1 War by other means: The law and politics of sexual minority freedom in post-apartheid South Africa

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1 Introduction: Setting the scene

Michel Foucault's lecture series of 1975-1976 at the College de France (published under the title *Society must be defended*)[1] famously inverted Clausewitz's definition of war as 'the continuation of politics by other means',[2] in order to provide an analysis of power from the point of view that 'politics is the continuation of war by other means'.[3] Around the same time, critical legal thought, heavily influenced by Foucault, began to insist and illustrate that 'law is politics'.[4] Reading these two arguments together provokes the conclusion that law is inescapably implicated in the definition of politics as the continuation of war by other means. As Foucault asks in *Society must be defended*:

> If we look beneath peace, order, wealth, and authority, beneath the calm order of subordination, beneath the State and State apparatuses, beneath the laws, and so on, will we hear and discover a sort of primitive and permanent war?[5]

In this precise sense alone, Foucault is the original thinker of that which today marches under the banner of 'lawfare'. Far from relegating law to the outskirts of modernity (as Foucault is often (mis)read), the *Society must be defended* lectures show that Foucault considered law, which he did

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1 M Foucault *Society must be defended: Lectures at the Collège de France, 1975-1976* (2004).

2 Foucault (n 1) 21.

3 Foucault (n 1) 15.

4 For an overview, see P Schlag 'Notes toward an intimate, opinionated, and affectionate history of the Conference on Critical Legal Studies' 36 *Stanford Law Review* 391. Also see P Schlag 'Foreword: Postmodernism and law' (1991) 62 *University of Colorado Law Review* 439, at 448 where the author makes the direct Foucaultian link between law, politics and power: '[l]aw is politics, not because law is subject to political value choice, but rather because law is a form that power sometimes takes'.

5 Foucault (n 1) 47.

not distinguish rigorously from politics, as an indispensable modality of power in modernity.

In this chapter, we aim to show that there are critical moments in the legal discourse on sexual minority freedom in post-apartheid South Africa that are punctuated by a certain logic or mentality, no matter how subtle, of warfare – a logic which is not very far removed at all from the overt logic of warfare that permeated apartheid era law and politics. Despite the inclusion in South Africa's post-apartheid Constitutions, of 'sexual orientation' as a ground of presumed unfair discrimination, the struggle for sexual minority freedom in the postcolony has generated a protracted and equivocal judicial and legislative discourse of power from which the homosexual legal subject emerges as at once liberated and thoroughly *disciplined*, that is, put in her (heteronormative) legal place.

We begin by laying out the complex record of 'sexual orientation' as a ground of presumed unfair discrimination in the post-apartheid Constitutions. There can be no shortcuts here, since our argument turns on the idea that each judicial and, later, legislative development constituted a critical moment in the assembly of a legal discourse that remains in operation today. The historical trajectory can be summarised as the move from decriminalisation to incremental recognition – specifically of same-sex relationships and families – to legislative reform. We proceed to argue that the recognition jurisprudence (that is, the jurisprudence that followed decriminalisation) constituted a disciplinary regime of power/knowledge in relation to the homosexual legal subject. This regime revolves around two closely related discursive constructions: the 'good' homosexual subject and the 'permanent same-sex life partnership'. Having put this regime of power/knowledge to work, the Constitutional Court ironically proceeded to disavow its validity in the *Fourie*[6] case, in which it declared the heteronormative definition of legal marriage in the common law and the 1961 Marriage Act unconstitutional. However, this disavowal proved to be largely without consequence, in that the knowledge regime that had been constituted in the recognition jurisprudence dominates the legislative reform represented by the Civil Union Act.[7] We conclude that the legal history of sexual minority freedom in the postcolony period reveals a picture of South Africa as what Foucault in the above lectures called a 'binary' society;[8] the society at war with itself, the society, even, at war with its own law. In closing, we rely on Golder and Fitzpatrick's reading of Foucault's law, to argue that the legal future of sexual minority freedom

6 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

7 Act 17 of 2006.

8 Foucault (n 1) 51.

in South Africa might still be different to the heteronormative hegemony that has been imposed upon it through lawfare.

2 The political and legal history of sexual minority freedom in post-apartheid South Africa

2.1 The inclusion of 'sexual orientation' in the post-apartheid Constitutions and decriminalisation

The history of the legal recognition of sexual minority freedom in South Africa begins with the story of gay anti-apartheid activist Simon Nkoli. Jacklyn Cock remarks that, in the period between 1987 and 1990, the gay rights movement that was already established in South Africa, 'expanded and was able to place gay issues on the agenda of the anti-apartheid struggle both in South Africa and abroad'.[9] Nkoli and his prominence as a freedom fighter and openly gay black man within the struggle played a key role in forging a particularly strategic alliance between the gay rights movement and the mass democratic movement.[10] In 1987, Nkoli – at the time, a member of the Gay Association of South Africa (GASA)[11] – was arrested, detained and, along with 19 others, charged with 'high treason' in the highly publicised Delmas treason trial.[12] After his acquittal, Nkoli became chairperson of the Gay and Lesbian Organisation of the Witwatersrand (GLOW) which organised, in 1990, the first public LGBTQI parade in South Africa. In his address at the march, Nkoli said:

> I'm fighting for the abolition of apartheid, and I fight for the right of freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as a black man if I am not free as a gay man.[13]

Cock convincingly argues that it was Nkoli's embodiment and assertion of a link between the black liberation struggle and the struggle for sexual minority freedom that 'shifted the attitudes of key political actors'.[14]

9 J Cock 'Engendering gay and lesbian rights: The equality clause in the South African Constitution' (2002) 26 *Women's Studies International Forum* 35 at 36.

10 Cock (n 9) 36-38.

11 GASA, in Cock's words, was a 'largely white, middle class, and male' organisation with a pronounced apolitical stance. It's failure to support Nkoli after his arrest as well as its general failure to link the struggle for sexual minority freedom with the struggle against apartheid, resulted in its eventual expulsion from the International Lesbian and Gay Association (ILGA) in 1987. See Cock (n 9) 37.

12 Cock (n 9) 36.

13 As above.

14 As above.

This attitudinal shift became concrete when the African National Congress (ANC) included in its pre-democracy constitutional proposals[15] the following wording: 'the right to be protected from unfair discrimination must specifically include those discriminated against on the grounds of ethnicity, language, race, birth, *sexual orientation* and disability'.[16] This wording represented a clear recognition of the particularly harsh fate that sexual minorities suffered as a result of apartheid law.[17] The inclusion of 'sexual orientation' in the ANC's pre-constitutional proposals paved the way for section 8(2) of the interim Constitution of the Republic of South Africa of 1993,[18] which famously became the first constitutional provision in the world expressly to prohibit unfair discrimination, directly or indirectly, on the ground of 'sexual orientation'.[19] In 1994, the National Coalition for Gay and Lesbian Equality (NCGLE),[20] established itself with the explicit purpose of coordinating the lobbying for the retention of 'sexual orientation' in the 1996, so-called 'final', Constitution (the Constitution). The NCGLE's submissions to the Constitutional Assembly

15 ANC Policy Proposals for a Final Constitution http://www.anc.org.za/ancdocs/policy/building.html#BILL (accessed 1 October 2006). Adopted by the National Conference of the African National Congress on 31 May 2002.

