

Section 1 of the Civil Union Act 17 of 2006: Does the blanket ban on minors from entering into a civil union underpin “the best interests of the child” principle in terms of the Constitution of the Republic of South Africa

by

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DECLARATION

I, the undersigned, LIZELLE RAMACCIO CALVINO, do hereby declare that the work entitled, "Section 1 of the Civil Union Act 17 of 2006: Does the blanket ban on minors from entering into a civil union underpin "the best interests of the child" principle in terms of the Constitution of the Republic of South Africa", is my original work both in style and substance, that the same has never been submitted for examination at any academic institution, or other institution at all and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references, and that all direct quotations from such sources have been clearly and correctly indicated.

THIS DONE at the UNIVERSITY OF ZULULAND on the ____ day of _____ 2018.

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I would like to express my sincere gratitude to my darling husband, family, friends and colleagues for their constant support and encouragement. I furthermore wish to thank my supervisor for his patience, reassurance and invaluable guidance.

ABSTRACT

The purpose of the study was to firstly determine whether the categorical ban of minors from entering into a civil union undermines the “the best interests of the child” principle, and if so, whether section 1 of the Civil Union Act unjustifiably violates the Constitution. The study furthermore evaluated the current South African marriage law system in determining whether the prohibition of minors from entering into a civil union, whilst the Marriage Act and the Recognition of Marriages Act afford minors (provided they obtain the required consent) the right to enter into a marriage, results in disparity and whether such disparity violates minors’ right to equality before the law and their right to have their dignity respected and protected.

The study was conducted by applying qualitative research methodology. An interpretivist paradigm was applied whilst a descriptive and interpretive design were used to interpret and analyse the data. The data was collected in two phases. Phase one consisted of a historical and comparative analysis of primary and secondary sources. Semi-structured interviews were conducted in terms of the second phase of the data gathering process. In conducting the interviews, ten participants were purposively selected from the offices of the family advocates in the area of Durban, Pietermaritzburg and Ntuzuma. Eight common themes emerged from the interviews. The findings, in respect of the second phase of the study, were integrated with the findings in respect of phase one. Ultimately the study concluded that as a result of section 1 of the Civil Union Act categorically excluding “the best interests of the child” principle, section 1 of the Civil Union Act is in violation of section 28(2) as well as other fundamental constitutional rights of minors.

From the comparative analysis that was conducted within the first phase of the study, recommendations are made to address the indifference that results from the application of the various legislations regulating the current South African matrimonial law system.

OPSOMMING

Die doel van die studie was om eerstens te bepaal of die kategoriese verbod op minderjariges om in 'n burgerlike unie te tree, die beginsel van die "beste belange van die kind" ondermyn, en inderdaad wel, of artikel 1 van die Wet op Burgerlike Unie die Grondwet onregmatiglik oortree. Die studie het voorts die huidige Suid-Afrikaanse huweliksregstelsel geëvalueer om te bepaal of die verbod op minderjariges om in 'n burgerlike unie te tree, terwyl die Huwelikswet en die Wet op Erkenning van Gebruiklike Huwelike minderjariges toelaat (mits hulle die vereiste toestemming verkry), lei tot teenstrydigheid en of sodanige teenstrydigheid minderjariges se reg op gelykheid sowel as hul reg tot waardigheid skend.

Die studie is uitgevoer deur die toepassing van kwalitatiewe navorsingsmetodologie. 'n Interpretatiewe paradigma is toegepas terwyl 'n beskrywende en interpretatiewe ontwerp toegepas was om die data te interpreteer en te analiseer. Die data is in twee fases versamel. Fase een het bestaan uit 'n historiese en vergelykende analise van primêre en sekondêre bronne. Semi-gestruktureerde onderhoude is uitgevoer in terme van die tweede fase van die data-insamelingsproses. Tydens die onderhoude is tien deelnemers doelbewus gekies vanuit die kantore van die gesinsadvokaat in die omgewing van Durban, Pietermaritzburg en Ntuzuma. Agt algemene temas het uit die onderhoude ontstaan. Die bevindings, ten opsigte van die tweede fase van die studie, is geïntegreer met die bevindings ten opsigte van fase een. Uiteindelik het die studie tot die gevolgtrekking gekom dat artikel 1 van die Wet op Burgerlike Unie se kategoriese verbod op minderjariges wat in 'n burgerlike unie wil tree teenstrydig is met die beginsel van "die beste belang van die kind" en gevolglik dat artikel 28 (2) van die Grondwet asook ander fundamentele Grondwetlike regte van minderjariges geskend word.

Uit die vergelykende analise wat in die eerste fase van die studie gedoen is, word aanbevelings gedoen om die onverskilligheid wat voortspruit uit die toepassing van die verskillende wetgewings wat die huidige Suid-Afrikaanse huweliksregstelsel reguleer, aan te spreek.

KEY TERMS

Best Interests of the Child

Civil Marriage

Civil Union

Consortium Omnis Vitae

Customary Marriage

Life Partnership

Marginalisation of Same-sex Marriages

Marriage Formula

Marriageable Age

Minor

Permanent Heterosexual Life Partnerships

Permanent same-sex Life Partnership

Same-sex Marriage

Sexual Orientation

LIST OF ABBREVIATIONS AND ACRONYMS

AU	African Union
CRC	Convention on the Rights of the Child
CROC	Committee on the Rights of the Child
ECHR	European Convention on Human Rights
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
SALRC	South African Law Reform Commission
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
DRC	Declaration of the Rights of the Child
UNC	United Nations Convention
ACRWC	The African Charter of the Rights and Welfare of the Child

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CHAPTER ONE

INTRODUCTION

“[e]veryone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.”¹

1.1 Background to the Study

Marriage is an institution that gives legal recognition to an interpersonal relationship between two parties.² The nature of marriage has evolved over centuries. During the Early Roman times marriages were viewed as a social institution that was centred on a *de facto* rather than a *de iure* basis.³ Accordingly, ecclesiastical rites were not a requisite for a marriage to be concluded.⁴ In addition the state’s involvement was mostly restricted to the regulation of the consequences of the marriage rather than the solemnisation thereof.⁵ The nature of early Roman marriage however changed considerably when Christianity became the official religion of Rome and as the principles of marriage became founded on Christian teachings.⁶ As a result of the influence of the Catholic Church’s marriage doctrine,⁷ marriage was viewed as “one of the seven sacraments of faith”.⁸ The Roman Catholic Church accordingly transformed marriage from a social to a sacred institution. The South African civil marriage law

¹ Section 9(1) and (2) of the 1996 Constitution (hereinafter referred to as “the Constitution”).

² Heaton *South African Family Law* 15.

³ Van Zyl *History and Principles of Roman Private Law* 97.

⁴ *Fourie* case para 23.

⁵ Merin *Equality for Same-sex Couples* 10.

⁶ Van Zyl *History and Principles of Roman Private Law* 90. For a general discussion of the early concept of marriage and how Canon law was received into Roman-Dutch law, see De Ru 2013 *Fundamina* 222-224.

⁷ Witte *From Sacrament to Contract* 27.

⁸ On the Catholic sacramental model being based on the ideal of a marriage being a unit comprising of natural, contractual, and sacramental elements generally, see Witte *From Sacrament to Contract* 23-26.

under the Marriage Act was accordingly derived from the aforesaid understanding of marriage.⁹

Preceding the current constitutional era, South African marriage law only acknowledged and protected relationships between a man and a woman who entered into a state-sanctioned marriage in terms of the Marriage Act.¹⁰ In terms of the common law definition of marriage, the Marriage Act, provides for the marriage of monogamous, heterosexual couples that are both eighteen years of age or older. The Marriage Act therefore exclusively provides for monogamous heterosexual civil marriages. In addition to civil marriage, customary marriages were given legal recognition in terms of the Recognition of Customary Marriages Act.¹¹ Although the Marriage Act, as well as the Recognition of Customary Marriages Act, impose a minimum age for entering into a civil or customary marriage, the said Acts make provision for heterosexual minors to marry provided they obtain the required consent.¹² The Marriage Act as well as the Recognition of Customary Marriages Act however precludes same-sex marriages.

With the adoption of the Constitution of the Republic of South Africa, and in particular the equality and non-discrimination clauses,¹³ couples staying in a life partnership akin to that of a marriage relationship challenged the exclusion of certain spousal benefits that were previously restricted to married couples. The full recognition, benefits and protection of a marriage relationship was however restricted to civil and customary marriages of heterosexual couples. This elitist position changed with the Constitutional Court ruling in *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae)*; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs*,¹⁴ declaring the exclusion of same-sex couples from the common law

⁹ Generally on the pre-1994 South African marriage law not adhering to a particular religious model of marriage and the influence of Afrikaner Christian Nationalism, see Witte *From Sacrament to Contract* 194-195; De Ru 2013 *Fundamina* 225-226.

¹⁰ Marriage Act, Act 25 of 1961 (hereinafter referred to as “the Marriage Act”).

¹¹ Recognition of Customary Marriages Act 120 of 1998 (hereinafter referred to as “the Recognition of Customary Marriages Act”).

¹² Section 24(1) of the Marriage Act; compare Section 3(1) (a) (i) of the Recognition of Customary Marriages Act.

¹³ Section 9(1) and Section 9(3) of the Constitution.

¹⁴ *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae)*; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC) (hereinafter referred to as “the *Fourie* case”).

definition of marriage and the marriage formula (as provided for in section 30(1) of the Marriage Act) inconsistent with the Constitution and the Marriage Act invalid to the extent of this inconsistency.¹⁵ In response to the *Fourie* case ruling, Parliament enacted the Civil Union Act¹⁶ and elected to retain the Marriage Act in its existing format.¹⁷ Despite South Africa having two separate Acts regulating civil marriages, the legal consequences of the Civil Union Act equate to that of a civil marriage in terms of the Marriage Act.¹⁸

A civil union is defined as “the voluntary union of two persons who are both eighteen years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, whilst it lasts, of all others”.¹⁹ The marriage formula in terms of the Civil Union Act is not gender-specific²⁰ and is therefore applicable to monogamous relationships²¹ of either same-sex or heterosexual couples.²² The Civil Union Act however, only provides for adults to enter into a civil union regime either by way of marriages or civil partnerships.²³

1.2 Statement of the Problem

¹⁵ *Fourie* case para 2(c) of the order.

¹⁶ The Civil Union Act 17 of 2006 (hereinafter referred to as “the Civil Union Act”).

¹⁷ On Parliament’s response to the *Fourie* case and the guiding assumptions of the *Fourie* case generally, see De Vos and Barnard 2007 *SALJ* 800-806; Smith and Robinson 2008 *BYUJPL* 425; Sinclair 2008 *International Survey of Family Law* 397-402.

¹⁸ Section 13(1) of the Civil Union Act provides that “[t]he legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union”.

¹⁹ Section 1 of the Civil Union Act.

²⁰ Section 11(2) of the Civil Union Act; compare Section 30 of the Marriage Act.

²¹ Section 8(1) and 8(2) of the Civil Union Act provides that a party to a civil union “may not conclude a marriage under the Marriage Act or the Recognition of Customary Marriages Act 120 of 1998”. In addition Section 8(3) of the Civil Union Act stipulates that “[a] person who is married under the Marriage Act or the Customary Marriages Act may not register a civil union.” For a general discussion of traditional values in terms of customary law being omitted from the Civil Union Act, see Ntlama 2010 *PELJ* 194-197.

²² By applying the purposive approach and by interpreting the Act in accordance with Section 39(2) of the Constitution, it can be concluded from the preamble to the Act, as well Sections 6 and 8(6) of the Act that the Civil Union Act applies to heterosexual and same-sex couples. Generally on interpretative difficulties in respect of the Civil Union Act, see Van Schalkwyk 2007 *De Jure* 168 and 172-173; Smith and Robinson 2008 *IJLPF* 357-368 and 379-380; 2008 *BYUJPL* 426-430; Bakker 2009 *JJS* 8-9.

²³ Section 2 of the Civil Union Act.

In terms of the Civil Union Act minors, regardless of their sexual orientation and regardless of their personal circumstances, are prohibited from entering into a civil union. In terms of the South African Constitution "[a] child's best interests are of paramount importance in every matter concerning the child".²⁴ The first research question which this study seeks to investigate, is whether the categorical ban of minors from entering into a civil union is underpinned by the "the best interests of the child" principle, and if not, whether section 1 of the Civil Union Act unjustifiably violates the Constitution. The study ultimately considers whether the categorical exclusion of minors from entering into a civil union, without considering their personal circumstances as well as their viewpoints, is in "the best interests of the child" or rather whether such exclusion perpetuates the marginalisation of minors' (and in particular same-sex minors') constitutionally protected rights.²⁵

In addition, this study investigates whether the prohibition of minors from entering into a civil union, whilst the Marriage Act and the Recognition of Marriages Act afford minors the right to enter into a marriage provided they obtain the required consent, results in inequality and whether such inequality violates minors' right to equality before the law and their right to have their dignity valued and protected. The study therefore considers whether section 1 of the Civil Union Act is consistent with the democratic values of human dignity, equality, and freedom,²⁶ on which South Africa's Constitution is founded.

In evaluating whether section 1 of the Civil Union Act accentuates the need for South African marriage law reform, a comparison with countries that share similar circumstance as that of South Africa may provide insightful knowledge. In this regard a comparative analysis with the Dutch and Canadian marriage law systems may offer insight into an alternative workable strategy for South Africa by providing guidelines on legislative law reform.

1.3 Preliminary Literature Review

²⁴ Section 28(2) of the Constitution.

²⁵ For a general discussion of the constitutional arguments regarding the position of same-sex minors, see Van Schalkwyk 2007 *De Jure* 168.

²⁶ Section 7(1) of the Constitution.

In terms of the common law, a marriage is defined as the legally recognised life-long voluntary union between one man and one woman to the exclusion of all others.²⁷ Although the definition requires that the parties to the marriage should be adults, section 24(1) of the Marriage Act provides that:-

“No marriage officer shall solemnise a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing”.

Section 25 of the Marriage Act furthermore provides that if the consent of the parent or guardian cannot be obtained that:-

“(2) A commissioner of child welfare shall, before granting his consent to a marriage under sub-section (1), enquire whether it is in the interests of the minor in question that the parties to the proposed marriage should enter into an antenuptial contract, and if he is satisfied that such is the case he shall not grant his consent to the proposed marriage before such contract has been entered into, and shall assist the said minor in the execution of the said contract.

(4) If the parent, guardian or commissioner of child welfare in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the Supreme Court of South Africa: Provided that such a judge shall not grant such consent unless he is of the opinion that such refusal of consent by the parent, guardian or commissioner of child welfare is without adequate reason and contrary to the interests of such minor”.

Therefore the test that should be applied when considering whether or not to grant a minor permission to enter into a civil marriage is whether it is in the best interest of that minor.

In terms of the Recognition of Customary Marriages Act, a customary marriage refers to a “marriage concluded in accordance with customary law”.²⁸ Section 3 of the Act provides that:-

“(1) For a customary marriage entered into after commencement of the Act to be valid:-

(a) The prospective spouses –

²⁷ *Seedat’s Executors v The Master (Natal)* 1917 AD 302.

²⁸ Section 1 of the Recognition of Customary Marriages Act.

- (i) *Must both be above the age of 18 years; and*
- (ii) *Must both consent to be married to each other under customary law...*

In addition section 3(3) (b) of the Recognition of Customary Marriages Act provides that section 25 of the Marriage Act also applies in cases where a guardian's consent to the customary marriage cannot be obtained. It is evident from the aforesaid that both Acts do not only provide for a minor to enter into a marriage, but that both Acts also apply "the best interests of the child" as the yardstick when considering whether or not to grant consent to a minor when entering into a marriage.

Section 1 of the Civil Union categorically excludes all minors from entering into a civil union. A civil union is defined as:-

"the voluntary union of two persons who are both eighteen years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, whilst it lasts, of all others".

Unlike the Marriage Act and the Recognition of Customary Marriage Act, the Civil Union Act precludes a minor from entering into a civil union irrespective of whether the minor's guardian consents to the civil union. The Act furthermore omits to consider "the best interests of the child" standard. "The best interests of the child" standard is enshrined as the "primary" consideration in all matters concerning a child in terms of article 3(1) of the United Nations Convention on the Rights of the Child²⁹ as well as article 4 of the African Charter on the Rights and Welfare of the Child.³⁰ The CRC was one of the first international instruments to recognise children's rights which ultimately led to the constitutionalism of children's rights in South Africa. Treaties such as the CRC have resulted in the fundamental transformation of children's rights from being regarded as the property of their fathers to legal subjects and independent holders of rights. Key to the transformation is article 4 of the CRC which requires:-

"[s]tate parties to take all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention".

²⁹ United Nations Convention on the Rights of the Child (hereinafter referred to as "the CRC").
³⁰ The African Charter on the Rights and Welfare of the Child (hereinafter referred to as "the ACRWC").

South Africa, as a signatory to the CRC, encompassed the general principles of the CRC in the South African Constitution. The best interest of the child is enshrined in the South African Constitution by including a constitutional provision that specifies that:-

"[a] child's best interests are of paramount importance in every matter concerning the child".³¹

South Africa has accordingly made a significant commitment to the development and protection of children's rights by constitutionalising children's rights and dedicating section 28 of the Constitution to the rights of the child. Children in South Africa are accordingly not only protected in terms of the Bill of Rights but also in terms of "the children's clause".³² Although the principle of "the best interests of the child" is entrenched in the South African Constitution, no explicit indication exists therein of what constitutes "the best interests of the child".³³ Section 7 of the Children's Act³⁴ does however provide for the best interest standard that should be considered in determining the best interest of the child. Section 7(1) provides that:-

"[w]henever a provision requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely: -

- (a) the nature of the personal relationship between-*
 - (i) the child and the parents, or any specific parent; and*
 - (ii) the child and any other care-giver or person relevant in those circumstances;*
- (b) the attitude of the parents, or any specific parent, towards-*
 - (i) the child; and*
 - (ii) the exercise of parental responsibilities and rights in respect of the child;*
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;*
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-*
 - (i) both or either of the parents; or*

³¹ Section 28(2) of the Constitution.

³² Section 28 of the Constitution.

³³ Strous 2007 SAJP 223.

³⁴ Children's Act 38 of 2005 (hereinafter referred to as "the Children's Act").

