

‘For whom does the bell toll? The challenges and possibilities the Civil Union Act creates for family law in South Africa’

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1. Introduction

- What is at stake in extension of marriage to lesbian/gay people?
- Outline of Paper

2. The Goals and Purposes of Achieving Marriage Equality Through Law

- Restrictions on private conduct of lesbians/gays and restriction to the private
- The move to publicly recognise lesbian/gay relationships challenges this assumption
- How to achieve public recognition? 3 perspectives
- Formal Rights Perspective: achieve equal legal rights and responsibilities
 - Does not explain why marriage per se is important
 - Formalities and Public character of Marriage
 - Marriage has a particular social meaning that cannot merely be recreated by an alternative institution
- Substantive Rights Perspective: equal legal rights, and responsibilities plus status equality (so far as is possible for law to achieve)
 - Challenges heterosexual domination by admitting lesbian/gay into ‘ideal’
 - Fundamentally conservative: accommodation of lesbian/gay to heterosexual ‘ideal’
 - Self-defeating if retains repressive aspects of marriage: constructions of male and female, gender relations and economic dynamics that are unequal
 - Marriage subordinates alternative forms of relationship and familial forms
- Transformative Perspective: Need to de-center marriage as primary familial form and open up space for experimentation and recognition of multiple familial forms
 - Marriage bears a particular social meaning and to fail to campaign for it relegates lesbian/gay relationships to second-class status at least in interim
 - Dislodging centrality of marriage is not necessarily best achieved through campaigning against marriage or working outside an institutional framework that acknowledges marriage as one possible form of relationship
- Substantive Rights and Transformative Perspective are not mutually exclusive
 - Can attempt to widen ambit of marriage whilst de-centering it as primary social form and recognising other familial forms
 - Civil Union Act offers possibility of this as elaborated in next section

3. A Contestation over Social Meanings: the Civil Union Act

- Fourie as a catalyst for the Act
- The constitutional defect in Fourie: ambiguity?
- The Initial Draft: Separate Acts for lesbian/gay and heterosexuals; no marriage for lesbians/gays

- Adopted Formal Rights Perspective
 - Fourie requires going beyond formal rights alone and thus unconstitutional as it stood
- Alternative proposal: Amend Marriage Act to render it gender-neutral: simple, constitutional remedy: clear expression of substantive rights approach
 - Problem is that such a proposal would retain dominance of marriage
 - No Transformative goals achievable
- The Final Act
 - Heterosexuals and lesbians/gays in same Act
 - Marriage for lesbians/gays
 - Choice between civil partnerships or marriage for all
- Change in notion of a civil partnership
- Choice between marriage and civil partnership: what lies behind it?
 - Raises status of civil partnerships whilst de-centering marriage
- Civil Union = either a marriage or a civil partnership
 - Catch-all is civil union rather than marriage
 - Wide range of relationships under Civil Union
- Substantive Rights and Transformative Goal potentially Achievable

4. An Imperfect Vehicle for Transformation: the Civil Union Act and its Deficiencies

- The Retention of Separate Acts
 - Impact on status equality?
 - Distinction without a difference?
 - Construction of social meanings around Acts
- Lesbian/gay specific clauses
 - Conscientious Objection and its Unconstitutionality as it Stands
 - Objectionable both from Substantive Rights and Transformative perspective
- Religious Denominations
 - Contradiction between civil conscience and religious subjection
 - Chilling impact on substantive rights and transformative goals
- Exclusion of Customary Marriages
 - Symbolic exclusion and hampering of social meanings
- Domestic Partnerships
 - A form of civil Union? Help achieve Transformative Goals

5. Conclusion: Law and Social Change

- Caution: Not to Over-Estimate Role of Law in Social Change
- Caution: Important not to Under-Value Role of Law too
- The Appropriate Role for Law: create an enabling space for social experimentation and transformation to take place in family law
- Civil Union Act offers possibility that law will perform such a role and meet both substantive rights and transformative goals: need for continued activism to ensure that it in fact does so and recognises that ‘families come in many shapes and sizes’ in South Africa