16 ANC Policy Proposals (n 15) (emphasis added). For a detailed account of the way in which the sexual orientation clause found its way into the South African Constitution, see EC Christiansen 'Ending the apartheid of the closet: Sexual orientation in the South African constitutional process' (2000) 32 *Journal of International Law and Politics* 997. See also MF Massoud 'The evolution of gay rights in South Africa' (2003) 15 *Peace Review* 301; and S Croucher 'South Africa's democratisation and the politics of gay liberation' (2002) 28 *Journal of Southern African Studies* 315.

17 Examples of apartheid legislation in this regard include the Immorality Act 21 of 1950, which criminalised interracial sexual intercourse; the Prohibition of Mixed Marriages Act 55 of 1949, which prohibited interracial marriage; the Sexual Offences Act 1957, which provided for the criminal proscription of unnatural sexual acts committed between men 'at a party'; and the inclusion of the common law crime of consensual male sodomy in schedule 1 of the Criminal Procedure Act of 1977, which provided that a person who was suspected of having committed the crime of sodomy could be killed if, during the pursuit of the suspect, such suspect resisted arrest.

18 Constitution of the Republic of South Africa, 1993 (interim Constitution). This Constitution came into effect on 27 April 1994 – the date of the first democratic elections in South Africa.

19 Commentators refer, somewhat carelessly, to this inclusion as the 'key challenge to the edifice of heteronormativity through the "queering" of the Constitution'. See M Steyn & M Van Zyl 'The prize and the price' in M Steyn & M Van Zyl (eds) *The prize and the price: Shaping sexualities in South Africa* (2009) 3. As this chapter will show, it does not follow, without more, that the mere inclusion of sexual orientation as a ground for presumed unfair discrimination sparks any meaningful queering of the Constitution. A Constitution is read, interpreted and given effect to by the courts, the legislature, the executive and the body politic. Queering the Constitution – if there is such a thing – depends in the final instance on the collective (ethico-political) practices of these bodies.

20 The NCGLE represented 65 member organisations.

– the political body tasked with the drafting of the Constitution – played a central role in the retention of 'sexual orientation' as a ground of prohibited unfair discrimination in section 9(3) of the Constitution.

In the case of *S v K,*[21] the Cape High Court became the first court in South Africa to declare that the common law crime of male sodomy ceased to exist after the coming into operation of the interim Constitution on 27 April 1994. The decision, however, only applied in the geographical jurisdiction of the Cape High Court. In addition, the Constitution had not yet come into operation when the alleged offence occurred that led to the accused in *S v K* being charged (although the High Court in *S v K* held that the criminalisation of sodomy was, in any event, also inconsistent with the provisions of the final Constitution that had come into effect when the accused appeared in court for the first time).[22] By the time that the *S v K* case was decided, the NCGLE had devised a litigation strategy on the basis that it would approach the courts first to deal with the most egregious and obvious forms of discrimination, before tackling the politically more contentious forms of discrimination such as the effective legal prohibition of same sex marriage.

As a result of the unsatisfactory judicial outcome in *S v K,* the NCGLE brought a case before the Witwatersrand High Court applying for an order declaring unconstitutional the common law crimes of sodomy and the commission of 'unnatural sexual acts between men' as well as various legislative provisions in connection with such criminalisation, including the infamous 'men at a party' provisions of section 20A of the Sexual Offences Act.[23]

The Witwatersrand High Court declared the common law crimes as well as all the related statutory provisions unconstitutional.[24] The Constitution, however, provides that where a lower court declares an Act of Parliament unconstitutional, such an order, to have force and effect, must be referred to the Constitutional Court for confirmation.[25]

21 1997 (4) SA 469 (C).

22 *S v K* (n 16) para 3.

23 See in this regard see *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W) paras 7-9 and 13.

24 *National Coalition for Gay and Lesbian Equality* (n 23).

25 Section 172(2)(a) of the Constitution provides as follows: 'The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.'

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[26] the Constitutional Court held that a confirmation of the constitutional invalidity of the statutory provisions necessarily required it to pronounce on the constitutionality of the underlying common law crimes.[27] To this extent, the Court carefully considered the meaning of 'sexual orientation' in section 9(3) of the Constitution and adopted a broad and generous interpretation of the phrase:

> [S]exual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.[28]

The Court held that the phrase applied equally to bisexual orientation and transgendered individuals as well as to those who, on a single occasion, find themselves attracted to a member of their own sex.[29] The Court concluded that the discrimination represented by the legislation and the common law was unfair and therefore contrary to the right to equality envisaged in section 9 of the Constitution.[30] It also held that the criminal proscriptions violated the right to dignity under section 10 of the Constitution:

> There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.[31]

The Court furthermore held that the impugned provisions infringed on the right to privacy:

> The fact that a law prohibiting forms of sexual conduct is discriminatory, does not, however, prevent it at the same time being an improper invasion of the intimate sphere of human life … We should not deny the importance of a

26 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

27 *National Coalition for Gay and Lesbian Equality* (n 26) para 9.

28 *National Coalition for Gay and Lesbian Equality* (n 26) para 20.

29 *National Coalition for Gay and Lesbian Equality* (n 26) para 21.

30 *National Coalition for Gay and Lesbian Equality* (n 26) para 27.

31 *National Coalition for Gay and Lesbian Equality* (n 26) para 28. The Court also held that the constitutional right to privacy had been violated independent of the violations of the rights to equality and dignity.

> right to privacy in our new constitutional order, even while we acknowledge the importance of equality.[32]

Given that the South African Constitution introduces a legal culture of justification by virtue of its section 36 provisions, the Court was required to visit the question whether the violation of the rights mentioned above were nevertheless justifiable in 'an open and democratic society based on human dignity, equality and freedom'.[33] It held that this exercise was essentially one of the balancing of different interests:

> In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.[34]

In accordance with this approach, the Court held that no valid purpose for the limitation had been suggested and that, accordingly, there was no justification for the limitation. The Court also placed significant emphasis on the fact that the general trend in open and democratic societies had been towards decriminalisation of sodomy – a trend which provides further support for the contention that there is no legitimate purpose served by criminalisation.[35] It accordingly endorsed the order of the High Court that the common law offence of sodomy, as well as its incorporation into the relevant statutes, were unconstitutional and invalid.[36] The Court went on to declare section 20A of the Sexual Offences Act unconstitutional for fundamentally the same reasons as were advanced in relation to the common law crime of sodomy.[37]

Notably, the Court (in a concurring judgment by Sachs J) signalled its acceptance that individuals should not only enjoy protection of the constitutional rights if they conformed to a – possibly fictional but deeply embedded – heterosexual norm. Arguing that 'equality should not be confused with uniformity' and that 'in fact, uniformity can be the enemy of equality' the Court embraced the idea that individuals should be protected regardless of their differences.

> Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights

32 *National Coalition for Gay and Lesbian Equality* (n 26) para 32.