- (ii) *any brother or sister or other child, or any other care-giver or person, with whom the child has been living;*
- (e) *the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;*
- (f) *the need for the child-*
 - (i) *to remain in the care of his or her parent, family and extended family; and*
 - (ii) *to maintain a connection with his or her family, extended family, culture or tradition;*
- (g) *the child's-*
 - (i) *age, maturity and stage of development;*
 - (ii) *gender;*
 - (iii) *background; and*
- (h) *the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;*
- (i) *any disability that a child may have;*
- (j) *any chronic illness from which a child may suffer;*
- (k) *the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;*
- (l) *the need to protect the child from any physical or psychological harm that may:-*
 - (i) *subject the child to maltreatment, abuse, neglect, exploitation or degradation or expose the child to violence or exploitation or other harmful behaviour; or*
 - (ii) *expose the child to maltreatment, abuse, degradation, ill-treatment,*
- (m) *any family violence involving the child or a family member of the child; and*
- (n) *which action or decision would avoid or minimise further legal or administrative proceedings in respect of the child."*

Courts are accordingly mandated to consider the aforesaid factors surrounding a child in determining the child's best interest. In *Minister of Welfare and Population*

*Development v Fitzpatrick and Others*³⁵ Judge Goldstein emphasised that “the standard should be flexible as individual circumstances will determine which factors secure the best interest of a particular child”. The determination of “the best interests of the child” is therefore to a large extent a subjective conclusion reached by professionals.

In terms of the Civil Union Act, all minors, regardless of their circumstances or their viewpoints, are categorically barred from entering into civil unions. The child’s personal circumstances, *inter alia* his/her age, level of maturity, viewpoints and stage of development³⁶ are consequently not taken into consideration in terms of section 1 of the Civil Union Act. The categorical ban of minors from entering into a civil union therefore appears to disregard “the best interests of the child” principle which should be applied in any and all matters that concern a child.³⁷

Section 6(2) of the Children’s Act furthermore states that:-

*“[s]ubject to any lawful limitation, all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and all other rights and principles as set out in terms of the Children’s Act.”*³⁸

The categorical ban on minors from entering into a civil union without giving consideration to the factors listed in terms of section 7 of the Children’s Act accordingly creates the impression that section 1 of the Civil Union Act may be in conflict with section 6(2) of the Children’s Act as the prohibition does not respect, protect, or promote the child’s rights nor the best interests of a minor.

The exclusion of minors from entering into a civil union may also violate a minor’s right to equality and constitute discrimination. Section 9(1) of the Constitution provides that:-

³⁵ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (C).

³⁶ Section 7(1) (g) (i) and (iv) of the Children’s Act.

³⁷ Section 28(2) of the Constitution.

³⁸ Section 6(2) (a) of the Children’s Act.

“[e]veryone is equal before the law and has the right to equal protection by and benefit of the law”.

Providing for minors to enter into a civil or customary marriage in terms of the Marriage Act and the Recognition of Customary Marriages Act respectively, whilst prohibiting minors from entering into a civil union amounts to differentiation.³⁹ In considering whether such differentiation violates the equality clause, the guidelines set out by the Constitutional Court in *Harksen v Lane NO* should be applied.⁴⁰ In terms of the *Harksen* test, it must firstly be determined whether a law differentiates between people or categories of people, and if so, whether such diversity bears a rational connection to a legitimate governmental purpose.⁴¹ In terms of the provisions of section 1 of the Civil Union Act it is evident that the Act differentiates between minors who wish to enter into a civil union and minors wanting to enter into civil or customary marriages. In addition it is evident that the differentiation created by section 1 of the Civil Union Act bears no rational connection between the limitation of fundamental rights and a legitimate governmental purpose as required in terms of the *Harksen* test.⁴² The prohibition of minors wishing to enter into a civil union therefore appears not to be treated equally before the law and therefore does not receive equal protection and benefit of the law. Consequently, section 1 of the Civil Union Act appears to violate section 9(1) of the Constitution.

In addition, in the event of it being found that the differential treatment of minors in terms of the Civil Union Act had a rational basis, such distinction may amount to unfair discrimination in terms of section 9(3) of the Constitution as section 1 of the Civil Union Act differentiates on the grounds of age, marital status, and sexual orientation (in the case of same-sex minors). In this regard the differentiation constitutes illegitimate grounds of differentiation which are automatically presumed to be unfair in terms of section 9(5) of the Constitution until proven otherwise.⁴³ In this regard, the fact that same-sex minors have no legal means of entering into a legally recognised

³⁹ Currie and De Waal *The Bill of Rights Handbook* para 27.1.

⁴⁰ *Harksen v Lane NO* 1998 (1) SA 300 (CC) (hereinafter referred to as the “*Harksen* case”).

⁴¹ Currie and De Waal *The Bill of Rights Handbook* para 9.2.

⁴² Currie and De Waal *The Bill of Rights Handbook* para 7.2.

⁴³ Currie and De Waal *The Bill of Rights Handbook* paras 9.3 and 9.4.

relationship may infer that same-sex minors cannot have their family life recognised and protected by law.

Further to the possible violation of minors' rights to equality, the prohibition of minors from entering into a civil union may also violate a minor's right to dignity. Section 10 of the Constitution provides that:-

“[e]veryone has inherent dignity and the right to have their dignity respected and protected”.

The right to dignity embraces the right to family life.⁴⁴ The exclusion of minors from entering into a civil union may deprive minors the opportunity to enjoy the same status, entitlements, and responsibilities afforded to minors who enter into a civil or customary marriage. Accordingly, the Civil Union Act's exclusion of minors from entering into civil unions divests minors of their right to formalise their relationships by way of civil unions and may therefore violate their right to dignity.⁴⁵ In addition, by affording heterosexual minors the option to still formalise their relationship in terms of the Marriage Act or the Recognition of Customary Marriages Act, same-sex minors are particularly prejudiced as they are denied the opportunity to enjoy the same status, benefits, and responsibilities which heterosexual minors may acquire by means of a civil or customary marriage.⁴⁶

Although it appears as if the provisions of section 1 of the Civil Union Act constitute a violation of minors' rights to equality and dignity, consideration should be given to whether such provisions can be justified in terms of section 36 of the Constitution. In order to justify the limitation of minors' rights to equality and dignity, the law must be of general application and the limitation must be imposed for reasons that are reasonable and justifiable in an open and democratic society based on human dignity and equality.⁴⁷ It is submitted that when comparing the Marriage Act and the

⁴⁴ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 28 where the Constitutional Court held that legislation which significantly impairs the ability of individuals to achieve personal fulfillment in an aspect of life that is of central importance to them will constitute an infringement of the right to dignity.

⁴⁵ *Heaton South African Family Law* 194.

⁴⁶ For a general discussion of the constitutional arguments regarding the position of same-sex minors, see Van Schalkwyk 2007 *De Jure* 168.

⁴⁷ Section 36 of the Constitution.

Recognition of Customary Marriages Act to the Civil Union Act, the latter imposes a subjective exclusion because the former Marriage Act and the Recognition of Customary Marriages Act permit minors to marry whilst the Civil Union Act does not. Consequently the Civil Union Act is not a law of general application when considered against the backdrop of the entire body of legislation that regulates marriages in South Africa. Notwithstanding Sinclair's conjectures that the exclusion of minors from entering into civil unions may have been based on a mistaken inconsistency or on a moral basis,⁴⁸ no reason can be considered to be reasonable and justifiable to limit minors' rights to equality and dignity. It therefore appears as if the violation of minors' rights to equality and dignity cannot be a justifiable limitation as provided for in terms of section 36 of the Constitution. The provision of section 1 of the Civil Union Act accordingly appears to be an unjustifiable violation of minors' rights to equality and dignity.⁴⁹

Further to the aforementioned, the categorical prohibition of minors to enter into civil unions may also be in conflict with the International Convention on Consent to Marriage, Minimum Age for Marriages, and Registration of Marriage of 1962.⁵⁰ In this regard the section 39(1) (b) of the Constitution provides that when interpreting the Bill of Rights, consideration must be given to international law. South Africa as a signatory of the aforesaid convention⁵¹ undertook to incorporate legislative measures that are in line with the principles of the convention.⁵² In terms of the Convention signatories to the Convention are obliged to consider a minor's interest prior to setting an age requirement. Accordingly, as section 1 of the Civil Union Act categorically bans all minors from entering into a marriage, it does not consider minors' interests, as required in terms of the Convention.

It is in lieu of the aforesaid reasons as well as section 172(1) (a) and (b) of the Constitution demanding that "[a]ny law or conduct that is inconsistent with the

⁴⁸ Sinclair 2008 *International Survey of Family Law* 408.

⁴⁹ For a discussion of the best interest of the minor and the violation of a minor's right to enter into a civil union, see De Ru 2010 *THRHR* 560-562.

⁵⁰ The International Convention on Consent to Marriage, Minimum Age for Marriages and Registration of Marriage of 1962 (hereinafter referred to as the "Convention").

⁵¹ South Africa became a signatory of the International Convention on Consent to Marriage, Minimum Age for Marriages, and Registration of Marriage of 1962 on 29 January 1993.

⁵² Article 2 of the Convention.

Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable..."⁵³ that this study is conducted.⁵⁴

In considering recommendations to the present South African marriage law, a brief comparison between the present South African marriage law framework and that of the Dutch and Canadian marital systems will be conducted. The current Dutch marriage law system has evolved over a period of time and by way of Parliamentary process. As a result of South Africa's historical link to the Netherlands, and because the Netherlands allows for minors to get married regardless of their sexual orientation,⁵⁵ the Dutch system may offer an opportunity for South African marriage law to identify with similar circumstances experienced in the Netherlands and to obtain valuable insight into the Dutch marriage law reform process, thereby offering a workable strategy.⁵⁶ In contrast to the Dutch marriage law system, the Canadian marriage law system (excluding Quebec) has evolved as a result of judicial scrutiny of legislation for constitutionality. The Canadian marriage law system, as in the case of the South African marriage law system, is therefore a result of judicial rulings. Accordingly the law reform process of the Canadian marriage law system would be an appropriate international instrument in considering South African marriage law reform.

The study ultimately attempts to provide a legal framework that will allow for the application of a generic marriage law system that is both non-discriminatory and gender-neutral that exemplifies the democratic values entrenched in the South African Constitution.

1.4 Assumptions Underlying the Study

1.4.1 Points of Departure

⁵³ Section 172(1) (a) of the Constitution.

⁵⁴ For a discussion of the best interest of the minor and the violation of a minor's right to enter into a civil union, see De Ru 2010 *THRHR* 560-562.

⁵⁵ On the Dutch marital system generally, see chapter 1 of the *Burgerlijk Wetboek*, 1992; Curry-Sumner *The Netherlands* 256-274; Smith and Robinson 2010 *PELJ* 40-47.

⁵⁶ Smith and Robinson 2010 *PELJ* 66-68.

- 1 Constitutional supremacy in South Africa affords everyone the rights to human dignity and equality, which are entrenched in the Bill of Rights;
- 2 Section 9(3) of the Constitution affords everyone the human right not to be unfairly discriminated against directly or indirectly on *inter alia* the grounds of age, gender, sex, marital status ethnic and social origin, sexual orientation, religion, belief or culture;
- 3 Section 10 of the Constitution affords everyone the human right to dignity;
- 4 In terms of section 39 of the Constitution an obligation is placed on courts, tribunals and forums to promote the values that underlie an open democratic society based on human dignity, equality and freedom.

1.4.2 Assumptions

- 1 There is a duty on government to pass reasonable, clear and precise legislation that enables the average South African citizen to understand what is expected of him/her;
- 2 Presently, South African marriages are regulated by the Marriage Act, Civil Union Act and the Recognition of Customary Marriages Act;
- 3 Civil Union Act does not allow for minors to enter into a civil union;
- 4 The Civil Union Act differs from the Marriage Act and the Recognition of Customary Marriages Act by categorically prohibiting minors from entering into a civil union.

1.4.3 Proposition

There is a need for a generic and gender-neutral marriage legislation that has the object of affording the same legal protection to heterosexual and same-sex minors.

1.5 Aims and Objectives of the Study

The aim of the study is threefold. Firstly the study will examine what constitutes “the best interests of the child” by analysing relevant judicial and legislative authority. The study will furthermore evaluate the approach adopted by the judicial system and specifically the family advocate’s office when applying “the best interests of the child” principle and ascertain whether such an approach adequately caters for a child-centred determination in the context of marriage. In determining whether an individualised approach is applied by the judiciary when determining “the best interests of a child” the provisions of the Children’s Act as well as the provisions of National Charters will be analysed and compared to international instruments.

The second aim of the study through examination of South African legislation regulating civil and customary marriages will determine whether the blanket ban on minors from entering into civil unions are in conflict with “the best interests of a child” principle.

The third aim of the study is to investigate the juxtaposition of current South African matrimonial legislation in determining whether the prohibition of minors’ wishing to enter into a civil union violates minors’ fundamental human rights. In this regard the legal standing of same-sex minors in particular will be considered as they are seen to be mostly prejudiced by the prohibition as compared to heterosexual minors who may still choose to enter into a marriage in terms of the Marriage Act, whilst the Marriage Act forbids same-sex marriages. Same-sex minors are therefore currently denied the opportunity to enjoy the same protection, status, benefits, and responsibilities which heterosexual minors may acquire by means of civil marriage.⁵⁷

⁵⁷ For a general discussion of the constitutional arguments regarding the position of same-sex minors, see Van Schalkwyk 2007 *De Jure* 168.

Based on evaluating national and international instruments, recommendations will be made to regulate current marriage law in South Africa and propose the amendment and development of a marriage law system that underpins the values of the South African Constitution.

To achieve the above aims, this study pursues the following specific objectives:

- It outlines the basic tenets of what constitutes the “best interests of the child” through comprehensive literature review restricted to marriage law and legal historical origins;
- It outlines and discusses the general principals guiding the implementation of a child-centred approach by organs of state when determining the “best interests of the child”;
- It intends to obtain the perspectives and contributions of state organs, specifically the family advocate’s offices to provide rich and renewed information on the approach and evaluation process applied by the judicial system when determining “the best interests of the child”;
- It analyses with reference to national and international law (specifically selected members of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages) the general provisions applied with regard to marriageable age;
- It critically analyses the current South African matrimonial legislation as far as it relates to marriageable age and establishes whether a blanket ban on marriageable age underpins “the best interests of a child” principle;
- It evaluates whether the differentiation in marriageable age within the current South African marriage law framework violates minors’ constitutionally protected rights, and if so, if it is justified;

- It extracts thematic lessons from the practice of Canadian and Dutch marriage law and proposes solutions and recommendations for the development of a generic marriage law in South Africa that is non-discriminatory and reflective of fundamental human rights.

1.6 Intended Contribution to the Body of Knowledge

The study was motivated by the anomaly in the current South African marriage law framework whereby minors are allowed to enter into a civil or customary marriage, provided they have the necessary consent, whilst the Civil Union Act categorically bans all minors from entering into a civil union without giving consideration to “the best interests of the child”. The “best interests of the child” principle is not a new topic. Since the promulgation of the Constitution as well as the Children’s Act, numerous studies have been done on what constitutes the “best interests of a child”. According to the National Research Foundation records, no research has however been conducted relating to whether the blanket ban of minors from entering into a civil union is in conflict with the “best interests of the child”. In addition no study has been conducted on the prohibition of same-sex minors wanting to enter into a legally recognised union. As a result, the nature of the research should make an innovative and worthwhile contribution to the field of private law, more specifically marriage law.

The research will also contribute to the body of knowledge in its comparative study by comparing the Dutch and Canadian marriage systems to that of the marriage law framework of South Africa. It is envisaged that the findings of this research will contribute towards the development of current South African marriage law to ensure that it is in line with the constitutional values of a democratic society despite their culture, religion or their sexual orientation.

In addition to the above, the research should evoke interest in the minds of academics, legal practitioners, aspiring future practitioners and members of the judiciary, who are

and might be confronted with the application of the present Acts⁵⁸ regulating marriage law in South Africa.

1.7 Research Method and Scope of Study

As a point of departure, the legal historical and comparative methods are used to evaluate the progression of the existing South African marriage legislation, with the emphasis on certain characteristics of the provisions of the Civil Union Act and the purpose of the Act considering the post-Constitutional background. The initial phase of study is accordingly qualitative in nature reporting on primary sources such as the Constitution, relevant legislations and case laws as well as providing a synthesis of the relevant literature relating to “the best interests of the child” by consulting secondary sources such as current published writings, text books, reports and articles in the area of study. This part of the study therefore offers a synthesis of the relevant literature, critically investigating whether or not section 1 of the Civil Union Act amounts to a violation of the Constitution.

By conducting a comparative and historical analysis of South African marriage law with that of the Netherlands and Canada, South African legislators may obtain valuable insight into the marriage law reform process, thereby offering a workable strategy. The Netherlands share a historical link with South Africa and was the first country to promulgate matrimonial legislation that afforded same-sex marriages. The introduction of a federal gender-neutral marriage definition made Canada (excluding Quebec) the fourth country in the world, and the first country outside Europe, to legally recognize same-sex marriage throughout its borders. Both countries offer a gender-neutral marriage definition and allow for minors (regardless of their sexual orientation) to get married, provided they obtain the necessary consent. The Dutch and Canadian marriage law systems may therefore offer insight into similar circumstances experienced in South Africa.

⁵⁸ Civil Union Act, Marriage Act and Recognition of Customary Marriages Act.

In addition to the desk-top evaluation, the study will also incorporate interviews of members of the Family Advocate's offices which will allow for the collection of rich descriptive data in respect of the phenomenon studied.⁵⁹ A phenomenon is described as "any occurrence that is open to observation."⁶⁰ The interviews will be conducted by way of "purposive sampling" where the sampling is done with a specific purpose in mind; that is to use participants that are typical of the population.⁶¹ It is therefore imperative that the participants have experience in the field of study to ensure that their input and experiences can be fully analysed through direct interaction with them.

In selecting participants that have experience in the field of study, a representative sample of family advocates from all ethnic groups working in the Lower Umfolozi area will be interviewed for this study. As a result of the qualitative focus of the study and the large amounts of data that may emerge from the in-depth interviews conducted with the participants, it was decided not to exceed more than ten interviews.

The collection of data by means of an in-depth interview process will be based on the experience of the family advocates within the context of the consultation process. It is hoped that by using semi-structured questions during the interview, that participants would describe and share their perspectives and experience, allowing for vital and rich information for purposes of this study. Comprehending their personal experiences will allow for the capturing of the essence of their true beliefs and thoughts in the world of the subject without being shaded by one's own preconceived ideas. This method will therefore provide an understanding of the experiences of the family advocate's offices in their natural setting and will ensure that information emerges naturally and that the data is less likely to be contaminated by the techniques used whilst gaining comprehensive data from human experience.

The purpose of the interviews is ultimately to determine their perceptions in respect of:-

- Their understanding and approach towards the concept "the best interests of the child" in general and specifically in relation to minors within a matrimonial law context;

⁵⁹ Davies 2007 *Doing a Successful Research Project* 135-137.

⁶⁰ *Ibid.*

⁶¹ Punch *Introduction to social research: Quantitative and qualitative approaches* 185.

- The individual factors that they consider in determining “the best interests of the child”;
- Whether the “best interests of the child” principle is adequately applied in terms of minors wishing to enter into a marriage;
- Whether the categorical ban on all minors from entering into a civil union allows for the application of the “best interests of the child” principle;
- Whether a minors’ sexual orientation is considered when determining “the best interests of the child” and if so, to what extent.

