and is therefore singularly ill-suited to serving them.

Revising the rules of marriage so as to allow, for instance, same-sex marriage or polygamous marriage is better than nothing but it is only a partial solution to the problem. While it is desirable to broaden the definition of legal marriage, so that people are not excluded from the institution of marriage for moralistic reasons, the law should also protect unmarried parties who are left in an economically vulnerable position when their long-term intimate relationships end. Many people fall into cohabitation arrangements not because of a deliberate decision to avoid the consequences of marriage but rather because their partner refuses to marry them or because of ignorance of the legal consequences of failure to marry. It is more likely to be the male partner who refuses to marry and women are also more at risk from the law's failure to grant rights to unmarried cohabitants. The protective rationale of family law requires that weaker parties should not be left impoverished when long-term, mutually supportive, financially interdependent relationships end, whether or not they have formalised their relationships. As Nancy Polikoff observes:

[b]y constantly hammering at the injustice of excluding same-sex couples from the benefits and obligations of marriage, [the movement favouring gay and lesbian marriage], perhaps inadvertently, solidifies the differential treatment of the married and the unmarried. Rather than dethrone marriage from its favored status, a development that would honor all relationships, this movement seeks privileges for gay and

⁴¹ *Daniels* (n 4 above) para 77.

lesbian relationships that mirror heterosexual marriage. This is not optimal family policy.⁴²

The most obvious way to deal fairly with the problems that arise when domestic relationships end would be to create a new legal status, which ascribes rights and duties to the parties to interdependent, long-standing domestic relationships, whether or not they have married or formalised their relationship in some other way. The Constitutional Court took a step in this direction (albeit one from which it now appears to be backtracking, as explained in Part 3) when it articulated the notion of a life-partnership in the context of unformalised, same-sex relationships and said that marriage as recognised by law is just one form of life partnership.⁴³

If a solution of this kind were to be accepted, an obvious question would then arise, namely, 'Why should marriage exist as a status at all?' If all similar domestic relationships were to be treated similarly, regardless of the existence of a marriage licence, there would appear to be no need for the state to be in the business of granting marriage licences.

This might be disputed. It might be argued that it is one thing to remove moralistic restrictions on access to the institution of marriage, and to stop incentivising marriage by the carrot and stick method of withholding needed protection from the parties to comparable informal domestic relationships, but it would be going too far to abolish marriage as a legal status. This is because – it might be said – the rights and obligations of marriage have always attached automatically from the moment the ceremony concludes. Ascription of rights and obligations to people who have not formalised their relationships would, by contrast, require proof that the relationship has certain characteristics – many of which, such as long-term commitment and financial interdependence, might arise only after the passage of time. Furthermore, even after the passage of time, it might be reasonable to confer less onerous rights and obligations on the parties to non-formalised relationships than on the parties to a marriage. This being the case, it might be argued that legal support and protection based on the needs of parties who have shared their lives would not speak to the situation of people who wish to bind themselves to far-reaching and onerous obligations from the start of their relationship and regardless of whether they can demonstrate the requisite commitment, financial interdependence, and so on. It might consequently be concluded that there is a need to retain marriage as a distinct and unique legal status.

⁴² N Polikoff 'Ending marriage as we know it' (2003-2004) 32 *Hofstra Law Review* 203.

⁴³ *National Coalition (2)* (n 21 above) para 36.

My reply to this argument is that, apart from its probable exaggeration of the extent to which people are fully aware of the legal consequences of marriage, it is not necessary to retain marriage as a distinct status in order to cater for parties who would like to assume obligations of the kind described. Individuals who wish to replicate the traditional legal force of the marriage certificate by taking on very onerous obligations to each other from the start of their relationship may do so by entering into a contract to this effect.

A further possible objection to the suggestion that the state should cease to confer the status of 'marriage' is that the institution of marriage has always had powerful symbolic significance, connoting a very special kind of commitment, made in public, and that some people might want their relationship to be imbued with the symbolic meaning that marriage carries. But it is doubtful whether a liberal state, which ought to confine itself to the pursuit of generally shared objectives, should be in the business of conferring these kinds of contested symbolic and 'spiritual' benefits. Should a liberal state be entangled, as Tamara Metz puts it 'in an institution, the unique and perhaps primary purpose of which is to alter self-understandings in ways that go beyond what is necessary to the legitimate public welfare concerns of the state'?⁴⁴ Furthermore, as Metz also points out, it is possible for people to avail themselves of the symbolism of marriage without seeking the state's official sanction. Non-state entities regarded by the parties as ethically or symbolically authoritative, whether religious or secular, could confer the label of 'marriage', in the way that, for instance, the Christian religion pronounces people to be 'baptised'.⁴⁵

If the state were no longer to control marriage, it would be up to private organisations to set the rules. Some private organisations, such as some religious organisations, would no doubt have strict rules regarding the parties they are willing to marry. For instance, they might insist that their form of marriage is for monogamous, heterosexual partners. However, there would be nothing to stop private organisations from having very relaxed rules. Secular private organisations would no doubt spring up allowing adults to marry whoever they want, whether of the same or the opposite sex, or to marry multiple people, or even their close adult relatives, by participating in whatever kind of ceremony they prefer. As Cass Sunstein and Richard Thaler, who are in favour of privatising marriage, explain:

⁴⁴ T Metz 'The liberal case for disestablishing marriage' (2007) 6 *Contemporary Political Theory* 212.