33 See sec 36 of the Constitution of the Republic of South Africa, 1996.

34 *National Coalition for Gay and Lesbian Equality* (n 26) para 35.

35 *National Coalition for Gay and Lesbian Equality* (n 26) paras 39-57.

36 *National Coalition for Gay and Lesbian Equality* (n 26) para 73.

37 *National Coalition for Gay and Lesbian Equality* (n 26) para 76.

> requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference.[38]

If this line of reasoning was going to be followed to its logical conclusion, the law would be required to protect individuals and relationships that did not necessarily conform to any idealised (often heterosexual) norm. However, when called upon to extend legal recognition of same-sex partnerships, the Court retreated from this progressive position, an aspect of the jurisprudence we return to in part 3 below.

2.2 The legal recognition of same-sex partnerships

Once decriminalisation had been secured, the NCGLE turned its attention to the question of how the new constitutional dispensation could or would legally recognise same-sex relationships in the face of: the 'sexual orientation' ground in the Constitution's equality clause, on the one hand; and, on the other hand, the implicit prohibition of same-sex marriage by the gender specific Marriage Act of 1961, which remained in force. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[39] the Constitutional Court initiated its recognition jurisprudence in a case that dealt with the immigration rights of same-sex couples. In this case the NCGLE instituted proceedings in the Cape High Court for an order declaring section 25(5) of the Aliens Control Act[40] unconstitutional in that it facilitated the immigration into South Africa of the spouses of permanent South African residents, but did not extend the same benefits to men and women in permanent same-sex life partnerships with permanent South African residents. The High Court declared the section unconstitutional, whereupon the NCGLE applied to the Constitutional Court for a confirmation of the order of constitutional invalidity.

The Constitutional Court decided that section 25 of the Act was unconstitutional in that it unfairly discriminated against same-sex relationships on the basis of sexual orientation and marital status. The Court held that the word 'spouse' in the provision complained of,[41] could

38 *National Coalition for Gay and Lesbian Equality* (n 26) para 132.

39 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

40 Act 96 of 1991.

41 Section 25 provided that only the 'spouse' or 'dependent child' of a person who is permanently and lawfully resident in South Africa can apply for an immigration permit. The applicants contended that the section was unconstitutional because it did not allow the partners of permanently resident South Africans in permanent same-sex life partnerships to also apply for such permits.

not in its context be construed as including a partner in a permanent same-sex life partnership.[42] Such a construction would 'distort' the meaning of the expression. The Court relied explicitly on what it called the 'ordinary' meaning of the word 'spouse' as denoting a husband or a wife.[43] It also emphasised that the word 'marriage' as used in the relevant legislation did not extend 'any further than those marriages that are ordinarily recognised by our law'.[44] In short, the Court's decision was that a same-sex life partnership could not be regarded as a marriage. This is not to say that the Court did not recognise that the discrimination in this case was based on 'harmful and hurtful stereotypes of gays and lesbians'[45] and accordingly

> denies to gays and lesbians that which is foundational to our Constitution … 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.[46]

Given the Court's approach to the interpretation of the words 'spouse' and 'marriage' in the contested legislation, it held that the constitutionally defective legislation could only be remedied by reading the words 'permanent same-sex life partnership' into the statute. This remedy would afford partners in same-sex life partnerships the same statutory rights as spouses in legally recognised marriages. Although the remedy was limited to the statute only, it was clear that similar provisions in other statutes would not survive constitutional scrutiny and that the remedy would probably be the same in substance.[47] Mindful of this fact, the judgment included a list of factors[48] which would assist in the determination of whether the same-sex life partnership was 'permanent' and thus worthy of protection as a form

42 *National Coalition* (n 39) para 23.

43 *National Coalition* (n 39) para 25.

44 As above.

45 *National Coalition* (n 39) para 49.

46 *National Coalition* (n 39) para 42.

47 *National Coalition* (n 39) para 82.

48 *National Coalition* (n 39) para 88: 'Such facts would include the following: the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another.'

of family. The long set of factors listed by the Court has the appearance of a checklist for all the requirements of a traditional, idealised heterosexual marriage. The cumulative effect of this list of factors was to send a strong signal that only those intimate relationships that were sufficiently similar to that of an idealised heterosexual marriage would qualify for recognition and protection by the courts. The judgment therefore did not fully embrace the rhetoric of the earlier judgment which embraced the 'right to be different' as being at the heart of the constitutional promise for equality. The judgment suggested that relationships which had the same structure as that of the idealised heterosexual marriage or which had the same basic functions as such a relationship could therefore be singled out as worthy of protection. Intimate relationships which did not closely resemble an idealised heterosexual marriage, would therefore apparently not be worthy of equal concern and respect. In the final analysis the Court therefore seemed to support a rather narrow conception of what would qualify as intimate relationships worthy of constitutional protection, even while it professed to endorse a more open-ended view. The judgment suggested that intimate relationships that strayed too far from the model, one man, one woman and two (and a half) children, married monogamously until death do them part, would not be worthy of recognition.[49]

A flurry of decisions, which vindicated important rights for partners in permanent same-sex life partnerships, followed the decision in the second *National Coalition* case. These developments occurred against the backdrop of a violently patriarchal society in which heteronormativity, heterosexual hyper-masculinity and extreme conservatism about sexuality and sexual orientation remained as the order of the day, while, at the same time, the state was constitutionally obligated to eradicate all forms of unfair discrimination on the ground of sexual orientation.

In *Satchwell v President of the Republic of South Africa*,[50] the Court extended spousal benefits conferred in terms of the Judges' Remuneration and Conditions of Employment Act[51] to partners in permanent same-sex life partnerships but emphasised that the equality clause does not generally require benefits extended to spouses to also be extended to same-sex life partners.[52] The Constitution will only impose these benefits on same-sex partners where reciprocal duties of support have been undertaken.

49 P de Vos 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *South African Journal on Human Rights* 179 at 197. We return to this aspect in section 3 below.

50 *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC).

51 Act 47 of 2001.

52 *Satchwell* (n 50) para 24.

Whether such duties of support exist or not depends on the circumstances of each case.[53] Accordingly the Court ordered the reading in of the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' after the word 'spouse' wherever it occurred in the challenged legislation and regulations.[54]

On the basis of *Satchwell*, the Supreme Court of Appeal subsequently extended statutory benefits for spouses of road accident victims to partners in permanent same-sex life partnerships who have undertaken reciprocal duties of support.[55] The decision also had a significant impact on the extension of joint adoption rights to same-sex life partners in the case of *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)*.[56] In *J v Director General, Department of Home Affairs*,[57] the Constitutional Court used the reading-in remedy to cure the unconstitutionality of section 5 of the Child Care Act[58] which failed to provide that a partner in a permanent same-sex life partnership who did not give birth to a child conceived by artificial insemination, could become a legitimate parent of that child. In this case, the Court made it clear that 'comprehensive legislation regularising relationships between gay and lesbian persons' had become necessary, because

> it is unsatisfactory for the Courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation.[59]

2.3 The *Fourie* judgment's invalidation of the Marriage Act

The above cases and legislative developments set the scene for the Constitutional Court's 2006 decision in which it declared the common law definition of 'marriage' as well as the 1961 Marriage Act to the extent that it relied on that definition unconstitutional.[60] The Court held that the jurisprudence on sexual minority freedom had established that the family and family life of gay men and lesbians are in all significant respects indistinguishable from those of heterosexual spouses and in human terms

53 *Satchwell* (n 50) para 25.