The study furthermore provides a detailed description of the study design. The data will be analysed by employing an interpretive descriptive analysis approach. An analysis of the data gathered from the interviews will be compiled and discussed. A summary of the findings as well as recommendations based on the interviews will be detailed in the study. The personal perceptions and contributions of the participants combined with the findings of the literature study will provide valuable and renewed information relating to the exclusion of minors from entering into a civil union regime.

1.7.1 Research Paradigm

In making sense of the world, actions are continuously interpreted, created, defined and rationalised. The study is conducted within an interpretivist paradigm.⁶² An interpretivist paradigm is based on the assumption that human phenomena are distinct from natural phenomena and reflects the worldview, namely that people socially construct meanings through their interaction with the world around them.⁶³ As humans have an inherent meaning-creating behaviour, professionals, who participate in child related matters, are viewed as active agents who make meaning of the child’s best interest enquiry process. The intention of the research was accordingly to comprehend

⁶² Babbie and Mouton *The practice of social research* 28.

⁶³ Babbie and Mouton *The practice of social research* 28; Davies 2007 *Doing a Successful Research Project* 135-137.

and interpret the meanings as interpreted by the members of the family advocate's offices.⁶⁴

1.7.2 Research Design

A qualitative, descriptive, interpretive design was applied in this study.⁶⁵ The intention with this study is to interpretatively describe the approach adopted by the family advocate and ultimately the judiciary in determining the best interest of the child with specific reference to matrimonial issues.

Interpretive descriptive design allows for meanings and explanations to be generated from the narrative, and entails "constant comparisons of pieces of data within and across the interviews and documents and noting similarities and differences".⁶⁶ The foundation of interpretive descriptive design is a qualitative investigation of a clinical phenomenon for the purpose of capturing themes and generating an interpretive description. As in this study, interpretive descriptive design is informed by using small sample groups and collecting data by way of interviews and document analysis. Interpretive descriptive design therefore entails multiple data-collection strategies to evade naïve overemphasis and offers an improved appreciation of multifaceted empirical phenomena.⁶⁷

In this study the researcher was interested in describing the phenomenon of "the best interests of the child". Research is descriptive.⁶⁸ In this study the researcher had access to in-depth quality descriptions through the reports and judgements, as well as from the literature and one-on-one interviews with professionals. For the greater part of this research, data was collected qualitatively. It was of great importance that the questions asked during the interviews were diverse and relevant.

⁶⁴ Babbie and Mouton *The practice of social research* 28.

⁶⁵ Thorne *Interpretive Description* 26.

⁶⁶ *Ibid.*

⁶⁷ Carlander et al 2013 *Open Journal of Nursing* 379.

⁶⁸ Babbie and Mouton *The practice of social research* 28.

1.7.3 Research Methodology

The research methodology is presented with reference to the two consecutive phases in which the research for this study was conducted. A more comprehensive discussion of the research methodology is presented in chapter 6.

1.7.4 Trustworthiness of the Study

The quality of the research conducted in this study was ensured through the application of the following criteria. Firstly, the researcher ensured trustworthiness by collecting rich, in-depth data that was sufficient, applicable and multifaceted enough to make a contribution to the field of marriage law.

Secondly, the researcher's own involvement in matrimonial matters necessitated self-reflexivity about the biases and inclination of the research to ensure that the data was trustworthy. This implied that the researcher, who acted as the main instrument in this study, continuously reflected on psychological, sociocultural, academic or any other subjective characteristics that might have prejudiced data collection and explanation in order to minimise biased findings. The researcher shared her biases and assumptions about participants and the phenomenon with her supervisor to reduce researcher biases, while upholding self-reflectivity. Furthermore, the methods of data collection as well as the challenges faced in the process of obtaining the documents and identifying appropriate participants were described clearly.

Thirdly, credibility that refers to trustworthiness and plausibility of the findings was ensured through the application of the principles of crystallisation in each of the phases of the study. Thick descriptions were presented to show the data to the readers *without telling them what to think*.⁶⁹ In this study, the following principles of crystallisation were applied either across or in specific phases as indicated below:

⁶⁹ Ellingson *Engaging Crystallization in Qualitative Research* 843

Across phases: The use of multiple data sources including documents relating to matrimonial legislation and the experiences of professionals engaged in family law, as well as various methods of data collection, which in this case included document analysis and semi-structured interviews with family advocates.

Crystallisation: In each phase of the study the following was included:

Phase 1: (Document analysis): Using a coder who was able to provide a different lens and allow for a more complex understanding of the documents.

Phase 2: (Interviews): Including participants who were involved in a variety of contexts to ensure multi-vocality as their different viewpoints would be clearly heard without being influenced in any way.

1.8 Ethical Considerations of the Study

The framework for the proposed research was the Civil Union Act. This study furthermore focused on the exclusion of minors from entering into a civil union. The emphasis of the research focused on section 1 of the Civil Union Act as well as certain provisions of the Constitution, and specifically section 28 (2) which states that “*A child’s best interests are of paramount importance in every matter concerning the child*”. The ethics of the study was typically associated with morality as it dealt with matters of right and wrong with associated emphasis on human rights.

The following ethical principles were adhered to in this research: -

The fundamental ethical rule is that the research should not bring harm to the participants. In the first phase of the study secondary sources, including case laws were used. The identities of the persons referred to in these documents were protected to ensure that no harm is inflicted. In the second phase of this study the participants were professionals, thus harm may have been limited as they are familiar with the challenge associated with issues relating to “the best interests of the child”. The researcher paid particular attention to gauge whether any distressing issues for the participants had been aroused by the interview, and participants were given the opportunity to deal with any stressful issues that were evoked. The researcher clearly and openly stated the research procedures to the participants and the aim of the study

to the participants. No physical harm was caused to the participants, as they were merely required to relate incidents from their own experience. After the interviews, the researcher provided the participants with an opportunity to reflect upon issues and to discuss matters that may have been evoked during the interviews. To ensure informed consent from the participants, the researcher informed them about the duration of the process, how they would be engaged in the process, what procedures would be followed, possible advantages as well as the credibility of the researcher. The researcher did not deceive the participants in any way and maintained participants' right to refuse to be interviewed, to answer any questions or fill in any forms, and also respected their time. The protection of the participants' interests and identities were paramount in this study and the researcher ensured confidentiality at all times by protecting their anonymity. A participant is anonymous when the researcher cannot identify a given response with a given subject.

The researcher endeavored to maintain integrity in the data analysis and reporting, which also included ethical practices. A professional code of ethics was adhered to at all times. The data collected was stored at the University of Zululand and will be destroyed after 7 years.

The University of Zululand's Policy and Procedures on Research Ethics and its Policy and Procedures on Managing and Preventing Acts of Plagiarism were read.

Munro⁷⁰ makes the following definition:

"Ethics is a set of moral principles which is suggested by an individual or a group, is subsequently widely accepted, and which offers rules and behavioural expectations about the most correct conduct towards experimental subjects and respondents, employers, sponsors, other researchers, assistants and students".

The University's Research Ethics Policy defines research ethics as:

"... [T]he principles and practices that guide the ethical conduct of research. These should embody respect for the rights of others who are directly or indirectly affected by the research. Such rights include rights of privacy and

⁷⁰ Munro www.defsa.org.za (Date of use 15 July 2015).

confidentiality, protection from harm, giving informed consent, access to information pre- and post-research and due acknowledgement. Ethical conduct in research also includes the avoidance of inflicting animal suffering of any kind and protection of the environment”.

All research must be ethically sound, but specific circumstances – health research, research involving animals and human participants, especially children – give rise to special ethical considerations.

In lieu of same the researcher is of the view that to the best of her knowledge:

- Her research does not fall into any category that requires special ethical obligations. Although government officials will be interviewed, their identities will at all times be treated as anonymous;
- The research does not create any conflict of interest, real or perceived;
- The researcher is not involved in or associated with any project or activity that will become the subject-matter of my research, nor are any of her family members or close friends or associates involved in any way;
- Except as might be disclosed in this proposal, the researcher do not have any direct or indirect financial interest in the conduct of this research, nor do any of my family members or close friends or associates.

The researcher undertakes to abide by the general principles set out in the University's policies and the obligations which the policies impose upon her, and to mitigate any ethical and other risks that might arise. In particular, the researcher undertakes to:

- Respect the dignity, safety and well-being of others, including the government officials, and unless express written permission is given, the researcher will respect anonymity and confidentiality;

- Consider and be sensitive to different cultures, languages, beliefs, perceptions, and customs of persons who participate in or are affected by the research;
- Ensure that the research is relevant both to the broad legal and development needs of the country and to the individual needs of those who may be affected by my research;
- Conduct the research and produce a thesis on her own, subject to normal supervisory and collegial assistance;
- Acknowledge and attribute to others the ideas, designs and writings that are not original;
- Reference the research work accurately according to the chosen referencing guide, and comply with copyright requirements and seek the necessary permissions, where required;
- Make use of text-matching software throughout the research writing process, as discussed and required by the supervisor, and will submit appropriate reports in this regard with the proposal and thesis when they are in final draft form.

Should circumstances arise that impact upon the researcher's ethical obligations, the researcher undertakes to disclose them to her supervisor and take appropriate action in terms of the relevant University policy.

1.9 Structure of the Study

This study is divided into eight chapters. Chapter 1 comprises of an introduction to the research topic, the problem statement, the research question, and an outline of the study.

Chapter 2 contextualises the study by analysing the historical development of the changing face of "marriage" as from the early Roman times to present day with the

view to ascertaining the need for non-discriminatory South African marriage legislation. The chapter commence with an analysis of the ever-changing legal nature of marriage as from a matter of social significance (*iustum matrimonium*) between families to the formal recognition of an interpersonal relationship (*iustae nuptiae*). The chapter will include an expository account of the impact the Dutch and British Rule has had on the current South African marriage law system. The chapter also considers and evaluates the impact that the Constitution has had on the recognition of interpersonal relationships within South Africa's heterogeneous society.

Chapter 3 provides an analysis of the current South African marriage law system as well as non-marital interpersonal relationships. A general description and comparison is drawn between the Marriage Act, Civil Union Act and The Recognition of Customary Marriages Act with specific emphasis on the legal requirements. The wording and provisions utilised in the Civil Union Act are analysed to establish any shortcomings of and inconsistencies between the Civil Union Act and the Marriage Act which may render section 1 of the Civil Union Act unconstitutional. The chapter highlights the differences within the current legislation governing marriage law in South Africa.

Chapter 4 provides a legislative and judicial overview of international, national and South African instruments incorporating children rights as far as it relates to "the best interests of the child". The chapter provides an investigation into what constitutes "the best interests of the child" within a marriage law framework. A global perspective on the origins of the best interests of the child principle is presented, followed by a South African perspective. Specific attention is paid to the participation of children in the process and a brief critical evaluation of the implementation of the best interests of the child principle.

Chapter 5 provides a brief comparison between the present South African marriage law framework and that of structured marital systems as found in the Dutch and Canadian legal systems. The different forms as well as requirements of recognised interpersonal relationships found in the Netherlands and Canada are evaluated and compared with that of South African's marriage law, with specific emphasis on the principles applicable to minor marriages. For comprehensiveness a comparison is also drawn from the basic principles applied in terms of Africa. The differentiation between

the current South African marriage law system and that of the Dutch and Canadian systems should contribute towards evaluating whether the current South African law system is in need of reformation or not.

Chapter 6 encapsulates the research method applied in collecting the information pertaining to the study and analysing the data. The chapter focuses firstly on the research design of the study. A qualitative, descriptive and interpretive design is applied to understand the decision of using a qualitative approach. The data-collection approach is discussed in detail. The use of semi-structured interviews is elaborated upon and data analysis in specific content analysis and thematic analysis and the verification of data are conferred. The trustworthiness of the study and ethical considerations are discussed. Secondly, the research methodology or process of research followed in this study is presented, explicating the procedures, namely data collection, data analysis, literature study, sampling and interpretation. The chapter provides a summary of the findings of the semi-structured interviews.

Chapter 7 summarises the research study by drawing conclusions and inferences from the data collected during the study. In this chapter guidelines are presented for the facilitation of the best interests of the child within a marriage law framework and recommendations are made for law reform based on the documentary analysis of relevant documents as well as the data collected during the interviews with ten family advocates who have extensive experience in the field of family law.

The last chapter, chapter 8, concludes with a summative overview of the study and concluding remarks based on the findings of the study.

CHAPTER TWO

MARRIAGE: THE HISTORICAL DEVELOPMENT OF SOUTH AFRICAN MARRIAGE LAW

2.1 Introduction

This chapter consists of a brief overview of the development of South African marriage law as from the first European settlement at the Cape of the Good Hope until the present day. In appreciating the processes that lead to the development of South African marriage law the study will provide a deeper understanding of the rationale behind the current marriage law system applicable in South Africa. For purposes of the historical overview, the chapter will commence with a brief discussion on the changing nature of marriage from a social custom to a public institution. The historical overview will focus on the requirements of a marriage and especially the minimum marital age requirements. The chapter will furthermore evaluate the influence the Church and the State has had on the evolution of the nature of marriage in general. In this regard the importance of the different models of marriage, and in particular the influence the Catholic sacramental model has had on the principles on which the South African marriage law system development will be evaluated. The evaluation is followed by an analysis of the influence that colonisation, South African independence and the era prior to the Constitution has had on the promulgation and amendment of the Marriage Act. The influence of the new constitutional dispensation and in particular the impact sexual orientation, as a prohibited ground of unfair discrimination, has had on the recognition of same-sex couples' rights is evaluated. The chapter concludes with a brief discussion on post-Constitutional judicial and legislative reform, including the SALRC' s recommendation to extend marriage rights to same-sex couples in lieu of the *Fourie* case, and, finally, the promulgation of the Civil Union Act.

2.2. The Evolution of Marriage*

2.2.1 Ancient Rome: Marriage as a Social Institution

Marriage in early Roman law was monogamous in nature and restricted to Roman citizens that reached the age of puberty and that were not related to each other within the prohibited degrees of affinity.⁷¹ The age of puberty was twelve years in respect of a girl and fourteen in respect of a boy.⁷² Though marriage was viewed as a heterosexual union, same-sex male marriages, especially amongst the aristocracy, were accepted during the time of the emperors.⁷³

Roman marriages were signified as a private and social, rather than as a legal or religious institution.⁷⁴ Prior to the marriage, the parents of the bride and groom would usually enter into an agreement (*sponsalia*) akin to that of an engagement that is applied in South African law today.⁷⁵ The marriage itself was determined on a *de facto* rather than a *de iure* basis whilst the state's involvement was restricted to the consequences of the marriage and not the solemnisation thereof.⁷⁶ No religious rites were required for the solemnisation of the marriage.⁷⁷ Accordingly, the solemnisation of marriages in early Roman time was based on custom and did not have to conform to any formalities.

A significant aspect of early Roman marriages was the fact that a marriage could only be concluded by an act of free and mutual consent of both parties to marry each other in a mutual exchange.⁷⁸ *Manus*, an ancient Roman type of customary marriage, could either be concluded by *cum manu* (where the woman enters under her husband's

* Parts of this chapter are based on sections of the author's LLM dissertation *The Legal Paradox of the Civil Union Act* (University of South Africa, 2014). The author would like to thank Prof J Heaton for her valuable comments.

⁷¹ Van Zyl *History and Principles of Roman Private Law* 100-101; Spiller *A Manual on Roman law* 63.

⁷² Treggiari *Roman Marriage: Iusti Coniuges* 23; Hahlo *The South African law of husband and Wife* 1.

⁷³ Eskridge 1993 *Virginia Law Review* 1446.

⁷⁴ Colish *The Stoic Tradition from Antiquity to the Early Middle Ages* 383.

⁷⁵ Van Zyl *History and Principles of Roman Private Law* 98.

⁷⁶ Merin *Equality for Same-sex Couples* 10.

⁷⁷ Van Zyl *History and Principles of Roman Private Law* 97. See also *Campher v Campher* 1978 (3) SA 797 (O) at 798 (G).

⁷⁸ Colish *The Stoic Tradition from Antiquity to the Early Middle Ages* 383.

hand) or *sine manu* (a free marriage).⁷⁹ In terms of marriages *cum manu*, the wife was placed under the legal control of her husband's *potestas* (power) or that of his father.⁸⁰ The wife therefore became part of the husband's family and assumed the status of a daughter.⁸¹ Consequently, the wife did not have any proprietary rights.⁸² *Cum manu* marriages could be concluded either by way of *confarreatio* (sharing of emmer bread),⁸³ *coemptio*⁸⁴ or *usus*.⁸⁵ The latter did not require ritualistic practices as in the case of *confarreatio* and *coemptio* that required *inter alia* the presence of witnesses during the rituals.⁸⁶ In marriages *sine manu* the wife legally and ritually remained subjected to her father's *potestas*.⁸⁷ Marriages *sine manu* were a private act with the parties consenting to have the intention to marry.⁸⁸ No ceremonial formalities were held and no records were kept of the marriage.⁸⁹ The wife's status did not change and she could retain her proprietary rights.⁹⁰ The wife did however have the choice to enter into an agreement with her intended husband, by means of an *instrumentum dotale*, for purposes of regulating the patrimonial consequences of their marriage.⁹¹ This agreement is similar to an antenuptial contract applied in South Africa law today.

Family played a key role in Roman society as was signified by the fact that marriage in early Roman times was viewed as a private contractual act by which "a society of a man and a woman" was established to safeguard the procreation of the *paterfamilias*'s

⁷⁹ Colish *The Stoic Tradition from Antiquity to the Early Middle Ages* 383-385.

⁸⁰ Colish *The Stoic Tradition from Antiquity to the Early Middle Ages* 383; Van Zyl *History and Principles of Roman Private Law* 103.

⁸¹ Spiller *A Manual on Roman law* 68.

⁸² Treggiari *Roman Marriage: Iusti Coniuges* 23.

⁸³ This form of *cum manu* was reserved for Rome's elite and involved a ritual whereby the groom and bride shared emmer bread. The presence of ten witnesses and the recital of ceremonial sacred verses were required during the ritual. For a discussion on *cum manu* marriage rituals see Frier, Thomas and McGinn *A Casebook on Roman Family Law* 20-28.

⁸⁴ This form of *cum manu* was a fictitious notional sale of the woman to her husband that took place throughout the marriage. The transaction took place in the presence of at least five witnesses that had to be adult male Roman citizens. For a discussion on *cum manu* marriage rituals see Frier, Thomas and McGinn *A Casebook on Roman Family Law* 20-28; Van Zyl *History and Principles of Roman Private Law* 102.

⁸⁵ Referred to the cohabitation of the husband and wife for the duration of a year after which the wife was transferred into the ownership of her partner. For a discussion on *cum manu* marriage rituals see Frier, Thomas and McGinn *A Casebook on Roman Family Law* 20-28.

⁸⁶ Treggiari *Roman Marriage: Iusti Coniuges* 23.

⁸⁷ Treggiari *Roman Marriage: Iusti Coniuges* 23; Van Zyl *History and Principles of Roman Private Law* 105.