⁴⁵ Metz (n 44 above) 206.

a church could decide that it would marry only members of that church, and a scuba diving club could decide that it would restrict its ceremonies to certified divers. Instead of channeling every partnership into the same one-size-fits-all arrangement of state marriage, couples could choose the marriage-granting organization that best suits their needs and desires. Government would not be asked to endorse any particular relationships by conferring on them the term *marriage*.⁴⁶

Sunstein and Thaler go further, however. They favour not only the abolition of legal marriage but also, for libertarian reasons, the private ordering of domestic relationships, subject only to default rules.⁴⁷ By contrast, I do not accept the view that weaker parties to domestic relationships should be left to the best bargain they are able to strike on a contractual basis. While people should be free to increase their obligations to each other over and above those that are automatically imposed by law, they should not be at large to exclude necessary protections – or, at the very least, not without stringent safeguards against exploitation.

Nor do I believe that adjudication of domestic matters should be left to private institutions, such as religious organisations, as suggested by those, such as Daniel A Crane, who argue for the privatisation of marriage as a means of increasing the power of different religions to regulate family life and enforce their own conceptions of marriage. These religiously-minded theorists are in favour of abolishing marriage as a legal status because they do not want people's matrimonial arrangements to be subject to the uniform rules of the state, such as rules about gender discrimination. They believe that if the state were to relegate marriage to the status of a contract, the state would be more willing to encourage parties to make religious tribunals, not secular courts, arbiters of any disputes concerning their matrimonial arrangements, in accordance with the principles of religious law.⁴⁸

Crane goes on to argue that religious conservatives who would like individuals to conform to their marital norms should concentrate their efforts on securing acceptance of the idea that marriage should be a religious, not a legal matter, instead of, for instance, opposing the liberalisation of divorce law or arguing that marriage should be legally defined as the union of one man and one woman. This is because, according to Crane, religious organisations which engage with the

⁴⁶ C Sunstein & R Thaler *Nudge: improving decisions about health, wealth and happiness* (2008) 218. See also N Polikoff 'Why lesbians and gay men should read Martha Fineman' (2000) 8 *American University Journal of Gender, Social Policy and the Law* 167; M Fineman 'Why marriage?' (2001) 9 *Virginia Journal of Social Policy and the Law* 239.

⁴⁷ Sunstein and Thaler (n 46 above) 226-7.

⁴⁸ DA Crane 'A "Judeo-Christian" argument for privatizing marriage' (2005-2006) 27 *Cardozo Law Review* 1250-6.

state on the rules of marriage will find themselves less able, in the long run, to pursue their own, distinctive vision of marriage as subject to more restrictive rules.⁴⁹ He thinks that if religious communities seek to influence the law of marriage, they will be more likely to be compelled by the state to conform to progressive views of marriage.⁵⁰ He also thinks that engaging in political battles about the rules of marriage will encourage believers to think that marriage is what the state says it is, making it correspondingly more difficult to persuade them to conform to religious marital norms.⁵¹ For these reasons Crane concludes:

[t]he idea of a mandatory, uniform body of family law ... should cause concern to religious conservatives. Over the long run, such norms are likely to grow increasingly unfavourable to conventional religious doctrine. Rather than reinforcing the idea that marriage is a proper subject for civil regulation, religious conservatives should seek to bolster the idea of marriage as a subject for private choice and control by mediating institutions.⁵²

By contrast, although I have suggested that the state should not publicly recognise marriage as an official status, and that only private organisations should confer the label of ‘marriage’, I have not argued that such organisations should be able to settle family disputes according to their own rules, whether religious or otherwise, or that the state should abdicate its responsibility to regulate domestic relationships. On the contrary, I have argued that the state should treat all functionally equivalent domestic relationships equally, by conferring the same benefits, burdens, rights and responsibilities on the parties to them, regardless of whether or not they are legally, religiously or, in terms of the rules of any other organisation, ‘married’.

⁴⁹ Crane (n 48 above) 1258.

⁵⁰ Crane (n 48 above) 1255.

⁵¹ Crane (n 48 above) 1256-8.

⁵² Crane (n 48 above) 1256.