54 *Satchwell* (n 50) para 34.

55 *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

56 *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as* Amicus Curiae) 2003 (2) SA 198 (CC) para 39.

57 *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC).

58 Act 82 of 1987.

59 *J* (n 57) para 23.

60 *Fourie* (n 6) para 162.

as important.[61] Where the law fails to recognise the relationship of same-sex couples,

> the message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudice and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity.[62]

In its judgment the Court dealt with some of the most politicised and contested issues around same-sex marriage. Of these, the religious argument against same-sex marriage stands out as the main site of contestation. The conservative argument against same-sex marriage is well known: it is a widely held belief in South Africa that marriage is by its very nature a religious institution. To change its definition would violate religious freedom in a most fundamental way.[63] The Court elegantly refuted this argument. It recognised that religious bodies play a large and important part in public life and are part of the fabric of our society,[64] the open and democratic society contemplated by the Constitution requires mutual respect and co-existence between the secular and the sacred:

> [T]he acknowledgment by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. *The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected.* The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity.[65]

This entails, plainly, that the religious beliefs of some cannot be used to determine the constitutional rights of others.[66] In an open and democratic society there should be a capacity to accommodate and manage difference and not to enforce the view of the (religious) majority on marginalised minorities in ways that would reinforce unfair discrimination against a

61 *Fourie* (n 6) para 54.

62 *Fourie* (n 6) para 54, quoting from the judgment in *National Coalition v Minister of Home Affairs* (n 39) para 54.

63 *Fourie* (n 6) para 88.

64 *Fourie* (n 6) para 90.

65 *Fourie* (n 6) para 98 (emphasis added).

66 *Fourie* (n 6) para 92.

minority.[67] The Court concluded that the religious argument was based on a prejudice that is at odds with the constitutional requirements of equal treatment and respect for difference.[68] It added that granting same-sex couples the right to marry would in no way impair the capacity of heterosexual couples to marry in the form they wished and in accordance with their religious beliefs.[69]

Instead of an immediate reading-in of wording into the Marriage Act that would render the Act gender neutral and thus cure the unconstitutionality, the Court suspended the reading-in remedy for one year to give Parliament a chance to address the unconstitutional exclusion of same-sex couples from enjoying the status and entitlements coupled with responsibilities that are accorded to heterosexual couples by common law and by the Marriage Act.[70] As to the confines of this mandate to Parliament, it was very clear from the decision that the mandate was extremely narrow. The Court expressly held that whatever legislative measures Parliament takes, it could not subject same-sex couples to new forms of marginalisation or exclusion by the law, either directly or indirectly.[71] Parliament had to be

> sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation.[72]

It would therefore be completely unacceptable for Parliament to adopt a 'separate but equal' approach because this would serve 'as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation'.[73] In the Court's view:

> [T]his means that whatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved. In a context of patterns of deep past discrimination and continuing homophobia, appropriate

67 *Fourie* (n 6) para 94.

68 *Fourie* (n 6) para 94.

69 *Fourie* (n 6) para 111.

70 *Fourie* (n 6) para 156. In a dissenting judgment (*Fourie* (n 6) paras 167-169), O'Regan J held that it was not appropriate in this case to suspend the order of invalidity, given that Parliament's choice was a narrow one that would be unaffected by providing immediate relief.

71 *Fourie* (n 6) para 150.

72 *Fourie* (n 6) para 150.

73 As above.

> sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples.[74]

It is within this context that the Court noted that one of the principal functions of Parliament was to ensure that the values of the Constitution, as set out in the Preamble and section 1, permeate every area of the law.[75] And it is within this context that it encouraged Parliament to consult widely before adopting legislation in this regard.

The judgment contains resounding language affirming the right of gay men and lesbians to form intimate life partnerships and to 'be different'. But there seems to be a contradiction at the heart of the rhetoric employed by the Court. It is striking to note the degree to which this judgment valorises the institution of marriage and endorses the view that legal marriage remains the only comprehensive and valid way in which two people can (and perhaps should) bestow full legal and societal recognition on their relationship. At the heart of the decision is an acceptance of the fundamental and central importance of marriage for South African society. This acceptance is, from a descriptive point of view, persuasive, but it fails to develop a more expansive and less heteronormative view of relationships which should be recognised by the law. To show that the exclusion of same-sex couples from marriage fundamentally affects their human dignity, the Court emphasises both the legal and symbolic nature of marriage and approvingly notes that marriage provides those who enter into it with a specific, somewhat exalted, status in our society. Although this valorisation of the institution of marriage by the Constitutional Court is not new,[76] it is particularly striking and somewhat jarring in this case, given the rhetoric of the Constitutional Court in both the *NCGLE v Home Affairs* judgment and later in the *Fourie* judgment about 'the right to be different'. If the test for the full recognition of equality is about the recognition of and respect for difference, then why, one might wonder, is it appropriate for the law to bestow special rights and a special status on those hetero- or homosexual couples who choose to enter into traditional marriage? The judgment thus hints at the limits of a political and legal strategy for the emancipation of gay men and lesbians based on a model of assimilation and acceptance. It seems to suggest that acceptance, true acceptance, only comes to those who wish to make or have the power to make a choice in favour of 'normality' – even though, given the economic, social or cultural position of individuals, this 'choice' might not be open

74 *Fourie* (n 6) para 153.

75 *Fourie* (n 6) para 138.

76 See for example *Dawood, Shalabi, Thomas v Minister of Home Affairs* 2000 (8) BCLR 837 (CC); and *Volks v Robinson* 2005 (5) BCLR 446 (CC).

to all. The 'right to be different' then runs the risk of becoming an empty slogan. One might even argue that it becomes merely the right not to be a heterosexual – as long as one conforms to the image of the idealised imaginary heterosexual.[77]

2.4 Legislative developments after *Fourie* – the Civil Union Act

Parliament's response to *Fourie* eventually came in September 2006,[78] two months before the deadline of 30 November 2006. The first draft of the Civil Union Bill[79] did not provide same-sex couples with the choice to enter into a marriage or to conclude a civil union. The long title of the Bill made this abundantly clear: The purpose was to 'provide for the solemnisation of civil partnerships [and] the legal consequences of civil partnerships'.[80] Another way of stating the long title of the Bill would simply have been 'to preserve the traditional, historic nature and meaning of the institution of civil marriage'.[81] The Bill repeatedly reserved the category of 'marriage' for relationships other than same-sex partnerships (that is, heterosexual relationships). This effectively meant that the legislature and the Bill's drafters ignored the re-definition of 'marriage' endorsed in *Fourie*. Ultimately, the Bill purported to create precisely the separate but equal regime declared as 'absolutely unthinkable'[82] in the *Fourie* decision. For this reason, the State Law Advisor refused to certify the Bill before it was tabled in Parliament,[83] and parliamentary legal advisors continuously advised the Portfolio Committee of Home Affairs that the Bill would probably not survive a constitutional challenge.[84]

77 P de Vos 'The "inevitability" of same-sex marriage in democratic South Africa' (2007) 23 *South African Journal on Human Rights* 432, at 457.