⁸⁸ Spiller *A Manual on Roman law* 67.

⁸⁹ Van Zyl *History and Principles of Roman Private Law* 103.

⁹⁰ Hahlo *The South African law of husband and Wife* 2.

⁹¹ Van Zyl *History and Principles of Roman Private Law* 104.

family.⁹² Children born from a *sine manu* union were accordingly regarded as members of the husband's family.⁹³

In addition to *manus*, Roman law during the reign of Augustus⁹⁴ also acknowledged *concubinatus* (cohabitation) as an inferior form of marriage.⁹⁵ Parties entering into *concubinatus* had to comply with the same requirements of that of a *manus* (except that they did not have the intention to marry) failing which the relationship would have no legal standing.⁹⁶ Children born from *concubinatus* were however not regarded as children born from the male cohabitant.⁹⁷ The rationale for this may be to protect the *paterfamilias*. With the influence of Christianity the institution of *concubinatus* became discredited in the fourth century and later abolished.⁹⁸

Despite Christianity becoming the official religion of the Roman Empire in 313 AD, the Roman law of marriage remained based on *matrimonium ratum* (consent) of the two parties to the marriage and was thus not rigidly regulated by church or State.⁹⁹ From the above it is noteworthy that certain traits of early Roman marriages, such as monogamy and consent to a marriage, still form an integral part of the current civil marriage law system in South Africa.

2.2.2 The Middle Ages: Marriage as a Sacred Institution

The impact Christianisation of the Roman Empire had on the development of marriage law, and in particular South African marriage law, cannot be understated. With the Roman Catholic Church exercising jurisdiction over matrimonial law from the tenth century AD, the nature of early Roman marriage drastically changed.¹⁰⁰ However the basic requirements of marriage, namely consent, capacity to act and lawfulness, remain intact to this very day. Although Eskridge suggests that ceremonies were

⁹² Van Zyl *History and Principles of Roman Private Law* 97.

⁹³ Treggiari *Roman Marriage: Iusti Coniuges* 23.

⁹⁴ The first Roman emperor in 27 BC.

⁹⁵ Spiller *A Manual on Roman Law* 74.

⁹⁶ Spiller *A Manual on Roman Law* 74; Labuschagne 1989 *TSAR* 659.

⁹⁷ Spiller *A Manual on Roman Law* 74.

⁹⁸ Labuschagne 1989 *TSAR* 659.

⁹⁹ *Fourie* case para 70.

¹⁰⁰ Witte *From Sacrament to Contract* 31.

conducted to formalise same-sex “brother-making” liturgies, the viewpoint of the Church towards same-sex relationships changed from the thirteenth century onwards.¹⁰¹ The Christian teaching influenced the principles of marriage whilst the Church¹⁰² was transformed into “an autonomous legal and political corporation”.¹⁰³ Accordingly the Roman Catholic Church became State and divine leader.¹⁰⁴ The Catholic Church’s marriage doctrine influenced the way marriage was viewed since the Church alleged that Christ elevated marriage amongst baptised persons to a sacrament to ensure procreation.¹⁰⁵ Accordingly the Church regarded marriage as “one of the seven sacraments of faith”.¹⁰⁶

The Canon law was characterised as Roman law that was adapted to meet the needs of the medieval church.¹⁰⁷ The systemisation of Canon law as well as the Catholic Church’s marriage principles led to the development of the Catholic sacramental model of marriage.¹⁰⁸ This model was the first of five Christian theological models of marriage that influenced the way marriage was viewed by society.¹⁰⁹ In terms of the Catholic sacramental model, marriage comprised of three components, the natural (marriage being based on a union between two people for purposes of procreation), the consensual undertaking (parties undertaking to be faithful and dutiful parents) and the sacramental (a visible symbol of an everlasting union with God).¹¹⁰ As a result of the Christian influence during this era, same-sex intimacy was prohibited and later criminalised.¹¹¹ Marriages by girls under the age of twelve and boys under the age of fourteen without the required consent of his/her parents; polygamy and marriage within the prohibited degrees of affinity were also outlawed in terms of Canon law.¹¹² In

¹⁰¹ Eskridge 1993 *Virginia Law Review* 93.

¹⁰² Van Zyl *History and Principles of Roman Private Law* 90. For a general discussion of the early concept of marriage and how Canon law was received into Roman-Dutch law, see De Ru 2013 *Fundamina* 222-224.

¹⁰³ Van Zyl *History and Principles of Roman Private Law* 90; Witte *From Sacrament to Contract* 31.

¹⁰⁴ Van Zyl *History and Principles of Roman Private Law* 90.

¹⁰⁵ Witte *From Sacrament to Contract* 27.

¹⁰⁶ On the Catholic sacramental model being based on the ideal of a marriage being a unit comprising of natural, contractual, and sacramental elements generally, see Witte *From Sacrament to Contract* 23-26.

¹⁰⁷ Hahlo and Kahn *The South African legal system and its background* 511.

¹⁰⁸ Witte *From Sacrament to Contract* 23.

¹⁰⁹ *Ibid.*

¹¹⁰ Witte *From sacrament to contract* 4, 23-26.

¹¹¹ Church 2003 *Fundamina* 44; Reid and Witte 1999 *Emory Law Journal* 686.

¹¹² Hahlo and Kahn *The South African legal system and its background* 384.

addition the consent of the father of the bride as well as the bride herself became mandatory.¹¹³

In terms of Canon law marriage therefore comprised of three phases, namely espousal, the contracting of the marriage in the presence of the parties and lastly the consummation of the marriage.¹¹⁴ Consummation therefore became a requirement for the validity of the marriage.¹¹⁵ In ensuring that there was no opposition to the solemnisation of a marriage between the two parties a banns requirement was introduced in 1215 and made mandatory in 1563.¹¹⁶

The marriage ceremony furthermore evolved from an informal private negotiation between the family members of the bride and groom to a formalised church ceremony that was concluded in public by a priest and in the presence of two witnesses.¹¹⁷ The validity of the marriage was however based on the consent of the parties and not the blessing of the marriage.¹¹⁸ The nature of marriage during the Middle Ages accordingly changed from a social to a sacred institution. Sacred marriages became mandatory in the sixteenth century.¹¹⁹

2.2.3 Roman-Dutch Law: Secularisation of Marriage Law

With the decline of the Roman Empire and in the absence of general coherent legislation, the Netherlands¹²⁰ started to apply Germanic common law in conjunction with the Roman law.¹²¹ The Roman law enjoyed minority status to that of common law

¹¹³ Witte *From Sacrament to Contract* 32; Hahlo and Kahn *The South African legal system and its background* 384; 448-450.

¹¹⁴ Witte *From Sacrament to Contract* 32.

¹¹⁵ Hahlo and Kahn *The South African legal system and its background* 448.

¹¹⁶ *Fourie* case paras 70 -71.

¹¹⁷ Merin *Equality for Same-sex Couples* 11; Hahlo and Kahn *The South African legal system and its background* 448.

¹¹⁸ Hahlo *The South African law of husband and wife* 7.

¹¹⁹ Merin *Equality for Same-sex Couples* 11; Hahlo *The South African law of husband and wife* 7.

¹²⁰ The Netherlands formed part of the Frankish Empire. North and South Holland as well as Friesland was conferred on Dirk I in 922 AD, thereby establishing the House of Holland. For a discussion in general on the Frankish Empire see Wessels *History of the Roman-Dutch law* 50-65.

¹²¹ Hahlo and Kahn *The South African legal system and its background* 486; Lee *An introduction to Roman-Dutch law* 4.

and was initially applied where indigenous laws omitted to address issues of law.¹²² Due to common law being uncoded, the application of a codified Roman law system came to be applied more frequently in later days.¹²³

With the decline of the influence of the Catholic Church in the thirteenth century and growing Protestant movement in the sixteenth century, the concept of marriage as a sacrament was questioned.¹²⁴ This led to a significant re-evaluation of the notion of marriage which was influenced by the development of the Roman-Dutch¹²⁵ law system.¹²⁶

The three main Protestant societies¹²⁷, namely Lutheranism, Calvinism and Anglicanism each retained the Catholic sacramental model's view of marriage that a marriage had a natural and contractual element but rejected the notion that marriage was a sacrament.¹²⁸ The models did however recognise the divinely ordained nature of the covenant of marriage. In addition all three societies shared the view that the State had to play a more significant role in the regulation of the institution of marriage.¹²⁹ Each model did however have their own theological basis of marriage. In understanding the rationale behind the changing viewpoints of marriage, which ultimately influenced the development of marriage law, the essence of each of the models will be discussed briefly.

In terms of the Lutheran social model of marriage a distinction was drawn between the kingdoms of heaven and earth contending that marriage was not a sacrament in nature but merely a vessel to fulfil a social need.¹³⁰ Due to the fact that marriage was regarded as forming part of the earthly kingdom, the Lutheran model was accordingly of the

¹²² Hahlo and Kahn *The South African legal system and its background* 516; Van Zyl *History and Principles of Roman Private Law* 315.

¹²³ Van Zyl *History and Principles of Roman Private Law* 315.

¹²⁴ Witte *From Sacrament to Contract* 2.

¹²⁵ Simon van Leeuwen first referred to the law of the province of Holland as Roman-Dutch law in 1652. For a discussion on the development of Roman-Dutch law in general see Hahlo and Kahn *The South African legal system and its background* 486.

¹²⁶ Witte *From Sacrament to Contract* 2-4.

¹²⁷ The term protestant refers to all traditions of Western Christianity that distanced themselves from the Catholic doctrine. For a discussion on the Protestant societies in general see Hayes *History of Western civilization* 354.

¹²⁸ Witte *From Sacrament to Contract* 4-5.

¹²⁹ Witte *From Sacrament to Contract* 2.

¹³⁰ Witte *From Sacrament to Contract* 5.

view that marriage should not be regulated by the Church, as in the case of the Sacramental model, but by the State.¹³¹

The Calvinist covenantal model of marriage in turn acknowledged a faith that was based purely on the scriptures and accordingly attempted to remodel church services to embrace practices specifically approved of by the Bible.¹³² This model also rejected the notion that marriage was a sacrament.¹³³ The Calvinists viewed marriage as a multilateral agreement, whereby the entire community (including the consent givers, the witnesses to the marriage, the minister and the magistrate) are involved.¹³⁴ The civil and Christian spiritual norms were therefore enforced by the State and the Church respectively and not solely by the State as in the case of the Lutheran model.¹³⁵ The Calvinistic model of marriage required a formal church ceremony after the civil registration of the marriage.¹³⁶ This model's principles of marriage included *inter alia* that parties had to be fit to marry, that the parties must enter into the marriage voluntarily and that the marriage must be transparent. These principles, which the French (Calvinist) Huguenots settlers, who over time came to regard themselves as Afrikaners, encompassed, played a considerable role in the development of South African marriage law, especially during the pre-Constitutional period.¹³⁷

The Anglican Commonwealth tradition embraced the previously discussed models but viewed the purpose of a marriage as a means by which the Church could exercise authority over the family or "little commonwealth" (consisting of the husband's authority over his wife and likewise the parents' authority over a child) whilst in turn being controlled by State or the "broader commonwealth" (consisting of the church's role in relation to the family and the state's position in relation to the church).¹³⁸ Consequently each unit, whether in the "little or broader commonwealth," had a position within a hierarchy structure and with that came a consequent responsibility and duty.¹³⁹ Society

¹³¹ Witte *From Sacrament to Contract* 6-7.

¹³² Witte *From Sacrament to Contract* 7; Hayes *History of Western civilization* 354.

¹³³ Witte *From Sacrament to Contract* 7-8.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ Witte *From Sacrament to Contract* 84-85.

¹³⁷ Sachs *Justice in South Africa* 70.

¹³⁸ Witte *From Sacrament to Contract* 131.

¹³⁹ Witte *From Sacrament to Contract* 8-9, 131.

was accordingly strictly controlled.¹⁴⁰ In terms of the tradition a marriage had to be solemnised as a public event in a parish church after complying with the requirement for the banns to be published.¹⁴¹ Parental consent also became a requirement for people under the age of twenty one.¹⁴²

With the introduction of the Bill of Rights that was introduced in England in 1689, the principles of equality and liberty received recognition during the Age of Enlightenment.¹⁴³ The previous model of a traditional hierarchy that derived from the natural order as discussed above began to be replaced by a democratised hierarchy based on individuals freely contracting with one and other. The Biblical duties were accordingly replaced by contractual relationships.¹⁴⁴ This revised model therefore emphasised the new principles of equality and contractual freedom thereby focussing more on the needs of the individual and the contractual aspect of marriage rather than what was allowed by the Church.

From the discussion on the evolving nature of marriage it is evident that the institution of marriage has changed from a private custom to a public law.¹⁴⁵ The influence of the Catholic sacramental model¹⁴⁶ as well as the influence of the *Order in Council* of 1838¹⁴⁷ that were later legislated in terms of the Marriage Act 25 of 1961 cannot be understated.¹⁴⁸ It is furthermore evident that the institution of marriage that was regarded as a sacrament during the Middle Age changed to a divinely ordained covenant between two people based on informed consent in terms of the Roman-Dutch law.¹⁴⁹ Consequently a couple wishing to marry each other could attach any religious significance to the marriage regardless of their religious denomination. As a result of the aforementioned, ecclesiastical courts were abolished in terms of Roman-

¹⁴⁰ Witte *From Sacrament to Contract* 170.

¹⁴¹ Witte *From Sacrament to Contract* 9, 132.

¹⁴² Witte *From Sacrament to Contract* 161.

¹⁴³ Witte *From Sacrament to Contract* 132. For a discussion on the Age of Enlightenment see Witte *From Sacrament to Contract* 132-138.

¹⁴⁴ Witte *From Sacrament to Contract* 132.

¹⁴⁵ Merin *Equality for Same-sex Couples* 10.

¹⁴⁶ The Catholic sacramental model and especially the ideologies that were embodied in the Political Ordinance of 1580 had a profound influence on the development of South African Marriage law under the Marriage Act 25 of 1961. For a discussion on the influence of the Catholic sacramental model on marriage generally see Witte *From Sacrament to Contract* -21.

¹⁴⁷ The *Order of Council* of 1838 viewed marriage as a secular institution.

¹⁴⁸ *Fourie case* para 78-80.

¹⁴⁹ Witte *From Sacrament to Contract* 2.

Dutch law and the Church and all acts performed in church, including marriage, were placed under State control.¹⁵⁰ Accordingly, the sacred nature of marriage was repudiated as the law of marriage in Holland became secularised.¹⁵¹ The application of Roman-Dutch law in Holland was ended in 1838 with the codified *Burgerlijk Wetboek*.¹⁵²

2.3 The Shaping of South African Marriage Law

2.3.1 Pre-Colonialism

Prior to colonialism, South Africa was mostly unpopulated.¹⁵³ Eyewitness accounts by sailors found Bantu people (migrants from West and East Africa) on the east coast of South Africa.¹⁵⁴ In addition to the Bantu people (Nguni tribe), Khoi (Hottentots) and the San (Bushmen) were broadly spread over parts of Southern Africa.¹⁵⁵ The indigenous groups were each governed by their own traditions and cultures.¹⁵⁶ Their laws were enforced by way of an uncoded legal system that developed by way of precedents and customs that became immemorial rules that were imposed by the chief of their tribe.¹⁵⁷ Accordingly, the indigenous law of a tribe regulated all matters concerning its people, including marriage.¹⁵⁸ Customary or indigenous marriages were accordingly a social institution that was formalised in terms of an uncoded system based on traditions and customs. The requirements as well as the consequences of customary marriages are discussed in Chapter 3.

2.3.2 Colonialism

2.3.2.1 The Dutch Occupation

¹⁵⁰ Hahlo and Kahn *The South African legal system and its background* 411-418.

¹⁵¹ Sinclair assisted by Heaton *The law of marriage* 191.

¹⁵² Hahlo and Kahn *The South African legal system and its background* 488.

¹⁵³ Pakenham *The Boer War* 29-37.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ Pakenham *The Boer War* 32.

¹⁵⁷ Pakenham *The Boer War* 26.

¹⁵⁸ Pakenham *The Boer War* 28.

When Jan van Riebeeck established a refreshment post for the VOC (*Vereenigde Geoctroyeerde Oost-Indische Compagnie*)¹⁵⁹ at a mostly unhabituated Cape of the Good Hope, the settlement was under the jurisdiction of the *Raad van Indie* that was seated in Batavia.¹⁶⁰ As a result the *Statutes van Batavia*, which was based on the *Political Ordinance of the States of Holland 1580*, applied in the Cape.¹⁶¹ The VOC was accordingly under the rule of the *Staten-Generaal*.¹⁶² In terms of the *Political Ordinance* marriage was regarded as a divine institution and not a sacrament as previously contended.¹⁶³ Marriages in the Cape were accordingly regulated by the *Politieke Raad*.¹⁶⁴ During the period 1652 -1665 the Secretary of the *Raad* would solemnise the marriage in the presence of all council members after banns were called in the council chambers.¹⁶⁵ The duty of the Secretary to solemnise marriages was later on delegated to a clergyman in 1665.¹⁶⁶

With the establishment of the *Collegie van Commissarissen van Huwelijks Zaken* in 1676, a bride and groom had to appear before four commissioners of the *Collegie*.¹⁶⁷ The commission comprised of two officials and two civilians.¹⁶⁸ This position changed in 1804 with the re-composition of the *Raad van Justitie* when the *Raad* was represented by jurists only.¹⁶⁹ Marriages in the Cape had to take place before the commissioners in Cape Town.¹⁷⁰ In terms of the *Collegie*, the commissioners would grant a certificate permitting a clergyman to call the banns for three consecutive Sundays, provided the couple complied with the statutory requirements of marriage as

¹⁵⁹ Commonly known as the “Dutch East India Company”.

¹⁶⁰ Hahlo and Kahn *The South African legal system and its background* 511; 536; De Wet 1957 *THRHR* 237.

¹⁶¹ Hahlo and Kahn *The South African legal system and its background* 511-518; De Wet 1958 *THRHR* 164.

¹⁶² For a discussion on whether the Octrooi of 1602 gave the VOC authority to act on behalf of the *Staten-Generaal* and exercise authority in the Cape of the Good Hope see De Wet 1958 *THRHR* 85-94; Van Zyl *History and Principles of Roman Private Law* 315.

¹⁶³ Hahlo *The South African law of husband and wife* 11.

¹⁶⁴ Hahlo and Kahn *The South African legal system and its background*; De Wet 1958 *THRHR* 166.

¹⁶⁵ Hahlo and Kahn *The South African legal system and its background* 411; De Wet 1958 *THRHR* 162 and Botha 1914 *SALJ* 251.

¹⁶⁶ Botha 1914 *SALJ* 251.

¹⁶⁷ De Wet 1958 *THRHR* 94, 162.

¹⁶⁸ Botha 1914 *SALJ* 250-252.

¹⁶⁹ Botha 1914 *SALJ* 250; Hahlo and Kahn *The South African legal system and its background* 512.

¹⁷⁰ De Wet 1958 *THRHR* 166; Botha 1914 *SALJ* 255.

prescribed by the *Statutes of Batavia*.¹⁷¹ This was typically followed by a congratulatory dinner that was attended by the bride and grooms' family and friends.¹⁷² The marriage would thereafter be solemnised by the minister of their church provided no objection to the intended wedding was filed with the commission.¹⁷³ Due to logistical reasons, local magistrates were later empowered to grant such certificates subject to the commissions' approval in Cape Town.¹⁷⁴ On approval of the certificate, the marriage was solemnised in the parties' local church.¹⁷⁵ Marriages during the first Dutch rule consequently constituted a secular and religious component that had to be complied with.

The *Ordinance* furthermore provided for the basis of law of civil marriage.¹⁷⁶ In this regard the regulation of marriages was not confined to a specific religious denomination.¹⁷⁷ A marriage also had to be solemnised in front of two witnesses by either a magistrate or minister of religion and parental consent had to be obtained by a female that was younger than 20 years of age and 25 years of age in respect of a male.¹⁷⁸ The latter requirement was imposed to protect against possible financial abuse of a secret marriage to a younger person.¹⁷⁹ In the absence of parental consent being obtained, a marriage to a female or male under the aforesaid ages resulted in the other party being barred from any benefit that he/she may have been entitled to.¹⁸⁰

During the second period of Dutch rule civil or secular marriages were introduced to the Cape.¹⁸¹ The rationale behind this introduction was the lack of clergymen in remote outposts. Civil marriages in remote areas could henceforth be solemnised by civil servants, a *landdrost* and two *heemraden*.¹⁸² Civil marriages were therefore, from a legal perspective, regarded as a secular institution that allowed spouses to have their

¹⁷¹ De Wet 1958 *THRHR* 167; Hahlo and Kahn *The South African legal system and its Background* 512 and Botha 1914 *SALJ* 250-252.

¹⁷² Hahlo and Kahn *The South African legal system and its background* 521.

¹⁷³ *Ibid.*

¹⁷⁴ Botha 1914 *SALJ* 253-255.

¹⁷⁵ Botha 1914 *SALJ* 253; De Wet 1958 *THRHR* 169.

¹⁷⁶ Hahlo and Kahn *The South African legal system and its background* 511.

¹⁷⁷ Article 3 of the Political Ordinance of 1580.

¹⁷⁸ *Fourie* case para 71; Hahlo *The South African law of husband and wife* 12.

¹⁷⁹ Article 17 of the *Perpetual Edict* of 1540; Lee *An introduction to Roman-Dutch law* 57.

¹⁸⁰ Lee *An introduction to Roman-Dutch law* 57.

¹⁸¹ Hahlo and Kahn *The South African legal system and its background* 531.

¹⁸² Hahlo and Kahn *The South African legal system and its background* 522.

marriage blessed, if so wished, by any religious denomination.¹⁸³ Civil marriages were however abolished during the second period of occupation under British rule in 1806.¹⁸⁴

It is evident from the discussion that as a result of the *Political Ordinance* of 1580, Roman-Dutch law was applied in the Cape of the Good Hope¹⁸⁵ and that this led to Roman-Dutch law becoming the common law of South Africa. Roman-Dutch law accordingly formed the cornerstone on which the South African legal system and in particular the marriage law system is founded.¹⁸⁶

2.3.2.2 The British Invasion

Despite the British occupation of the Cape of the Good Hope during 1795-1803 and later in 1806, Roman-Dutch law continued to be administered in the name of the British monarch.¹⁸⁷ It is however noteworthy that civil marriage, which was previously introduced under Dutch rule, was abolished by the English resulting in all marriages again having to comply with the religious requirements of a marriage and be solemnised by the clergy.¹⁸⁸

It is furthermore noteworthy that during the English rule the age of majority was reduced from twenty five to twenty one years of age in respect of both men and woman which remained the position until 2007 when the Children's Act 38 of 2005 reduced the age of majority to eighteen.¹⁸⁹

With the introduction of the 1838 *Marriage Order in Council* a marriage register was introduced.¹⁹⁰ The provisions of the *Order* were very similar to that of the Dutch

¹⁸³ Botha 1914 *SALJ* 253-255.

¹⁸⁴ Grutter and Van Zyl *The story of South Africa* 18.

¹⁸⁵ De Wet 1958 *THRHR* 34.

¹⁸⁶ Hahlo and Kahn *The South African legal system and its background* 516; De Wet 1958 *THRHR* 93-95.

¹⁸⁷ De Wet 1958 *THRHR* 172-173.

¹⁸⁸ Botha 1914 *SALJ* 256; Hahlo *The South African law of husband and wife* 15-16.

¹⁸⁹ *Perpetual Edict* of 1540; Children's Act 38 of 2005.

¹⁹⁰ De Wet 1957 *HRHR* 237-244.

Political Ordinance of 1580.¹⁹¹ The promulgation of the Marriage Act, 16 of 1860 changed yet again the position of secular marriages by providing for the solemnisation of secular as well as religious marriages.¹⁹² In terms of the Act, resident magistrates were appointed as marriage officers and were given the right to perform the tasks associated with the banns requirement.¹⁹³

Considering the fact that Roman-Dutch law was applied during the first British invasion as well as the fact that the 1838 *Marriage Order in Council* did not differ much from the Dutch *Political Ordinance* of 1580, it can be concluded that the English law had a marginal influence on the development of South African marriage law.

2.3.3 Independence and Pre-1994

Although the Union of South Africa was established in 1910, South Africa was only acknowledged as an independent country in 1931.¹⁹⁴ A standardisation of laws for the Union of South Africa commenced in 1940. By 1910 the provisions of the English *Order in Council* were adopted in each of the Union of South Africa's colonies by way of their own marriage laws. Civil marriages throughout the Cape colony, Natal, Transvaal and Free State were therefore regarded as secular institutions.

Shortly after D. F. Malan became the first prime minister of the Union of South Africa, the policy of Apartheid was instigated.¹⁹⁵ Apartheid policies were justified by Afrikaner Nationalist ideology.¹⁹⁶ The Apartheid policies led to the promulgation of various statutes, *inter alia* the *Prohibition of Mixed Marriages Act*, 55 of 1949 whereby European and non-Europeans were precluded from marrying each other.¹⁹⁷ In terms of policy, people of different races could get married provided one of them was not a

¹⁹¹ Hahlo and Kahn *The South African legal system and its background* 578.

¹⁹² De Wet 1957 *HRHR* 237-244; Botha 1914 *SALJ* 256.

¹⁹³ De Wet 1957 *THRHR* 237-244.

¹⁹⁴ Hahlo and Kahn *The South African legal system and its background* 534, 565-568.

¹⁹⁵ Grutter and Van Zyl *The story of South Africa* 52.

¹⁹⁶ Grutter and Van Zyl *The story of South Africa* 52. For a discussion on the influence Afrikaner history and Dutch Calvinism had on the Apartheid policies generally, see Hahlo and Kahn *The South African legal system and its background* 398.

¹⁹⁷ Hahlo and Kahn *The South African legal system and its background* 578.

European.¹⁹⁸ The justification for this legal disparity (Europeans over Non-Europeans) may be generalised as the perceived superiority of one group over another. The Prohibition of Mixed Marriages Act was only repealed in 1985.

In 1927 the Black Administration Act, 38 of 1927 was promulgated that governed marriages between black persons. In terms of this Act, the default marriage system was out of community of property, which differed from the default marital regime for marriages in South Africa.¹⁹⁹ The Act differentiated between a “marriage” and a “customary union”.²⁰⁰ The latter was not recognised as a marriage in terms of South African law.²⁰¹ In terms of the Act black persons were not allowed to enter into polygynous marriages but only polygamous customary unions.²⁰² This issue is further discussed in Chapter 3.

With the promulgation of the Marriage Act 25 of 1961, marriage laws within the Republic of South Africa were consolidated.²⁰³ The Act provided that a marriage be solemnised as a secular institution despite permitting religious officers to solemnise a marriage.²⁰⁴ The Act therefore emphasised the fact that a marriage was a secular institution free of any religious dogma.²⁰⁵ The minimum age of marriage was retained as sixteen in respect of a woman and eighteen in respect of a man.²⁰⁶ Marriage was defined based on Christian beliefs and interpreted as a monogamous relationship between a man and a woman. Polygamy and same-sex intimacy was accordingly regarded as *contra bonis mores* and criminally sanctioned.²⁰⁷ Sexual intimacy between men was outlawed in terms of the *Immorality Act* 5 of 1927 which was later substituted with the *Sexual Offence Act* 23 of 1957 to protect the sanctity of marriage and the protection of family life.

¹⁹⁸ Hahlo and Kahn *The South African legal system and its background* 578.

¹⁹⁹ Section 22(6) of the Black Administration Act 38 of 1927.

²⁰⁰ Black Law contained in the Schedule to Law 19 of 1891(Natal).

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Fourie* case para 78; Hahlo and Kahn *The South African legal system and its background* 578.

²⁰⁴ *Fourie* case para 78.

²⁰⁵ *Ibid.*

²⁰⁶ Section 26 of the Marriage Act 25 of 1961. Section 1 of the Marriage Law Amendment Act 8 of 1935 first contained the provision and provided that persons younger than the prescribed minimum age could get married provided they obtain their parents' consent as well as the Minister of Interior.

²⁰⁷ Church 2003 *Fundamina* 49.

Amendments to the Marriage Act in terms of the Marriage Amendment Act 51 of 1970 resulted in the banns requirement being abolished and the age of marriage in respect of a girl being reduced to fifteen years of age.²⁰⁸ In 1984 the Act was once again amended to include section 24A to regulate the patrimonial consequences of a marriage where a party to the marriage did not obtain parental consent.²⁰⁹

Marriages, in terms of the Marriage Act, therefore had to comply with the requirements of the Act. Accordingly purely religious marriages that were not solemnised in terms of the Marriage Act were not recognised as a valid marriage.²¹⁰ This emphasises the change in the nature of marriage from a sacred institution controlled by the church to a secular institution regulated by the state.

It is evident from the above that the South African civil marriage system, under the Marriage Act, was a consequent of Roman-Dutch law.²¹¹ The Christian morals that supported the sanctity of marriage led to the moralistic condemnation of same-sex intimacy.²¹² Such discontentment is evident in the traditional common law definition of marriage as a legally recognised life-long voluntary union between one man and one woman to the exclusion of all others.²¹³ Family life beyond the limitations of a state-sanctioned marriage did therefore not obtain full legal recognition and protection,²¹⁴ ensuing in monogamous heterosexual civil marriages enjoying a superior position,

²⁰⁸ Section 6 of the Marriage Amendment Act 51 of 1970.

²⁰⁹ Section 24A(1) of the Marriage Act 25 of 1961 provides that “No marriage officer shall solemnize a Marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing”.

²¹⁰ For a discussion on Islamic and purely religious marriage generally see In *Mashia Ebrahim v Mahomed Essop* 1905 TS 59; *IsmailvIsmail*1983 (1) SA 1006 (A) and *Seedat’s Executors v The Master (Natal)* 1917 AD 302.

²¹¹ Generally on the pre-1994 South African marriage law not adhering to a particular religious model of marriage and the influence of Afrikaner Christian Nationalism, see Witte *From Sacrament to Contract* 194-195; De Ru 2013 *Fundamina* 225-226.

²¹² *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 11. For an example of the legal and moral climate towards homosexuality see *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) in which a lesbian mother was granted restricted contact rights in respect of her children as the court ruled that her children’s best interest could not be served by allowing them to be exposed to her lesbian relationship.

²¹³ *Seedat’s Executors v The Master (Natal)* 1917 AD 302.

²¹⁴ De Vos 2004 *SAJHR* 188-189.

whilst the lesser viewpoints of non-traditional family forms were overlooked.²¹⁵ As a result, South African law prior to the current constitutional era only recognised and protected relationships between a man and a woman who concluded a state-sanctioned marriage in accordance with the requirements of the Marriage Act. The consequences and benefits of marriage, *inter alia* the *consortium omnis vitae*²¹⁶ between married parties, were accordingly restricted to heterosexual monogamous marriage couples.

2.3.4 The Advent of the Constitution and the Inclusion of Sexual Orientation in the Bill of Rights

Prior to 1994 South Africa applied the Westminster system of government.²¹⁷ Consequently courts did not have the jurisdiction to preside over the legality of legislation.

The Apartheid regime was sanctioned worldwide during the 1980's as a result of the discrimination directed towards black people. During this period gay and lesbian movements were established and addressed gay issues on the program of the anti-apartheid struggle.

In drafting the Interim Constitution provision was made for prohibiting discrimination in respect of specific groups (who are particularly vulnerable to discrimination).²¹⁸ With the promulgation of the Interim Constitution in 1993,²¹⁹ section 8(2) of the Constitution consequently prohibited unfair discrimination, directly or indirectly, on specific grounds which encompassed sexual orientation. In drafting the final Constitution, it was

²¹⁵ In *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at para 160 Sachs J emphasises the pre-democratic South African law's blatant disregard of minority groups.

²¹⁶ For a discussion on *consortium omnis vitae* in general see Hahlo *The South African law of husband and wife* 22; *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 33.

²¹⁷ Robinson 2005 *Obiter* 488.

²¹⁸ Cameron 1993 *SALJ* 450-451.

²¹⁹ Constitution of the Republic of South Africa Act 200 of 1993.

proposed²²⁰ that sexual orientation should be reserved as prohibited ground for discrimination. Despite public antagonism and a lack of legal precedent, sexual orientation as a ground for protection from discrimination was entrenched in section 9(3) of the Constitution. By so doing, South Africa became the first country in the world to explicitly recognise (in its Constitution) sexual orientation as an automatic ground of unfair discrimination until the contrary has been proven.²²¹

On 4 February 1997 South Africa adopted the Constitution. The Bill of Rights, rooted in the Constitution, moulded the foundation of fundamental rights in South Africa by not only protecting the rights of all people and upholding the democratic values of human dignity, equality, and freedom,²²² but by also imposing an obligation on the state to respect, protect, promote, and fulfil these rights.²²³

It is noteworthy that a right to marriage and family life was not included in the Constitution. The rationale for the omission of such a right is found in *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the RSA, 1996*.²²⁴

²²⁰ The Technical Committee of Theme Committee Four as well as the Constitutional Committee proposed the retention of sexual orientation as a forbidden ground of discrimination. The Technical Committee found support for their argument in various international human rights documents. In addition the National Coalition for Gay and Lesbian Equality successfully campaigned for the retention of sexual orientation as a ground of discrimination. For a general discussion of the retention of sexual orientation as a forbidden ground of discrimination, see Cameron 1993 SALJ 450-466; De Ru 2013 *Fundamina* 229-232. For a general discussion of the influence gay and lesbian movements had on the retention of sexual orientation as a forbidden ground of discrimination, see De Ru 2013 *Fundamina* 226-229.

²²¹ Section 9(5) of the Constitution.

²²² Section 7(1) of the Constitution.

²²³ Section 7(2) of the Constitution.

²²⁴ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC). In this case the court held that “The absence of marriage and family rights in many African and Asian countries reflects the multi-cultural and multi-faith character of such societies. Families are a constituted *function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms.* They thereby avoid disagreements over whether the family to be protected is a nuclear family or an extended family, or over which ceremonies, rites or practices would constitute a marriage deserving of constitutional protection ... On the one hand, the provisions of the [new text of the 1996 Constitution] would clearly prohibit any arbitrary State interference with the right to marry or to establish and raise a family. [Section] 7(1) enshrines the values of human dignity, equality and freedom, while [section] 10 states that everyone has the right to have their dignity respected and protected. *However these words may come to be interpreted in future, it is evident that laws or executive action resulting in enforced marriages, or oppressive prohibitions on marriage or the choice of spouses, would not survive constitutional challenge...* On the other hand, various sections in the [new text] either directly or indirectly support the institution of marriage

The adoption of the Constitution and specifically the incorporation of the equality and non-discrimination clauses,²²⁵ did not only result in an increasing demand to allow same-sex couples the status of married couples, but also on the prohibition of same-sex couples from the *ex lege* consequences that heterosexual married couples are allowed in terms of marriage.²²⁶ As a result of the aforementioned, various same-sex couples (who had hitherto been prohibited from entering into legally recognised marriages) and heterosexual couples (who chose not to get married) were given an opportunity to approach the Constitutional Court demanding that some invariable consequences of a marriage be extended to non-traditional families.²²⁷

2.3.5 Post-Constitutional Developments: Judicial and Legislative Reform

As a result of self-regulation, and inadequate legislative regulation of non-traditional family forms,²²⁸ the Constitutional Court became the platform through which recognition was sought for, and eventually given to, changing social norms and needs.²²⁹

Numerous post-Constitution *ad hoc* judicial pronouncements were handed down encompassing spousal benefits to non-traditional families by *inter alia* including a same-sex life partner as a “dependant” in terms of the Medical Schemes Act 131 of

and family life. Thus, [section] 35(2)(f)(i) and (ii) guarantee the right of a detained person to communicate with, and be visited by, his or her spouse or partner and next of kin. There are two further respects in which the [new text] deals directly with the issue, and both relate to family questions of special concern. The first deals with the rights of the child, wherein the right to family and parental care or appropriate alternative care is expressly guaranteed ([section] 28(1) (b)). The second responds to the multi-cultural and multi-faith nature of our country. [Section] 15(3) (a) authorises legislation recognising 'marriages concluded under any tradition or a system of religious, personal or family law'".

²²⁵ Section 9(1) and section 9(3) of the Constitution.

²²⁶ *Fourie* case para 26.

²²⁷ For examples of cases in which non-traditional families approached the Constitutional Court for the extension of spousal benefits, see *Fourie* case paras 49-54; 56-58. For a general discussion of the extension of spousal benefits to same-sex life partners, see Heaton *South African Family Law* 253-254; Church 2006 *Fundamina* 100; Smith and Robinson 2008 *IJLPF* 368-374; Wood-Bodley 2008 *SALJ* 260-266.

²²⁸ Heaton 2005 *THRHR* 665-667.

²²⁹ Heaton 2005 *THRHR* 662-663.

1998,²³⁰ acknowledging same-sex immigrant partners,²³¹ acknowledging same-sex partners for purposes of an insurance policy,²³² allowing same-sex couples to adopt children,²³³ acknowledging that both same-sex partners have parental rights in respect of a child born as a result of artificial insemination,²³⁴ allowing a same-sex partner to institute a claim for loss of support,²³⁵ including a same-sex partner as the surviving spouse of a same-sex relationship,²³⁶ and providing that same-sex couples are entitled to inherit in terms of intestate succession.²³⁷ The exclusion of same-sex couples from the Marriage Act was however only scrutinised in 2005 in the *Fourie* case.