78 A Quintal 'Same-sex Marriages Bill tabled in Parliament' *IOL* 25 August 2006 http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20060825011114223C978307 (accessed 15 December 2006).

79 Civil Union Bill 26 of 2006.

80 As above.

81 This was in fact the long title of the Massachusetts Civil Union Bill (Senate No 2175) that was struck down as unconstitutional by the highest court of that state.

82 A Quintal 'Concern about Civil Union Bill' *IOL* 8 September 2006 http://www.iol.co.za/news/south-africa/concern-about-civil-union-bill-292875 (accessed 20 May 2017).

83 As above.

84 See Home Affairs Minutes of the Home Affairs Portfolio Committee Civil Union Bill Deliberations, 1, 7 and 8 November 2006 http://www.pmg.org.za/minutes.php?q=2&comid=11 (accessed 9 November 2007).

Unfortunately, the Parliamentary Home Affairs Portfolio Committee insisted on conducting its public participation process on the strength of a Bill that was patently unconstitutional. The result was deeply flawed, in that the overwhelming majority of written submissions and oral presentations at hearings propagated a discourse marked by the unchecked expression of naked homophobia, stereotypical misconceptions and widely accepted myths.[85] This reaction, in turn, put proponents of same-sex marriage who participated in the hearings on the back foot, forcing them into a discursive position in which they were not only subjected to openly homophobic discourse, but also compelled to repeat and emphasise, over and over again, the precise determinations of the *Fourie* judgment and its explicit instructions to Parliament. Moreover, given that the Bill was ostensibly unconstitutional, these proponents found themselves in the unenviable position of having to propose a legally workable, constitutionally sound alternative. The pressure exerted by this group, resulted in a last-minute radical redrafting of the Bill.

On 7 November 2006 the ruling ANC party tabled a proposal before the Home Affairs Portfolio Committee that would become the Civil Union Act.[86] This version of the legislation differed markedly from the first draft. Most tellingly, the proposed 'civil partnership' institution, reserved exclusively for same-sex couples, was replaced by a gender neutral 'civil union' that could be concluded by way of either a civil partnership or a marriage. While recognition of same-sex marriage was extended by the adoption of a separate law – leaving the traditional Marriage Act intact thus allowing heterosexual couples opposed to same-sex marriage to

85 See, inter alia, 'Civil Union Bill: A response by His People Christian Ministries (South Africa)' http://www.pmg.org.za/docs/2006/061016hispeople.htm (accessed 18 November 2006); 'Southern African Catholic Bishops' Conference submission to the Portfolio Committee on Home Affairs on the Civil Union Bill' http://www.pmg.org.za/docs/2006/061016catholic.htm (accessed 3 March 2007); Gereformeerde Kerke in Suid-Afrika 'Presentation to the Portfolio Committee on Home Affairs regarding the Amendment of the Marriages Act (25/1961): Reaction to the Proposed Civil Unions Bill' http://www.pmg.org.za/docs/2006/061016reformed.htm (accessed 3 March 2007); Muslim Judicial Council (SA) 'Submission on Civil Union Bill' http://www.pmg.org.za/docs/2006/061016mjc.pdf (accessed 18 November 2006); Christian Lawyers Association 'Submission to the Portfolio Committee of Home Affairs Stakeholder Public Hearings October 2006 Civil Union Bill' http://www.pmg.org.za/docs/2006/061017vilakazi.doc (accessed 19 November 2006); 'Christian Brethren on the Civil Union Bill' http://www.pmg.org.za/docs/2006/061017stakeholder.pdf (accessed 19 November 2006); 'Couples for Christ Submission to Parliamentary Portfolio Committee' http://www.pmg.org.za/docs/2006/061017couples.pdf (accessed 19 November 2006); and Christian Action Network 'Submission regarding Civil Union Bill' http://www.pmg.org.za/docs/2006/061017couples.pdf (accessed 19 November 2006).

86 Act 17 of 2006.

enter into marriage in terms of the Marriage Act exclusively reserved for heterosexual couples – it affirmed that same-sex couples would enter into a marriage with the same legal rights and the same status of 'traditional' heterosexual marriages. The ANC eventually used its political power in the committee and in the houses of parliament to pass this version of the proposed legislation in time to meet the deadline of the Constitutional Court.[87]

3 The judicial construction of a 'separate but equal' power/knowledge regime and the discourse of the 'good' homosexual subject

Golder and Fitzpatrick write that Foucault

> gives ample evidence in his writings of the mid-1970s of how disciplinary and bio-political operatives and knowledges come to invade and inscribe themselves within modern law, and of how law is co-opted by disciplinary and bio-political imperatives.[88]

Foucault himself refers, in *Society must be defended* to how 'the techniques of discipline and discourses born of discipline are invading [the concept and practice of] right'.[89] Despite Foucault's insistence, then, that law and disciplinary power should be rigorously separated from an analytical point of view, he nevertheless was himself aware of and made room for the regular overlap between legal power and disciplinary power.

In this section, we will use the above insight to trace what we believe to be the two main obstacles to the achievement of family law equality for non-heterosexual legal subjects in post-apartheid South Africa. The first of these obstacles is the construction of a 'separate but equal' disciplinary power/knowledge regime around the trope 'permanent same-sex life partnership' within the jurisprudence of the Constitutional Court. As explained above, the jurisprudence created the distinct entity of a 'permanent life partnership', ostensibly to extend partnership rights to same-sex couples who were not allowed to get married, but in effect it reinforced the notion that same-sex relationships should be legally regulated and recognised in a different way than different-sex relationships.

87 'Same-sex couples can now legally tie the knot' *SABC News* 14 November 2006 http://www.sabcnews.com/politics/government/0,2172,138457,00.html (accessed 1 August 2022); 'S Africa approves same-sex unions' BBC News 14 November 2006 http://news.bbc.co.uk/2/hi/africa/6147010.stm (accessed 11 December 2006).

88 B Golder & P Fitzpatrick *Foucault's law* (2009) 2.

89 Foucault (n 1).

This regime, once it was established, provided the conceptual apparatus for the recognition jurisprudence as it progressed. Once it had performed this work through incremental legal reform, it was judicially disavowed in the *Fourie* judgment, only to reappear in the first draft of the Civil Union Bill and to, ultimately, become entrenched in the Civil Union Act. The second of the obstacles to the achievement of sexual minority freedom is the closely related construction, during the Court's recognition jurisprudence, of a discourse of what we call the 'good' homosexual subject.