In the *Fourie* case, it was held that the exclusion of same-sex couples from the right to marry unjustifiably denied same-sex couples equality before the law and equal protection and benefit of the law under section 9(1) of the Constitution. In addition it was held that such exclusion subjected same-sex couples to unfair discrimination by the state under section 9(3),²³⁸ and violated their right to dignity under section 10²³⁹ of the Constitution.²⁴⁰ The Constitutional Court accordingly acknowledged that the common law definition of marriage is inconsistent with the Constitution and therefore invalid to the extent that it does not permit same-sex couples to attain the dignity, status, benefits and responsibilities afforded to heterosexual couples through marriage.²⁴¹ The court furthermore declared “the omission from section 30(1) of the Marriage Act 25 of 1961 after the words ‘or husband’ of the words ‘or spouse’ ... to be inconsistent with the Constitution, and the Marriage Act ... to be invalid to the extent of this inconsistency”.²⁴²

²³⁰ *Langemaat v Minister of Safety and Security* 1998 (2) All SA 259 (T).

²³¹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Fourie* case para 30.

²³² *Farr v Mutual & Federal Insurance Co Ltd* 2000 (3) SA 684 (C).

²³³ *Du Toit v Minister of Welfare and Population Development* 2002 (10) BCLR 1006 (CC).

²³⁴ *J v Director-General of Home Affairs* 2003 (5) SA 621 (CC).

²³⁵ *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

²³⁶ *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC).

²³⁷ *Gory v Kolver (Starke Intervening)* 2007 (3) BCLR 249 (CC) (hereinafter referred to as the “Gory case”).

²³⁸ Section 9(3) of the Constitution provides that “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation...”.

²³⁹ Section 10 of the Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.

²⁴⁰ *Fourie* case paras 75-79.

²⁴¹ *Fourie* case paras 1(c) and 2(b) of the order.

²⁴² *Fourie* case para 2(c) of the order.

As a result of the highly contentious nature of the ruling in *Fourie*,²⁴³ both the aforementioned pronouncements of invalidity were deferred until 30 November 2006 to enable Parliament to address the defects through remedial legislation.²⁴⁴ The Constitutional Court instructed Parliament not to enact legislation that would result in the marginalisation of marriages or disrespect same-sex couples.²⁴⁵ The court furthermore ruled that the omission of enacting remedial legislation within the stipulated period of time, would result in the words “or spouse” automatically be read into section 30(1) of the Marriage Act after the words “or husband”,²⁴⁶ thus providing for a gender-neutral marriage formula that would allow heterosexual and same-sex couples to marry in terms of the Marriage Act.

The South African Law Reform Commission²⁴⁷ was requested to consider the aforementioned ruling and make recommendations regarding law reform. The SALRC firstly proposed that the Marriage Act be altered by inserting definitions for the concepts “spouse” and “marriage” which would provide for both heterosexual and homosexual marriages.²⁴⁸ The SALRC furthermore proposed that the words “or spouse” be inserted after the word “husband” in section 30(1) of the Marriage Act so as to provide for a gender-neutral marriage formula.²⁴⁹ An additional recommendation by the SALRC was to “accommodate religious and moral objections” by enacting a new Act (the Reformed Marriage Act) that would only allow for the solemnisation of orthodox religious marriages between one man and one woman by a minister of a religious denomination.²⁵⁰ In addition to the aforementioned recommendations, Parliament had to also consider the symbolic effect the solemnisation of same-sex

²⁴³ For a general discussion of the totalitarian moves on the part of fundamentalist religious groups, and political and social pressures that resulted in the Constitutional Court deferring the remedial action to the legislature, see Sinclair *International Survey of Family Law* 397-401; Barnard 2007 *SAJHR* 522-525; De Vos 2008 *ULR* 162 and 165-166; De Ru 2013 *Fundamina* 243-245. See also Bohler-Muller 2007 *De Jure* 90-98 in respect of a more tentative approach and public participation to satisfy the concerns of religious groups and traditional leaders as well as 90-112 in respect of political pressures.

²⁴⁴ *Fourie* case paras 158-159 and paras 1(c) (ii) and 2(d) of the order.

²⁴⁵ *Fourie* case paras 94; 147-150.

²⁴⁶ *Fourie* case paras 158-159 and para 2(e) of order.

²⁴⁷ South African Law Reform Commission (hereinafter referred to as “the SALRC”).

²⁴⁸ *Fourie* case para 32; SALRC 2006 report 306 para 5.6.6.

²⁴⁹ SALRC 2006 report 307 para 5.6.7.

²⁵⁰ SALRC 2006 report 311-313 paras 5.6.23-5.6.24.

marriages would have as a public event that would result in same-sex couples having private and public status equal to heterosexual married couples.²⁵¹

In promulgating remedial legislation, Parliament was therefore obliged to promulgate legislation that would accomplish their obligation to eradicate all forms of discrimination and prejudice.²⁵² In ensuring the protection of the parties to same-sex relationships against discrimination and persecution, Parliament opted to retain the Marriage Act in its existing form and to promulgate a separate Act. Accordingly a new “separate but equal” regime was created to introduce same-sex civil unions²⁵³ thereby accommodating the diverse cultural groups and religious viewpoints of a heterogeneous society that is South Africa. The SALRC’s recommendations are therefore currently not reflected in South African matrimonial law. Consequently although the promulgation of the Civil Union Act does provide for same-sex marriages and can therefore be regarded as a valuable human rights development and an accessible legal instrument, it should be noted that the promulgation of a separate Act for the institution of a civil union by way of marriage or civil partnership causes certain anomalies.

2.4 Summary and Conclusion

The *Fourie* case can be viewed as the impetus in the promulgation of legislation that provides non-traditional same-sex families the right to enter into legally acknowledged and protected civil unions.

South Africa is by nature largely a conservative society. Therefore any legislation has to balance the sometimes conflicting needs of constitutional principles versus the need of society at large to embrace such legislation. Failure to embrace such legislation could result in a serious legal predicament where the law is no longer respected and upheld.

²⁵¹ *Fourie* case para 81. For a general discussion of the impact same-sex marriages would have on same-sex couple’s public and private status, see De Vos and Barnard 2007 SALJ 821.

²⁵² Section 7(2) of the Constitution; Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

²⁵³ For a discussion of the first draft of the Civil Union Bill generally, see De Vos and Barnard 2007 SALJ 808-811 and 813-819; De Vos 2008 ULR 167-169.

The next chapter evaluates the current position of marriage and interpersonal relationships within the South Africa marriage law framework. A comparative analysis will be conducted with regard to the legislations that regulate civil marriages as well as customary marriages. The legal recognition afforded to interpersonal relationships that fall outside the traditional concept of “marriage” will also be evaluated to establish whether the current marriage law framework is consistent with the democratic values of equality and human dignity as entrenched in the Constitution.

CHAPTER 3

THE CURRENT LEGISLATIVE FRAMEWORK REGULATING MARRIAGES AND INTERPERSONAL RELATIONSHIPS IN SOUTH AFRICA

3.1 Introduction

This chapter consists of a succinct overview of the three statutes that currently regulate marriages in South Africa as well as the legal position of interpersonal relationships that fall outside the ambit of matrimonial legislation. The chapter will commence with a comparative analysis of the Marriage Act and the Civil Union Act that regulate civil marriages in South Africa with a view to establishing any inconsistencies and /or contradictions that may underpin the need for marriage law reform. In addition, the impact of the application of dual but separate Acts to regulate civil marriages will be assessed. The comparative analysis will be followed by an investigation into whether the legislation that regulates customary marriages is consistent with that of civil marriages and civil unions. Throughout the analysis, the scope of the comparison will be limited to the legal requirements of a civil and customary marriage, as well as a civil union and in particular the capacity of minors to enter into such institutions. The chapter will conclude with a brief discussion on the legal position of non-nuclear families²⁵⁴ such as parties to “purely religious marriages”²⁵⁵ that are not solemnized in terms of the Marriage Act, as well as life partnerships,²⁵⁶ with the aim of identifying any shortcomings within the current legislative framework, which should be embodied in marriage legislation so that they align with the values of South African law in general and matrimonial law in particular.

²⁵⁴ In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000(1) BCLR 39 (CC) 2000 (2) SA 1 (CC) the Constitutional Court recognised that the right to family life extended beyond the traditional / nuclear relationship between a man and a woman that are legally married.

²⁵⁵ A “purely religious marriage” includes Muslim marriages by Islamic law as well as Hindu marriages.

²⁵⁶ A life partnership is defined as “a same-sex or heterosexual relationship which is analogous to or has many of the characteristics of a marriage.” Heaton *South African Family Law* 243.

3.2 Legally Recognised Marriages in South Africa

From the previous chapter it is apparent that Christian beliefs influenced the way marriage was viewed and later codified under the Marriage Act. Same-sex intimacy was moralistically disapproved of and family life beyond the limitations of a traditional state-sanctioned marriage was not afforded full legal recognition and protection.²⁵⁷ Consequently parties to a monogamous heterosexual civil marriage enjoyed a superior position, whilst the lesser viewpoints of non-traditional family forms were overlooked.²⁵⁸

With the adoption of the South African Constitution, and in particular the Bill of Rights, the democratic values of human dignity, equality and freedom were affirmed on all South Africans.²⁵⁹ The Constitution furthermore bestowed the right to freedom of conscience, religion, thought, belief and opinion to all South Africans.²⁶⁰ In keeping with the right of freedom of association, the Constitution provides that marriages concluded under any tradition, or a system of religious, personal or family law; or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion should be legally recognised, provided such marriage is consistent with the provisions of the Constitution.²⁶¹ In giving effect to the aforesaid provision as well as addressing the needs of a diverse society the legislator extended the legal recognition of marriage to monogamous and *de facto* polygamous customary marriages by promulgating the Recognition of Customary Marriages Act 120 of 1998 on the 1 November 2000. The aforesaid Act nevertheless only regulates the solemnisation of customary marriages based on customs and traditions.²⁶² Despite the Recognition of Customary Marriages Act, the Marriage Act still only regulates the

²⁵⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 11. For an example of the legal and moral climate towards homosexuality see *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) in which a lesbian mother was granted restricted contact rights in respect of her children as the court ruled that her children's best interest could not be served by allowing them to be exposed to her lesbian relationship.

²⁵⁸ In *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at para 160 Sachs J emphasises the pre-democratic South African law's blatant disregard of minority groups.

²⁵⁹ Section 7(1) of the Constitution.

²⁶⁰ Section 15(1) of the Constitution.

²⁶¹ Section 15(3) of the Constitution.

²⁶² Section 1 of the Recognition of Customary Marriages Act.

solemnisation of heterosexual monogamous marriages and prohibits polygamous marriages. The Marriage Act is therefore applied alongside the Recognition of Customary Marriages Act.

On the 30th day of November 2006, South Africa became the first country in Africa legally recognising same-sex marriages by promulgating the Civil Union Act 17 of 2006.²⁶³ The Civil Union Act 17 of 2006 regulates the solemnisation of civil unions or civil partnerships between monogamous heterosexual or same-sex couples.²⁶⁴ It is noteworthy that despite certain provisions of the Marriage Act being held unconstitutional in the *Fourie* case, the Marriage Act (in its original form) still only regulates the solemnisation of heterosexual marriages. Despite the aforesaid, the legal consequences of a civil marriage and that of a civil union are similar.²⁶⁵ Civil unions and civil marriages are consequently regulated by two separate but dual Acts which overlap with respect to consequences.

The next part of the chapter will comprise a comparison between the legislative requirements of the Marriage Act, Recognition of Customary Marriages Act and the Civil Union Act. The chapter will furthermore attempt to provide the rationale behind such requirements, with the emphasis being placed on the capacity of a person to enter into such institutions. This evaluation will attempt to establish any contradictions between the aforementioned Acts and assess the possible justification thereof.

3.2.1 Civil Marriages

3.2.1.1 The Marriage Act 25 of 1961

²⁶³ <http://www.pewforum.org/2017/06/30/gay-marriage-around-the-world-2013/> (accessed 10 June 2017).

²⁶⁴ Section 1 of the Civil Union Act.

²⁶⁵ Section 13 (1) of the Civil Union Act provided that “The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.”

In common law a civil marriage is defined as the legally recognised life-long voluntary union between one man and one woman to the exclusion of all other persons.²⁶⁶ In terms of the common law definition of marriage as well as the marriage formula,²⁶⁷ the Act is therefore restricted to regulating only monogamous heterosexual marriages.

3.2.1.1.1 The Requirements for the Solemnisation of a Civil Marriage

The basis of a civil marriage is that the marriage must be a voluntary agreement between two parties.²⁶⁸ Accordingly consensus is paramount in entering into a civil marriage.²⁶⁹ In addition to the parties being able to consent to marriage, the intention of the parties at the time of the marriage must be to marry each other.²⁷⁰ This requirement is evident from the marriage formula that provides that each party must expressly accept the other party as his or her marriage partner.²⁷¹ It is furthermore vital that the marriage must be lawful. In this regard marriages in terms of the Marriage Act are restricted to heterosexual monogamous couples that are above the age of puberty and are not related to each other within the prohibited degrees of affinity.²⁷² The final requirement for civil marriages is that the marriage officer must comply with certain formalities as prescribed in terms of the Marriage Act.²⁷³

3.2.1.1.2 An Analysis of the Requirements

3.2.1.1.2.1 Capacity to Act

²⁶⁶ *Seedat's Executor v The Master (Natal)* 1917 AD 302.

²⁶⁷ Section 30 of the Marriage Act.

²⁶⁸ *Pienaar v Pienaar's Curator* 1930 OPD 171. *Fourie* case para 23.

²⁶⁹ Heaton *South African Family Law* 15.

²⁷⁰ For a discussion on the requirement that the parties to a civil marriage must have intention to marry each other generally, see Heaton *South African Family Law* 25-27.

²⁷¹ Section 30(1) of the Marriage Act.

²⁷² For a discussion on the requirement that an intended marriage must be lawful generally, see Heaton *South African Family Law* 27-31.

²⁷³ For a discussion on the prescribed formalities of a civil marriage generally, see Heaton *South African Family Law* 31-34.

All natural people are legal subjects and have legal capacity.²⁷⁴ Capacity to act refers to the ability of a person to conclude a valid juristic act.²⁷⁵ Infants (a person below the age of seven) and a mentally ill person that lacks the mental ability to understand the nature and consequences of their actions are unable to make a rational judgement and are consequently prohibited from entering into a civil marriage.²⁷⁶ The restriction of their capacity to act is therefore to protect them from their potential lack of judgement.²⁷⁷

Minors (people between the ages of seven and eighteen) have limited capacity to act.²⁷⁸ The same rationale that applies to infants applies to minors and accordingly the limited capacity of a minor to act is to protect the minor from his/her impaired judgement. In terms of section 24(1) of the Marriage Act, a minor cannot enter into a civil marriage without obtaining written consent.²⁷⁹ Despite section 24 (1) of the Marriage Act referring to consent being furnished in writing, Heaton and other authors are of the view that a marriage of a minor should not be invalid purely on the basis that the consent was obtained orally.²⁸⁰ The importance of a minor obtaining consent to enter into a civil marriage is furthermore evident from section 27 of the Marriage Act that places an onus on a marriage officer to refuse the solemnisation of a marriage if he or she suspects that the prospective bride or groom is a minor and has not obtained the required consent.²⁸¹ The requirement of consent in terms of a minor entering into a civil marriage is therefore rigorously regulated in terms of the Marriage Act.

²⁷⁴ Heaton *Law of Persons* 4-5.

²⁷⁵ Heaton *Law of Persons* 36.

²⁷⁶ Heaton *South African Family Law* 16.

²⁷⁷ Heaton *Law of Persons* 36.

²⁷⁸ Heaton *South African Family Law* 17.

²⁷⁹ Section 24(1) of the Marriage Act provides that “[n]o marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing”. It is noteworthy that in terms of section 24(2) of the Marriage Act a divorced or widowed minor who was previously married in terms of a civil or customary marriage attained majority upon entering into the first marriage and therefore does not need to obtain consent in respect of the second civil or customary marriage.

²⁸⁰ For a discussion on whether a marriage is invalid based on that the consent was given orally and not in writing generally, see Heaton *South African Family Law* 18; Sinclair assisted by Heaton *The Law of Marriage* 370.

²⁸¹ Section 35 of the Marriage Act furthermore sanctions such conduct by providing that “[a]ny marriage officer who knowingly solemnizes a marriage in contravention of the provisions of this Act shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or, in default of payment, to imprisonment for a period not exceeding six months”.

As far as the consent required for a civil marriage is concerned, the Marriage Act provides that a minor must obtain the required consent to enter into a marriage from his or her parents.²⁸² In the event of a legal guardian/s being appointed, the consent of the legal guardian/s is required.²⁸³ A legal guardian may however not consent to the marriage of a minor where he/she is a party to the marriage and consequently a minor would have to obtain the consent of the High Court if he or she wishes to marry his/her legal guardian. It is noteworthy that this preclusion is founded on the basis that the minor needs protection from possible abuse and that the High Court should accordingly only grant such consent if it is found that the refusal of consent is contrary to the minor's interest.²⁸⁴ The benchmark applied by the court is therefore the best interest of the child.

The Marriage Act also stipulates that all boy minors under the age of eighteen and girl minors under the age of fifteen must, in addition to obtaining parental consent and complying with the provisions of the Marriage Act, also obtain the written consent of the Minister of Home Affairs.²⁸⁵ It is noteworthy that in addition to the aforesaid, section

²⁸² In terms of the Children's Act 38 of 2005, section 18 (3) provides that a child born from married parents requires the consent of both parents, whilst a child born from unmarried parents where the biological father does not have guardianship over such child only requires the consent of the mother. Section 18(4) furthermore provides that in cases where sole guardianship has been awarded to a single parent only that parent's consent is required. In the case of the mother of a minor being a minor herself, the consent of her guardian must be obtained. Section 18(5) of the Children's Act furthermore provides that the consent of all persons having guardianship over the minor wishing to enter into a marriage must consent to same.

²⁸³ Section 27 (1)(a) of the Children's Act provides that "[a] parent who is the sole guardian of a child may appoint someone fit and proper as guardian of the child in the event of the parent's death". Section 27(2) furthermore provides that an appointment of a legal guardian must be contained in a will made by the parent. A legal guardian may consent to a minor's marriage over which he or she has been appointed guardian provided the marriage is not between him / her and the minor.

²⁸⁴ Heaton *South African Family Law* 20-21. It should be noted that the authority of the High Court as upper guardian of minors originated in Germanic law and was later received in Holland (where the Court of Holland assumed the function) and the rest of the Netherlands in the middle ages. The authority of the High Court was accordingly received in South Africa as part of the Roman-Dutch law.

²⁸⁵ In terms of section 26 (1) of the Marriages Act "[n]o boy under the age of eighteen years and no girl under the age of fifteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable...". Although section 26 is not clear as to whether the Minister may consent to a marriage where a person is below the age of puberty Heaton is of the viewpoint that the Minister's authority only applies to girl minors between the ages of twelve and fifteen and boy minors between the age of fourteen and eighteen. For a discussion on the authority of the minister to amend the common law age of puberty generally, see Heaton *South African Family Law* 19-20; Sinclair assisted by Heaton *The Law of Marriage* 367.

26(3) of the Marriage Act provides that if a minor male or girl under the age of fifteen entered into a civil marriage without the consent of the Minister, such marriage is null and void but may be ratified by the Minister if deemed desirable and in the interest of the parties. The test applied by the Minister in deciding whether or not to grant his/her consent is accordingly based on whether the marriage is desirable and in the interests of the child.²⁸⁶

Section 25(1) of the Marriage Act moreover provides that in the event of a minor not being able to obtain the consent of his/her parents or legal guardian due to any good reason *inter alia* as a result of their absence, the consent of the presiding officer of the Children's Court may be obtained.²⁸⁷ The presiding officer is again obliged to consider the best interests of the child when deciding whether or not to grant such consent and whether or not the minor should enter into an antenuptial contract to protect the minor's interest.²⁸⁸

In the event of consent being withheld by the parents, legal guardian or presiding officer of the Children's Court, the Marriage Act makes the provision that a minor may approach the High Court (as upper guardian of all minors) for permission to enter into a marriage.²⁸⁹ Section 25(4) of the Marriage Act specifies that the test that must be applied by the High Court as to whether or not the refusal to consent to the marriage is justified is whether the intended marriage is contrary to the minor's interests.²⁹⁰ Ultimately the court needs to consider:

²⁸⁶ Section 26(2) of the Marriage Act.

²⁸⁷ Section 25 (1) of the Marriages Act provides that "[i]f a commissioner of child welfare is after proper inquiry satisfied that a minor who is resident *in* the district or area in respect of which he holds office has no parent or guardian or is for any good reason unable to obtain the consent of his parents or guardian to enter into a marriage such commissioner of child welfare may in his discretion grant written consent to such a minor to marry a specified person, but such a commissioner of child welfare shall not grant his consent if the minor is such a pupil or child as is mentioned in paragraph (a) of sub-section (l) of section *fifty-nine* of the said Act or if one or other parent of the minor whose consent is required by law or his guardian refuses to grant consent to the marriage".

²⁸⁸ Section 25 (2) of the Marriages Act specifically provides that "[a] commissioner of child welfare shall, before granting his consent to a marriage under sub-section (l), enquire whether it is in the interests of the minor in question that the parties to the proposed marriage should enter into an antenuptial contract, and if he is satisfied that such is the case he shall not grant his consent to the proposed marriage before such contract has been entered into, and shall assist the said minor in the execution of the said contract".

²⁸⁹ Section 25(4) of the Marriage Act.

²⁹⁰ The High Court would only interfere with parental authority if adequate reason is given and that such refusal is contrary to the best interest of the child. See *Allcock v Allcock* 1969 1 SA 427 (N) at 429E-430B; *Kruger v Fourie* 1969 4 SA 469 (O) at 473A-B. See also *B v B* 1983 1 SA 496 (N) at 501 where it was held that the court should consider all circumstances relating to the case.

*“having weighed up the reasons for the parental refusal, whether by its own objective standards there are sufficient reasons to justify the parental refusal and in doing so it mustbe of paramount importance whether it will be in the best interests of the minor to allow the minor to marry.”*²⁹¹

In the absence of consent from the parents, legal guardian, or presiding officer of the Children’s Court, the marriage of a minor is deemed voidable and the marriage may be set aside by way of a court application brought by either the minor’s parents or legal guardian or the minor self.²⁹² It is striking that section 24 A(2) of the Marriage Act specifically provides that a court may not set aside a marriage of a minor that did not obtain the required consent unless it is satisfied that it is in the minor’s best interests. In the event of the court deeming it fit to dissolve the marriage because of lack of consent, the division of the matrimonial property of the spouses will be determined by the court as it deem just. Section 24 (1) of the Act is mute on what factors the court will take into consideration when considering what it deems just. Sinclair however submits that factors such as the age of the parties, their financial circumstances, their wishes and any financial abuse by the major spouse should be considered in establishing the interests of the child.²⁹³ Section 24(2) of the Marriage Act regulates the patrimonial consequences of a voidable marriage of a minor that is not set aside. In this regard a minor may either be regarded as being married in community of property (if the minor did not enter into an antenuptial contract) or being married out of community of property with the inclusion of the accrual system (if the minor entered into an antenuptial contract including the accrual system).²⁹⁴ The patrimonial consequences in terms of section 24(2) of the Act are based on what marriage regime would best serve the interests of the minor.

From the above-mentioned analysis there is one common principle that is applied, namely that if a minor did not obtain the required consent or if the required consent was refused by it by the parents, legal guardians or the Minister of the Children’s Court, the High Court has to base its decision on what would be in the interest of the child.

²⁹¹ *B v B* 1983 (1) SA 496 (N) 501H.

²⁹² Section 24A(1) of the Marriage Act.

²⁹³ Sinclair assisted by Heaton *The Law of Marriage* 374.

²⁹⁴ For a discussion on the validity of an antenuptial contract entered into by a minor without the required consent generally, see Heaton *South African Family Law* 23-25.

This principle is therefore fundamental in deciding the interest of a minor wishing to enter into a civil marriage and as such the personal circumstances of the minor needs to be considered in deriving such a decision. The nature and significance of the best interests of the child principle will be discussed in the following chapter.

3.2.1.1.2.2 Consensus

Consensus refers to the meeting of minds.²⁹⁵ As far back as the early Roman era the parties to a marriage had to have *matrimonium ratum* (consent or agreement) and the intention to conclude a marriage by an act of mutual consent.²⁹⁶ A consensual undertaking was similarly viewed as one of three components that constituted a marriage in terms of the Catholic sacramental model. This viewpoint was continued in the Calvinistic model of marriage and later adopted in terms of the *Political Ordinance of the State of Holland 1580* and later the Marriage Act. To ensure that the parties to the marriage entered into the marriage freely and voluntarily, section 30(1) of the Marriage Act provides that during the marriage ceremony the parties have to expressly affirm their intention to freely enter into the marriage.²⁹⁷ This provision consequently endeavours to stay a marriage from taking place where a party to the marriage was being misrepresented or where the marriage was going to be entered into whilst either of the parties to the marriage were under duress or being unduly influenced.²⁹⁸

²⁹⁵ Heaton *South African Family Law* 25.

²⁹⁶ A distinction can be drawn between a *sine manu* and a *concubinatus*. In terms of the latter the parties are not legally recognised as they do not have the intention to marry each other. In the case of a *sine manu*, although the wife does not fall under the *potestas* of her husband she has the intention to marry him and therefore children born from the *sine manu* are regarded as children of her husband.

²⁹⁷ Section 30(1) of the Marriage Act states that "[i]n solemnizing any marriage the marriage officer, if he is a minister of religion or a person holding a responsible position in a religious denomination or organization, may follow the rites usually observed by his religious denomination or organization, but if he is any other marriage officer he shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative: "Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?", and thereupon the parties shall give each other the right hand and the said marriage officer shall declare the marriage solemnized in the following words: "I declare that A.B. and C.D. here present have been lawfully married".

²⁹⁸ For a discussion on factors that may invalidate the requirement of consensus generally, see Heaton *Family Law* 25-27.

In addition to marriages having to be entered into freely and voluntarily, marriages also had to be concluded in such a manner that the public could object to the solemnisation of the intended marriage. The notion of transparency of the solemnisation of the marriage was adopted during the Middle Ages with the introduction of the banns requirement²⁹⁹ that later on became mandatory. Although the banns requirement was abolished in 1970,³⁰⁰ the intention was, and still is, to ensure that a marriage is solemnised within the public sphere to avoid clandestine marriages.³⁰¹ Marriages today are still viewed as a public institution. For this very reason, the Marriage Act requires that a marriage must be solemnised in the presence of two witnesses.³⁰²

3.2.1.1.2.3 Lawfulness

In terms of the common law a civil marriage is restricted to heterosexual couples that enter into a monogamous union.³⁰³ During the Early Roman era marriage was viewed as a contractual act to safeguard the procreation of the family.³⁰⁴ The Christianisation of the Roman Empire furthermore influenced the way marriage was viewed to the point that marriage was regarded as a sacrament.³⁰⁵ Although the sacrament of marriage was later questioned, the theological models of marriage still regarded marriage as a vessel to fulfil a social need and a divine blessing.³⁰⁶ As a result of the deeply rooted Christian influences and the protection of “the family unit”, same-sex intimacy was

²⁹⁹ Article 3 of the Political Ordinance of 1580 required that prior to a marriage taking place, the intended marriage had to be publically announced whereafter the marriage could be solemnised by a marriage officer in the presence of witnesses. The banns requirement therefore provided family members of the prospective spouses to object to the intended marriage should they not approve of the marriage. For a discussion on the banns requirement generally, see Pollock and Maitland *The history of English law before the time of Edward I* 370-371 as well as Wessels *History of the Roman-Dutch law* 438.

³⁰⁰ Section 6 of the *Marriage Amendment Act* 51 of 1970 repealed sections 13 to 21 of the 1961 Act.

³⁰¹ Hahlo and Kahn *The South African legal system and its background* 411; De Wet 1958 *THRHR* 162 and Botha 1914 *SALJ* 251.

³⁰² Section 23(3) and (4) of the Marriage Act provides that “[i]f any such objection is brought to the notice of the marriage officer who is to solemnize such marriage he shall inquire into the grounds of the objection and if he is satisfied that there is no lawful impediment to the proposed marriage, he may solemnize the marriage in accordance with the provisions of this Act. If he is not so satisfied he shall refuse to solemnize the marriage”.

³⁰³ *Seedat's Executor v The Master (Natal)* 1917 AD 302.

³⁰⁴ Van Zyl *History and Principles of Roman Private Law* 9.

³⁰⁵ *Fourie* case para 70; Witte *From sacrament to contract* 23 - 26.

³⁰⁶ *Fourie* case para 23. See also Witte *From sacrament to contract* 2-5; Hahlo *The South African law of husband and wife* 7.

viewed as “contrary to the order of nature.”³⁰⁷ This viewpoint was adopted by the Roman-Dutch law and was instrumental in South Africa criminalising male-to-male sodomy and other unnatural sexual offences.³⁰⁸ Although the criminalisation of same-sex intimacy has been abolished and same-sex marriage has been legalised since 2006, the majority of South African citizens still disapprove of homosexuality at the time when the *Fourie* case was heard.³⁰⁹ This viewpoint still seems to be echoed with the promulgation of a separate Act to provide for same-sex marriages. It is for this reason that the Marriage Act, despite the Constitutional Court declaring the common law definition of marriage and section 30(1) of the Marriage Act unconstitutional, still does not provide for same-sex marriages.³¹⁰

From the Early Roman era marriage was regarded as a monogamous institution.³¹¹ The monogamous nature of marriage was also embedded in Christian beliefs.³¹² The requirements for the formation of marriage under the Marriage Act remains firmly rooted in the Roman-Dutch law *Political Ordinance* of 1580 that had evolved from the Catholic model.³¹³ Although certain spousal benefits have been extended to spouses of polygamous marriages, the mere nature of a polygamous marriage is moralistically disapproved of and viewed as *contra bonos mores*.³¹⁴ Except for the Recognition of Customary Marriages Act allowing for *de facto* polygynous marriages in terms of indigenous customs and traditions, polygamous marriages are prohibited in terms of South African law.³¹⁵

In addition to keeping with the belief that marriage should be restricted to safeguard the procreation of the family unit, people who are within the prohibited degrees of

³⁰⁷ Church 2003 *Fundamina* 49.

³⁰⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 11. For a discussion on the disapproval of same-sex intimacy and the criminalisation thereof generally, see Church 2003 *Fundamina* 44; Reid and Witte 1999 *Emory Law Journal* 686.

³⁰⁹ *Fourie* case paras 49-50; 121.

³¹⁰ *Fourie* case para 78.

³¹¹ Van Zyl *History and Principles of Roman Private Law* 100-101; Spiller *A Manual on Roman law* 63.

³¹² Witte *From Sacrament to Contract* 31.

³¹³ *Hahlo and Kahn The South African legal system and its background* 516; *De Wet* 1958 THRHR 166.

³¹⁴ For a discussion on the extension of certain spousal benefits to polygamous spouses generally, see the Heaton *South African Family Law* 232-235.

³¹⁵ *Seedat's Executors v The Master (Natal)* 1917 AD 302.

relationship are prohibited from entering into a marriage.³¹⁶ In this regard the prohibition is justified on the basis of religion, biology, as well as socio-economical and ethical-moralistic objections.³¹⁷

3.2.1.1.2.4 Formalities

All civil marriages must be solemnised by a marriage officer that may either be a minister of religion or an ex officio marriage officer.³¹⁸ It is noteworthy that a minister may refuse to solemnise a marriage if such marriage is contrary to his/her tenants and disciplines of his/her religious denomination.³¹⁹ The Act furthermore requires that the parties must be present during the conclusion of the marriage³²⁰ and that the marriage must be conducted in accordance with section 29 of the Marriage Act as far as the place and time of the marriage is concerned. A blessing of the marriage is permitted but is not a requirement for the solemnisation of the marriage.³²¹ In terms of section 29A of the Marriage Act the marriage must be registered in the marriage register whereinafter the marriage must be entered into the registry of the Department of Home Affairs.

The aforementioned requirements are adopted from the Roman-Dutch law *Political Ordinance* of 1580 that was later encompassed under the Marriage Act.³²² The prescribed formalities are accordingly inherited principles from the Roman-Dutch law.

³¹⁶ For a discussion on persons within prohibited degrees of relationships being prohibited from entering into a marriage generally, see Heaton *South African Family Law* 27-31.

³¹⁷ Labuschagne *TSAR* 416.

³¹⁸ Section 2 of the Marriage Act provides that “(1) [e]very magistrate, every special justice of the peace and every native commissioner shall by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office. (2) The Minister and any officer in the public service authorized thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Union to be, by virtue of his office and so long as he holds such office a marriage officer, either generally or for any specified race or class of persons or country or area”.

³¹⁹ Section 31 of the Marriage Act states that “[n]othing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organization to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization”. It is noteworthy that section 2 of the Marriage Act does not make provision for ex officio marriage officers to execute such discretion.

³²⁰ Section 29(4) of the Marriage Act.

³²¹ Sections 30(2), 33 and 34 of the Marriage Act.

³²² *Fourie case* para 71; Hahlo *The South African law of husband and wife* 12; Lee *An introduction to Roman-Dutch law* 57.

3.2.1.2 The Civil Union Act 17 of 2006

The Civil Union Act is a creature of statute. As such section 1 of the Civil Union Act defines a civil union as “the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, whilst it lasts, of all others”.³²³ The Civil Union Act accordingly regulates monogamous relationships³²⁴ of either same-sex or heterosexual couples.³²⁵

3.2.1.2.1 Requirements for the Solemnisation of a Civil Union

Notwithstanding the legal requirements for a civil union being almost alike to those of a civil marriage,³²⁶ certain prescribed formalities regulating the solemnisation and registration of a civil union vary from those concerning a civil marriage. These differences will be discussed briefly hereunder.

3.2.1.2.1.1 Capacity to Act

A civil union, as in the case of a civil marriage, is a contract hence both parties to the union must have the capacity to enter into the union.³²⁷ The requirements discussed

³²³ Section 1 of the Civil Union Act.

³²⁴ Section 8(1) and 8(2) of the Civil Union Act provides that a party to a civil union “may not conclude a marriage under the Marriage Act or the Recognition of Customary Marriages Act 120 of 1998”. In addition section 8(3) of the Civil Union Act stipulates that “[a] person who is married under the Marriage Act or the Customary Marriages Act may not register a civil union”. For a general discussion of traditional values in terms of customary law being omitted from the Civil Union Act, see Ntlama 2010 *PELJ* 194-197.

³²⁵ By applying the purposive approach and by interpreting the Act in accordance with section 39(2) of the Constitution, it can be concluded from the preamble to the Act, as well as sections 6 and 8(6) of the Act, that the Civil Union Act applies to heterosexual and same-sex couples. Generally on interpretative difficulties in respect of the Civil Union Act, see Van Schalkwyk 2007 *De Jure* 168 and 172-173; Smith and Robinson 2008 *IJLPF* 357-368 and 379-380; 2008 *BYUJPL* 426-430; Bakker 2009 *JJS* 8-9.

³²⁶ The parties to the civil union must have the necessary capacity to act, have the intention to enter into a civil union with one another and must, in terms of section 8(6) of the Civil Union Act, not be prohibited by law from entering into a civil union: Labuschagne 1989 *TSAR* 171-172. For a general discussion of the legal requirements for a civil union, see Heaton *South African Family Law* 194-199.

³²⁷ Heaton *South African Family Law* 194.

in para 3.2.1.1.2 above are therefore also applicable to civil unions except for the position of minors.

The Civil Union Act prohibits minors (whether same-sex or heterosexual) from entering into a civil union.³²⁸ In this regard a divorced or widowed minor who became a major by marriage (civil or customary marriages) will still be precluded from entering into a civil union.³²⁹ This prohibition differs from the Marriage Act in that it provides that a minor may enter into a civil marriage provided he/she obtains the required consent. Accordingly, the law permits a minor to enter into civil marriage whilst the Civil Union Act categorically prohibits the same. A civil union entered into by minors, even if consent was obtained, will consequently be regarded as null and void.

3.2.1.2.1.2 Consensus

The principles relating to consensus in respect of the Marriage Act are the same as those advanced in terms of the Civil Union Act.³³⁰ Accordingly they are not repeated here.

3.2.1.2.1.3 Lawfulness

A civil union constitutes a monogamous union and accordingly polygamous marriages are, as in the case of the Marriage Act, prohibited.³³¹ As in the case of the Marriage Act a marriage officer may not proceed with the solemnisation and registration of a

³²⁸ Section 1 of the Civil Union Act clearly prescribes that the partners to a civil union must be 18 years of age or older. It can therefore be inferred that even if a minor was previously married in terms of the Marriage Act or the Recognition of Customary Marriages Act, and is now single, he or she still may not enter into a civil union. See also para 3.2.1.

³²⁹ Section 1 of the Civil Union Act.

³³⁰ Para 3.1.3.2.

³³¹ Section 8 of the Civil Union Act provides that “(1)[a] person may only be a spouse or partner in one marriage or civil partnership. (2) A person in a civil union may not conclude a marriage under the Marriage Act or the Customary Marriages Act. (3) A person who is married under the Marriage Act or the Customary Marriages Act may not register a civil union. (4) A prospective civil union partner who has previously been married under the Marriage Act or Customary Marriages Act or registered as a spouse in a marriage or a partner in a civil partnership under this Act, must present a certified copy of the divorce order or death certificate of the former spouse or partner, as the case may be, to the marriage officer as proof that the previous marriage or civil union has been terminated”.

civil union unless certain that the intended parties are single.³³² In contrast to the Marriage Act, the Civil Union Act does provide for the solemnisation of same-sex civil unions.³³³

3.2.1.2.1.4 Formalities

In terms of section 4(2) of the Civil Union Act “a marriage officer has all the powers, responsibilities and duties as conferred upon him or her under the Marriage Act, to solemnise a civil union”. Accordingly the solemnisation and registration of a civil union is mostly identical to that of a civil marriage except for the differences discussed hereunder.