As illustrated above, it was in the second *National Coalition* judgment that the Court initiated the judicial discourse of the 'permanent same-sex life partnership'. From a legal ideology point of view, the second *National Coalition* judgment departed radically from its predecessor, the decriminalisation judgment, which overall could be described as the judgment in which the judicial discourse was organised around the 'right to be different'.[90] The Constitutional Court's ideological about-turn in the second *National Coalition* judgment became legible through its refusal in that case to recognise partners in permanent same-sex life partnerships equally as spouses for all legal intents and purposes. Despite the soaring rhetoric of the decriminalisation judgment, the right to be different, it appeared, had discretely and thoroughly delimited limits.

Apart from the ideological about-turn that this approach represented, the second *National Coalition* judgment was not sufficiently cognisant of the historical context in which it was operating, namely the aftermath of apartheid in which insidious 'separate but equal' dispensations loomed large.[91] The creation of the 'permanent same-sex life partnership' as a juridical institution alongside heterosexual marriage, invariably created the impression of yet another insidious 'separate but equal' regime, this time organised around sexual orientation. In this sense, the Court failed to heed its own emphasis on the important role of history and the past in South Africa's constitutional project.[92] That the creation of a 'separate

90 *National Coalition v Minister of Justice* (n 26) para 107.

91 De Vos (n 49) 268.

92 See *S v Zuma* 1995 (2) SA 642 (CC) para 15, where it was stated that 'regard must be paid to the legal history, traditions and usages of the country concerned'; *S v Makwanyane* 1995 (3) SA 391 (CC) para 39, where Chaskalson P held that 'we are required to construe the South African Constitution … with due regard to our legal system, our history and circumstances'; para 263, where Mahomed DP remarked that '[i]t is against this historical background and ethos that the constitutionality of capital punishment must be determined'; and para 322, where O'Regan J stated that 'the values urged upon the Court are not those that have informed our past … [and in] … interpreting the rights enshrined in chapter 3, therefore, the Court is directed to the future'. See also *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) para 61, where it was held (per Chaskalson

but equal' power/knowledge regime for same-sex couples was at stake, becomes clear once one notices how the Court lapsed into the language of marriage 'protection':

> *Protecting* the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership.[93]

These words sound as if the Court is describing a new obstacle that the discourse of the protection of traditional marriage has to overcome in a constitutional era. In other words, the protection discourse itself was tacitly accepted as constitutionally legitimate. After the decriminalisation judgment, one could reasonably have expected the exact opposite of these words. At the very least, one could reasonably have expected the Court to steer clear from language intimating that homosexuality and/or same-sex intimate partnership (still) constitutes a danger to 'the traditional institution of marriage'.

This brings us to the list of factors that the Court laid out in the judgment to determine whether a particular same-sex relationship would qualify as a 'permanent same-sex life partnership'. The list of factors clearly consists of the characteristics of an idealised heterosexual marriage. Its creation and application suggests that only marriage-like relationships would be legally protected. Although the Court was at pains to point out that none of these requirements is indispensable for establishing a relationship worthy of legal protection,[94] the cumulative effect of this set of factors suggests that relationships that do not closely map that of an idealised heterosexual marriage, will not be worthy of equal concern and respect. Kenneth Norrie has argued that there is an 'insidious danger in seeking legal legitimacy for a same-sex couple's relationship from the social similarity that that couple has with an opposite-sex couple'.[95] Such an approach risks denying real

P) that the nature and extent of the power of Parliament to delegate its legislative powers ultimately depends 'on the language of the Constitution, construed in the light of the country's own history'; *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC) fn 48, quoting LE Trakman *Reasoning with the Charter* (1991) at 201, where Sachs J said the following: 'Rights are not self-explanatory. They are principled constructions informed by social history' See also *Brink v Kitshoff* 1996 4 SA 197 (CC) para 40, where the court held that the equality provision was the product of our own particular history and that 'its interpretation must be based on the specific language of [the provision], as well as our own constitutional context', and went on to say that our 'history is of particular relevance to the concept of equality'.

93 *National Coalition v Minister of Home Affairs* (n 6) para 54 (authors' emphasis).

94 *National Coalition v Minister of Home Affairs* (n 6) para 88.

95 K Norrie 'Marriage and civil partnership for same-sex couples: The international imperative' (2005) 1 *Journal of International Law and International Relations* 249 at 269.

differences between the two types of relationship. It also suggests that the closer a same-sex relationship resembles a marriage, the easier it will be to qualify as a family and thus to access the statutory benefits available to a family.[96] As Norrie concludes, this approach has implications for equality: '[T]rue equality would require society and the law to recognise the legitimacy of a diversity of family forms.'[97]

In stark contrast to the forceful rhetoric of the Court in the decriminalisation judgment as regards the 'right to be different', the second *National Coalition* judgment in our view turns on a cynical interpretation of the right to be different as grounding a 'separate but equal' power/knowledge regime in which the 'permanent same-sex life partnership' operates as a disciplinary mechanism through which the 'good' homosexual legal subject, the subject worthy of legal protection, is discursively produced. In accordance with this regime, the judgment supports a narrow conception of family, even while it professes to endorse a more open-ended view of the legal regulation of intimate relationships. It is silent, say, on a relationship in which a gay man and a lesbian decide to have a child and to act as co-parents of that child but do not engage in a conjugal relationship traditionally associated with the joint parents of a child.

The list of determinative factors, moreover, have a clear normative dimension in that they reveal who qualifies as a 'good' homosexual in the eyes of the law. The factors – for example couples sharing a common home, joint pension rights, joint wills – mirror neo-liberal assumptions about the role of relationships in the capitalist system. Ideal homosexual relationships, it seems, will be relationships that help to facilitate the privatisation of care responsibilities and will thus shift the burden of care from the state onto individuals. This means that the 'good' homosexual envisaged by the Constitutional Court is an ideal typical neoliberal subject – a partnered middle class, if not upper middle class, man or woman who, in a country like South Africa where class continues to follow race, is almost invariably white. After all, many poor and/or black South Africans still do not have the financial resources to fully carry the burden envisaged by this neo-liberal relationship model, and may continue to rely on the state to provide access to housing and old age pensions.

As Stychin points out, implicit in the Court's imagining of the good homosexual 'may be an understanding of homosexuality as a white, middle-class phenomenon and, as a consequence, a wide array of ways

96 Norrie (n 95) 269-270.

97 Norrie (n 95) 270.

of living come to be erased'.[98] Perhaps inevitably, the relationships considered worthy of protection as 'permanent same-sex life partnerships' are relationships that 'dare speak their name'. Only those couples prepared to and capable of disclosing the nature of their relationships and who are willing to open up their lives to surveillance by the Courts or officials of the Department of Home Affairs, stand a chance of protection. This is a potentially important insight because if true, it may well suggest that the ultimate achievement of full marriage rights for same-sex couples would not necessarily be a victory that would lead to the emancipation of all (or even the majority) of gay men and lesbians in South Africa, and that its benefits would be more pronounced for middle class (and mostly white) couples whose relationships mirror the imagined characteristics of an ideal marriage.

What happens to those gay men and lesbians whose lives do not allow for the opening of joint bank accounts, the sharing of homes, the making of joint wills and the sharing in pension fund benefits? What happens to those homosexuals whose sexual identities do not facilitate the formation of permanent same-sex life partnerships or whose social and economic circumstances or cultural and familial bonds and demands make it impossible to 'come out' of the closet to claim the legal rights aimed at protecting them?

The discourse of the 'permanent same-sex life partnership' and of the 'good' homosexual subject creates a disciplinary, 'separate but equal' power/knowledge regime which renders these subjects, often society's most vulnerable, invisible and unworthy of the law's protection. There is, moreover, a double alienation at play in this regime in that the partnered homosexual subject who seeks the law's protection is not only disciplined into the same-sex life partnership – he/she/they is, at the same time, not recognised as fully equal to the partnered heterosexual, since a 'separate but equal' dispensation applies to his/her/their partnership.

For these reasons, we conclude that the logic of warfare and the binary society that it implies, undergirds this legal discourse. In the 'binary conception of society', writes Foucault, there are 'two groups, two categories of individuals' 'and they are opposed to each other'.[99] In this conception, the discourse of rights is 'marked by dissymmetry, establishing a truth bound up with a relationship of force'.[100] Foucault

98 CF Stychin '"A stranger to its laws": Sovereign bodies, global sexualities, and transnational citizens' (2000) 27 *Journal of Law and Society* 27 601 at 621-622.

99 Foucault (n 1) 51.

100 Foucault (n 1) 54.

describes a discourse that emerged in the 17th century which held that '[t]he war that is going on beneath order and peace, the war that undermines our society and divides it in a binary mode is, basically, a race war'.[101] He goes on to describe how the discourse of race struggle becomes 'the discourse of power itself', how the discourse divides society between a 'superrace and a subrace',[102] and how there emerges from this discourse eventually a state racism:

> a racism that society will direct against itself, against its own elements and its own products. This is the internal racism of permanent purification, and it will become one of the basic dimensions of social normalization.[103]

In the light of these remarks and the preceding discussion, we are compelled to suggest that the 'separate but equal' discourse of the recognition jurisprudence had a similar effect in the domain of sexual orientation as that which Foucault describes in terms of race. Separate but equal regimes create a binary rift within society between the 'superior' and the 'inferior'.[104] In the domain of sexual orientation the rift exists between 'superior' heterosexuals who are by right entitled to marriage and 'inferior' homosexuals who may access the rights, benefits and duties of marriage only through the 'permanent same-sex life partnership' and now, by way of the Civil Union Act *only.* The Constitutional Court's adoption of such a regime in the domain of sexual orientation means that the logic of warfare and of a binary conception of society persisted in its judgment.

Now, one of the objections to our argument may be that the Constitutional Court realised the error of its ways in the *Fourie* judgment when it declared the common law definition of marriage and the Marriage Act unconstitutional[105] and held that a 'separate but equal' form of recognition is 'unthinkable in our constitutional democracy today, not simply because the law has changed dramatically, but because our society

101 Foucault (n 1) 60.

102 Foucault (n 1) 61.

103 Foucault (n 1) 62.

104 Consider the Court's reference in *Fourie* to the famous apartheid era case of *S v Pitje* 1960 (4) SA 709 (A), where the appellant, an African candidate attorney, occupied a place at a table in court that was reserved for 'European practitioners' and refused to take his place at a table reserved for 'non-European practitioners'. Steyn CJ upheld the appellant's conviction for contempt of court as it was 'clear [from the record] that a practitioner would in every way be as well seated at the one table as at the other, and that he could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table'.

105 *Fourie* (n 6) para 114 .

is completely different'.[106] But the truth of the matter is that this disavowal by the Court of its own earlier discourse, proved to be ineffectual: the legislature chose not to amend or repeal the Marriage Act and adopted the Civil Union Act. The adoption of this without repealing the Marriage Act constituted a legislated 'separate but equal' regime. In the Act itself, the 'separate but equal' discourse persists. As a result, the binary rift in society and its concomitant logic of warfare has been legislatively entrenched.

While the Civil Union Act offers a 'marriage' as one form of civil union, there are good reasons to suggest that the Act does not represent substantive equality in relation to sexual orientation and still conveys the message that, in the words of Sachs, J 'gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected'.[107] This 'serves in addition to perpetuate and reinforce existing prejudice and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion'[108] of the dignity of homosexuals. In other words, there are good reasons to suggest that the Act is unconstitutional because it discriminates unfairly against same-sex couples on the ground of sexual orientation. For example, section 6 of the Act allows for the state's marriage officers to refuse solemnisation of a civil union by way of marriage or civil partnership on grounds of conscience where that civil union is proposed between two people of the same sex. Section 8(6), in addition, creates the impression that the application of the Act is limited to same-sex unions. In addition, as Berger argues in a recent contribution, the requirement that religious organisations and denominations be designated before religious marriage officers can apply to conduct civil unions has proven to be a 'key problematic provision' of the Civil Union Act.[109]

4 Foucault's law

We end this chapter with an insistence, first, on returning to 'sexual orientation' as the constitutive ground of equality for sexual minorities in South Africa. Second, we insist on the interpretation of that phrase in the queer jurisprudence of the decriminalisation discourse. We see in this twofold insistence the possibility of authentic equality but we hesitate to

106 *Fourie* (n 6) para 151.

107 *Fourie* (n 6) para 54, quoting from the judgment in *National Coalition v Minister of Home Affair*.

108 As above.

109 J Berger 'Getting to the Constitutional Court on time' in M Judge, A Manion & S de Waal *To have and to hold: The making of same-sex marriage in South Africa* (2008) 26.

suggest that such equality is possible to achieve without lawfare as we have described it in this chapter.

Golder and Fitzpatrick's reading of law in Foucault's work will guide us here. They argue that there are in Foucault 'two crucial dimensions of law' at work. The first is a 'determinate law which expresses a definite content'.[110] This is the law that is 'to be resisted and transgressed'[111] because it is law on the side of the instantiation of the disciplinary norm. The second dimension of law is that in which it is constitutively engaged with resistance and transgression in such a way that it 'extends itself illimitably in its attempt to encompass and respond to what lies outside its definite content'.[112] Thus, in Foucault

> law is not simply rendered in terms of determinacy and closure. Rather, law can be seen to engage responsively with exteriority, with an outside made up of resistances and transgressions that assume a constituent role in law's very formation.[113]

Golder and Fitzpatrick show that this 'responsive dimension'[114] of law originates in Foucault's alternative understanding of modernity not as an epoch but as 'an *attitude* that one adopts towards the present'.[115] This attitude entails a critical imagining of the present as otherwise than it is. As a critical enterprise, such an imagining requires a '*limit-attitude*' that moves beyond 'the outside-inside alternative' towards a 'crossing-over of limits'. As Foucault writes: 'we have to be at the frontiers'.[116] This, then, is modernity at the frontier, modernity 'as constituent liability and contestation, and modernity as *rupture*'.[117] From such an attitude of modernity, Golder and Fitzpatrick derive a 'sociality of law' that is dedicated to the 'unworking of the space of the social'[118]: '[t]he law of the law of modernity thus resides in law's responsive dimension, in its being able to open society to alterity, to an ethic of constantly being otherwise'.[119] We find this responsive dimension of law particularly suggestive in terms

110 Golder & Fitzpatrick (n 88) 71.
111 As above.
112 As above.
113 Golder & Fitzpatrick (n 88) 56.
114 Golder & Fitzpatrick (n 88) 71.
115 Golder & Fitzpatrick (n 88) 107.
116 Golder & Fitzpatrick (n 88) 108.
117 Golder & Fitzpatrick (n 88) 109.
118 As above.
119 As above.

of what might be entailed in overcoming a binary discourse of 'us' and 'them' in sexual minority freedom: if the critical imagining of the present as otherwise than it is, is what is at stake in this overcoming, then for sexual minority freedom it spells the juridical treatment of the 'right to be different' as a mechanism through which the 'outside-inside' alternative and the binary logic of the extant power/knowledge regime in the recognition jurisprudence may be subverted.

The responsive approach to law proceeds from the insight that resistance is constitutive of power.[120] If, as Foucault argues, power is relational and 'everywhere',[121] indeed if it defines the social,[122] then power formations exist in a constituent relationship with counter-formations of resistance. Power relations, argue Golder and Fitzpatrick, derive their very existence from 'the impelling movement of resistance'.[123] This means that resistance is never in a relationship of simple or demarcated exteriority to power, resistances 'invest and inhabit power':[124] 'Foucault thus does not posit a stable and determinate instantiation of power, but rather a mobile and constantly shifting relation between power and that which contests it from outside'.[125] Transgression thus plays a central role in the very constitution of the limit: 'a limit could not exist if it were absolutely uncrossable and, reciprocally, transgression would be pointless if it merely crossed a limit composed of illusions and shadows'.[126] From this characterisation of the constitutive relationship between power and resistance, Golder and Fitzpatrick show that Foucault derived a modality of a law 'of mutability, a law which practices an "infinitely accommodating welcome" to what lies beyond it'.[127] It is 'the darkness beyond its borders',[128] 'obsessed with exteriority'.[129] Here then we have law or at least a 'mode of becoming'[130] of law as trans-formative, as attuned to alterity, as extending itself, 'constantly opening itself to new possibilities, new instantiations, fresh determinations'.[131]

120 Golder & Fitzpatrick (n 88) 75.
121 Golder & Fitzpatrick (n 88) 74.
122 Golder & Fitzpatrick (n 88) 75.
123 As above.
124 As above.
125 Golder & Fitzpatrick (n 88) 76.
126 Golder & Fitzpatrick (n 88) 77.
127 As above.
128 Golder & Fitzpatrick (n 88) 78.
129 As above.
130 Golder & Fitzpatrick (n 88) 79.
131 As above.

The sexual orientation jurisprudence of the Constitutional Court, at first, displayed hints of what could have been (and, perhaps, can be again) if the Court had consistently engaged with the notion of sexual orientation equality in the spirit of an infinitely accommodating welcome to what lies beyond. As noted above, in its first judgment on sexual orientation the Constitutional Court embraced what one could, perhaps, call a queer definition of sexual orientation. The definition provided by the Court opened-up new possibilities for thinking about sexuality. The definition was careful not to frame sexual orientation protection in terms of a kind of homosexuality that is viewed as a universal category, without recognising its historical and cultural specificity. It seemed to be based on an understanding that when we talk about sexuality we cannot accept that all of us share an understanding of sexual identity or hetero/homo dichotomy and embraces a notion of sexual orientation that is not based on a heteronormative understanding of the world or on the heteronormative assumptions that underlie so much of traditional equality jurisprudence in which stable and essential categories of heterosexual and homosexual are set up in a hierarchical opposition to each other.

The adoption of this definition seemed to signal a refusal by the Court in the realm of sexuality to view the world simply as it is, as it has supposedly always been. Instead, it considered the possibility that the law – and the constitutional text specifically – could be deployed to begin the work of subverting the hierarchy of the heterosexual over the homosexual. This subversion, we contend, would be based on the understanding that heteronormativity flourishes on the basis of the categories of 'heterosexual' and 'homosexual', categories through which desire is often constructed in terms of power relations in society in a way that privileges certain forms of (mainly) heterosexual desire while marginalising other forms of (mainly homosexual) desire. By providing a more open-ended and fluid definition of sexual orientation, the judgment provided the possibility to imagine a different way of being in the world, in which the hierarchy of sexual orientation identities would be troubled or even dissolved, thus subverting the very foundation on which the marginalisation and discrimination of people previously categorised as 'homosexual in opposition to and as 'lesser than' people categorised as 'heterosexual'.

Unfortunately, this non-essentialist orientation towards sexual orientation did not hold up when the Court was faced with the question of legal protection for same-sex relationships. As noted above, in the second *National Coalition* judgment the Court implicitly invoked the notion of the 'good homosexual' to determine whether couples in same-sex relationships were worthy of constitutional protection. By invoking a list of factors that postulated a deeply entrenched (but idealised) heterosexual norm, the

Court implied that the type of same-sex life partnership that the law would protect had to approximate as closely as possible the idealised, ordinary – and one is tempted to add mythical – heterosexual marriage. The judgment 'emphasised that what was needed was to determine whether the same-sex partnership was sufficiently similar to that of the idealised heterosexual marriage'. It is thus as if the Court assumed here a stable sexual orientation (and consequently denied its own non-essentialist definition) from which it proceeded to impose on intimate relationships that come about as a result of the orientation, the characteristics of relationships that come about as a result of heterosexual sexual orientation.

If the Court had been willing to open itself to new possibilities, new instantiations, fresh determinations, it would have begun the task of re-imagining the way in which the law recognises different types of relationships. This would have required imagining the world differently from what it has always been thought to be. It would have required imagining a world in which significant relationships worthy of legal regulation and protection did not necessarily conform to what most people might still think of as an idealised heterosexual relationship. Moreover, it would not have posited, as a condition for the legal rights, benefits and duties to accrue, conformity with a heterosexual norm (what Judith Butler referred to in *Gender trouble* as the 'heteronormative matrix').[132]

We believe that 'sexual orientation', harnessed in the 'right to be different', holds the potential of a return to the more queer, less heteronormative, less binary logic of the decriminalisation discourse. Such a shift, however, will not be achieved on its own: for sexual minority freedom activists and litigants the challenge will be how to fashion 'sexual orientation' and the 'right to be different' in a resistant way, how to construct and plead the legal argument in such a way that it subverts the binary logic of the recognition jurisprudence. And there may very well be great resistance to such an attempt at subversion. In other words, lawfare will continue to be on the cards for sexual minority freedom and may even intensify. The hope for sexual minority freedom, however, lies in the capacity of law, at least in Foucault's understanding, to open up to alterity, to new possibilities and, ultimately, to a law that will not perpetuate outdated and insidious hierarchies and separations, hierarchies and separations that are antithetical to the very idea of the postcolonial and the post-apartheid legal order and, for that reason alone, should be afforded no place in it.

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