As in the case of the Marriage Act, the Civil Union Act prescribes that a civil union may only be solemnised by a marriage officer³³⁴ and that the solemnisation must occur in accordance with the provisions of the Act.³³⁵ A marriage officer may either be a religious marriage officer or an *ex officio* marriage officer.³³⁶ A key difference is however that the Civil Union Act requires a religious denomination or organisation to apply in writing to the Minister of Home Affairs³³⁷ to be designated for the purposes of solemnising civil unions.³³⁸ Only after the religious denomination or organisation has been designated as a religious institution for purposes of solemnising marriages in terms of the Civil Union Act,³³⁹ may a minister of religion or any person holding a responsible position, for as long as he or she occupies such a position in the religious denomination or organisation,³⁴⁰ apply to be a designated

³³² Section 8(5) of the Civil Union Act.

³³³ Section 1 of the Civil Union Act.

³³⁴ Section 4(1) of the Civil Union Act.

³³⁵ Section 4(2) of the Civil Union Act provides that “[s]ubject to the provisions of the Act, the marriage officer has all the powers, responsibilities and duties conferred upon him or her under the Marriage Act, to solemnise a civil union”.

³³⁶ Section 1 of the Civil Union Act defines a “marriage officer” as a marriage officer *ex officio* designated in terms of section 2 of Civil Union Act and a minister of religion designated in terms of section 5 of the Civil Union Act; compare sections 2 and 3 of the Marriage Act.

³³⁷ In terms of section 1 of the Civil Union Act, “Minister” refers to “the Cabinet member responsible for the administration of Home Affairs”.

³³⁸ Section 5(2) of the Civil Union Act provides the Minister of Home Affairs with the authority to designate a religious denomination or organisation as a religious institution for purposes of solemnising a civil union. For a discussion of whether section 5(1), (2), (4) and (6) only provides for marriages and not also for civil partnerships: see Heaton *South African Family Law* 196-197.

³³⁹ Section 5(1) of the Civil Union Act.

³⁴⁰ Section 5(4) of the Civil Union Act.

marriage officer.³⁴¹ In contrast, the Marriage Act only requires a single application.³⁴² Accordingly, it is more difficult for a religious marriage officer to be appointed to conduct a civil union than a civil marriage. In terms of the Civil Union Act an *ex officio* marriage officer so designated by virtue of section 2 of the Marriage Act is also a marriage officer in terms of the Civil Union Act.³⁴³

Section 5 of the Civil Union Act does not provide a religious marriage officer with the right to refuse to solemnise a civil union. In contrast section 31 of the Marriage Act does provide that a religious marriage officer may refuse to solemnise a civil marriage which does not conform to the rites, tenets, or doctrines of his or her religious beliefs.

Furthermore, in terms of the Civil Union Act, *ex officio* marriage officers may refuse to solemnise same-sex civil unions on the grounds of their conscience, religion, and beliefs³⁴⁴ whilst *ex officio* marriage officers are obliged to solemnise civil marriages in terms of the Marriage Act.³⁴⁵ It is striking that this provision only relates to same-sex couples. The different provisions applicable to *ex officio* marriage officers, in terms of the Marriage Act and in terms of the Civil Union Act, constitute an anomaly which can only be rationalised as pandering to the perceived moralistic norms and prejudices of society.

Section 7 of the Civil Union Act requires that each of the parties to the civil union must produce to the marriage officer his or her identity document issued under the provisions of the Identification Act³⁴⁶ or furnish to the marriage officer the prescribed affidavit. In addition the parties to the intended civil union must inform the marriage officer prior to the ceremony whether they wish to refer to their union as a marriage or

³⁴¹ *Ibid.*

³⁴² Bonthuys 2008 SALJ 475.

³⁴³ Section 1 of the Civil Union Act; compare section 2(1) and (2) of the Marriage Act.

³⁴⁴ Section 6 of the Civil Union Act provides that “[a] marriage officer, other than a marriage officer referred to in section 5 may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union”.

³⁴⁵ Section 2 of the Marriage Act.

³⁴⁶ Identification Act 68 of 1997.

civil partnership.³⁴⁷ This requirement is obviously not applicable to civil marriages. In contrast to a civil marriage, the parties to a civil union must also declare in writing their willingness to enter into a civil union and must sign the required document in the presence of two witnesses.³⁴⁸ Only once the parties have complied with the formalities preceding the union ceremony may the marriage officer proceed with the solemnisation of the union.³⁴⁹

It is noteworthy that the marriage formula in terms of the Marriage Act is gender specific whilst the Civil Union Act is not gender-specific.³⁵⁰ Different registers are furthermore used to record civil unions and civil marriages.³⁵¹

The legal consequences of a marriage contemplated in the Marriage Act also apply to a civil union.³⁵² In addition, but with the exception of the Marriage Act and the Recognition of Customary Marriages Act 120 of 1998,³⁵³ any reference to husband, wife, or spouse includes a civil union partner.³⁵⁴

3.2.1.3 Dual but Separate Acts

Consequently two similar Acts regulate monogamous marriages in South Africa.³⁵⁵ There are however two distinct differences with respect to requirements between the dual Acts, the first being the provision restricting the marriageable age of civil union

³⁴⁷ Section 11(1) of the Civil Union Act. For a general discussion of the constitutionality of the dualistic nature of civil unions, see Labuschagne 1989 *TSAR* 168; De Vos 2007 *SAJHR* 462; Bakker 2009 *JJS* 7. For a discussion of whether the term “civil union” has been employed merely to differentiate between marriage and civil partnership and is therefore purely semantic and not meaningful, see Smith and Robinson 2008 *BYUJPL* 426.

³⁴⁸ Section 12(1) of the Civil Union Act.

³⁴⁹ Section 11 (1) of the Civil Union Act.

³⁵⁰ Section 11(2) of the Civil Union Act; compare section 30 of the Marriage Act.

³⁵¹ Section 12 of the Civil Union Act; compare section 29A of the Marriage Act.

³⁵² Section 13(1) of the Civil Union Act. Section 13(2) of the Civil Union Act furthermore provides for the application of the necessary changes to contextualise the references to marriage in any other law including the common law so that they can also operate in respect of a civil union. For a general discussion of the rationale of having the option to choose between a marriage and a civil partnership in terms of the Civil Union Act see De Vos 2008 *ULR* 170; Bakker 2009 *JJS* 7.

³⁵³ Hereinafter referred to as the “Recognition of Customary Marriages Act”.

³⁵⁴ Section 13(2) of the Civil Union Act. Section 1 of the Civil Union Act defines a civil union partner as “a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act”.

³⁵⁵ The Marriage Act and the Civil Union Act.

partners to eighteen years or older, and the second being the provision affording *ex officio* marriage officers the discretion to object to the solemnisation of a civil union on the basis of his or her religion, conscience, or beliefs. The latter difference only applies to same-sex couples.

The application of dual Acts in addition affords heterosexual couples a choice to either enter into a civil marriage in terms of the Marriage Act or to enter into a civil union in terms of the Civil Union Act.³⁵⁶ Same-sex couples can however only get married in terms of the latter Act. The aforementioned position may be regarded as inequality as the differentiation is based on a couple's sexual orientation. It can also be concluded that by enacting a new piece of legislation, distinct from the Marriage Act, same-sex couples are precluded from the institution of marriage.³⁵⁷ As a result of the aforesaid, as well as the fact that the Marriage Act has been retained in its original form, it may be inferred that a civil marriage is regarded as "superior"³⁵⁸ to that of a civil union.

Accordingly a threefold hierarchy within the institution of marriage³⁵⁹ has been created. The perceived "superior" civil marriage between heterosexual couples in terms of the Marriage Act, the civil union referred to as a marriage between heterosexual or same-sex couples in terms of the Civil Union Act, and lastly the civil union referred to as a civil partnership between heterosexual or same-sex couples in terms of the Civil Union Act.³⁶⁰ It can be argued that until such time as a single Act that provides for a gender-neutral institution of marriage is promulgated, the hierarchy within the institution of marriage will continue.

3.2.2 The Recognition of Customary Marriages Act 120 of 1998

³⁵⁶ De Ru 2010 *THRHR* 565.

³⁵⁷ De Vos and Barnard 2007 *SALJ* 821; De Ru 2010 *THRHR* 565.

³⁵⁸ For a general discussion of the second-class status of same-sex couples who enter into a civil union, see Bilchitz and Judge 2007 *SAJHR* 478-486; De Vos and Barnard 2007 *SALJ* 824-826; Barnard 2007 *SAJHR* 522-525; De Ru 2010 *THRHR* 564-565.

³⁵⁹ For a general discussion of the application of the dual Acts resulting in a threefold hierarchy within the institution of marriage, see Schäfer 2006 *SALJ* 628-634; De Vos and Barnard 2007 *SALJ* 821-822; Bakker 2009 *JJS* 15-18; De Ru 2010 *THRHR* 566-567.

³⁶⁰ Bakker 2009 *JJS* 17. Bakker suggest that customary marriages are ranked in-between civil marriages in terms of the Marriage Act and civil unions in terms of the Civil Union Act.

The regulation of customary marriages has evolved from traditional customary law, to the Natal Code of Zulu Law of 1891³⁶¹ to the Recognition of Customary Marriages Act 120 of 1998. The Act was enacted in terms of section 15 (3)³⁶² of the Constitution of South Africa. Section 1 of the Act customary marriage refers to a customary marriage “as a marriage concluded in accordance with customary law”. Customary law is furthermore defined as “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”. A customary marriage is accordingly concluded in terms of customary law which constitute the customs, usages and traditions observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples. The Act therefore only applies to the indigenous South African people and does not apply to customary marriages concluded in terms of Hindu and Muslim rites. Accordingly the Act provides for monogamous as well as *de facto* polygynous customary marriages.³⁶³

3.2.2.1 Requirements for the Formation of a Customary Marriage

3.2.2.1.1 Capacity to Act

A distinction can be drawn between customary marriages that were concluded before the coming into operation of the Act and marriages thereafter. In this regard marriages concluded before the Act came into operation had to have complied with the customary law requirements of a marriage to be regarded as a valid marriage.³⁶⁴ There

³⁶¹ The Natal Code of Native Law was not legally binding in Natal but was binding in Zululand by Proclamation 2 of 1887. In 1891 parliament made the Code law hence the Natal Code of Zulu Law.

³⁶² Section 15(3) of the Constitution provides that legislation should recognise marriages concluded under any tradition, or a system of religious, personal or family law; or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. In addition section 112 of the Constitution states that customary law must be applied where applicable, subject to the Constitution.

³⁶³ Section 2 of the Recognition of Customary Marriages Act bestows full legal recognition to monogamous and *de facto* customary marriages.

³⁶⁴ Section 2(2) of the Recognition of Customary Marriages Act recognises customary marriages entered into after the commencement of the Act, provided the marriage complies with the requirements of the Act. This position applies to polygamous marriages as well in terms of section 2(4) of the Act.

is also a difference between codified Zulu customary law and that of the remainder of the country that is mostly uncoded.³⁶⁵

In terms of Zulu customary Law, the Kwa-Zulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law³⁶⁶ applies. In terms of the Codes a bride must publicly declare³⁶⁷ and in the presence of an official witness³⁶⁸ her intention to marry the prospective husband. As in the case of the Marriage Act a minor must obtain the consent of his/her parents or legal guardian.³⁶⁹

The uncoded systems of customary marriages differ. Generally the spouses and the bride's father (regardless of her age) must consent to the marriage.³⁷⁰ The father or guardian of the groom will only be required to give his consent to the wedding should the groom be a minor.³⁷¹ The payment of *lobolo*³⁷² is a requirement in terms of most customary laws; however the *lobolo* does not necessarily have to be paid in full. As in the case of a civil marriage, a party to a customary marriage must be above the age of puberty and not related to each other within the prohibited degrees of affiliation.³⁷³ It should however be noted that the prohibited degrees of affiliation is determined by customary law and accordingly differs from that in terms of the Marriage Act.³⁷⁴

In terms of customary marriages concluded after the Recognition of Customary Act came into operation, a marriage will be regarded as valid if it complies with section 3 of the Recognition of Customary marriages Act. The general requirements for entering into a customary marriage includes that the prospective spouses must both be above

³⁶⁵ Heaton *South African Family Law* 206.

³⁶⁶ Proclamation R151 GG 10966 of 9 October 1987.

³⁶⁷ Section 42 of the Codes provide that the official witness must publicly ask the bride whether she freely and voluntarily consents to the marriage.

³⁶⁸ Section 1 of the Codes provided that the chief that will officiate the marriage would appoint a person to witness the marriage.

³⁶⁹ Section 3(1) of the Recognition of Customary Marriages Act.

³⁷⁰ Heaton *South African Family Law* 206.

³⁷¹ *Ibid.*

³⁷² Section 1 of the Recognition of Customary Marriages Act defines *lobolo* as " [t]he property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage".

³⁷³ Heaton *South African Family Law* 206.

³⁷⁴ Section 3(6) of the Recognition of Customary Marriages Act.

the age of eighteen years³⁷⁵ and that the marriage must be negotiated and entered into or celebrated in accordance with customary law.³⁷⁶ The Act furthermore provides that if either of the prospective spouses is a minor, both his and her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage.³⁷⁷ If there is no legal guardian, the Act provides for substitute consent.³⁷⁸ The parties must furthermore not be prohibited from marriage because of a relationship by blood or affinity as determined by customary law and in addition to the above requirements.³⁷⁹ A husband in a customary marriage, who wishes to enter into a further customary marriage after the commencement of the Act, must also apply to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.³⁸⁰ Failure to comply with the provisions of 7(6) of the Act will render the purported further customary marriage void.

In this regard it is significant to note that in terms of section 3 of the Recognition of Customary Marriages Act the same benchmark as applied in terms of section 25 of the Marriage Act is applicable, namely whether the consent for a minor to enter into a customary marriage is in his/her best interest. In the absence of the required consent section 24A of the Marriage Act that regulates the patrimonial consequences of a marriage of a minor that did not obtain the required consent applies *mutatis mutandi* to customary marriage.³⁸¹

3.2.2.1.2 Consensus

Section 3(1) (a) (ii) of the Recognition of Customary Marriages Act provides that the intended spouses to the customary marriage must both consent to be married to each

³⁷⁵ Section 3(1)(a)(i) as well as section 9 of the Recognition of Customary Marriages Act
³⁷⁶ Section 3(1) (b) of the Recognition of Customary Marriages Act. In *Fanti v Boto and Others* 2008 (5) SA 405 (C) it was held that the requirements for a valid customary marriage are a consensual agreement between two family groups with respect to the two individuals who are to be married and the *lobolo* to be paid; and the transfer of the bride by her family group to the family of the man. It should also be noted that should the rituals not take place and in accordance with certain customs, such marriage would be void.
³⁷⁷ Section 3(3) (a) of the Recognition of Customary Marriages Act.
³⁷⁸ Section 3(3) (b) of the Recognition of Customary Marriages Act.
³⁷⁹ Section 3(6) of the Recognition of Customary Marriages Act.
³⁸⁰ Section 7(6) of the Recognition of Customary Marriages Act.
³⁸¹ Section 3(5) of the Recognition of Customary Marriages Act.

other under customary law. As in the case of a civil marriage consensus is therefore an important requirement for a valid customary marriage.

3.2.2.1.3 Lawfulness

Section 37 of the Codes provides that in contrast to the Marriage Act a person may marry specified family members despite them being within the prohibited degrees of affinity. Section 3(6) of the Recognition of Customary Marriages Act also provides that the prohibited degrees of family relationships are regulated in terms of customary law.

It is also noteworthy that although the Recognition of Customary Marriages Act regulates heterosexual customary marriages, African customary law also recognises “women-women” marriages.³⁸² In terms of such a marriage an older women, who is no longer able to conceive, would marry a younger women in terms of customary rituals for the purpose of providing heirs to her family.³⁸³ A male genitor would father the child but have no rights in respect of such a child.³⁸⁴ The children born from the younger women would accordingly be regarded as children of the older women. Such marriages are therefore mostly of a non-sexual nature.³⁸⁵ In addition marriages between migrant male mineworkers have also been reported.³⁸⁶

3.2.2.1.4 Formalities

Customarily the groom or the head of his family would give the prospective bride’s family gifts in the form of livestock.³⁸⁷ Customary marriage must be registered within three months from date of marriage in cases where the marriage took place after the enactment of the Recognition of Customary Marriages Act.³⁸⁸ Marriages prior to the

³⁸² *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) para 12; Church 2003 *Fundamina* 50.

³⁸³ Oomen 2000 *THRHR* 275.

³⁸⁴ *Ibid.*

³⁸⁵ Bonthuys 2007 *SAJHR* 533.

³⁸⁶ Bonthuys 2007 *SAJHR* 534; Church 2003 *Fundamina* 51.

³⁸⁷ Sections 43, 47 and 51-52 of the Codes regulated the delivery of *lobolo*.

³⁸⁸ Section 4(3) (b) of the Recognition of Customary Marriages Act provides that “The spouses of

said Act were to be registered before 31 December 2010.³⁸⁹ A customary marriage certificate³⁹⁰ would only be issued after either spouse or interested parties furnish sufficient information in proof of such marriage to the registering officer.³⁹¹ The registering officer must thereafter record such marriage by recording the identity of the parties, the date of the marriage and the *lobolo* paid.³⁹²

3.2.3 Purely Religious Marriages

A purely religious marriage is a marriage that was entered into by persons professing a particular religion. In *Mashia Ebrahim v Mahomed Essop*³⁹³ it was held that although the Cape Colony's *Marriage Act* 16 of 1860 allowed for the appointment of Muslim marriage officers, a Muslim marriage still had to comply with the provisions of the Marriage Act and accordingly be of a monogamous nature. The monogamous nature of such marriages were emphasised in *Seedat's Executors Appellant v The Master (Natal), Respondent*³⁹⁴ as well as in *Ismail v Ismail*.³⁹⁵

Because purely religious marriages such as Hindu or Muslim marriages are entered into in terms of a particular religion's beliefs and customs it does not conform to the principles of the Marriage Act. Accordingly, despite certain statutes or parts thereof³⁹⁶ and judicial precedents³⁹⁷ recognising and or extending some spousal benefits to

a customary marriage have a duty to ensure that their marriage is registered. (2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage".

³⁸⁹ Section 4(3) (a) of the Recognition of Customary Marriages Act.

³⁹⁰ Section 4(3) (b) of the Recognition of Customary Marriages Act provides that a certificate of registration will be issued to the parties of the customary marriage.

³⁹¹ Section 4(2) of the Recognition of Customary Marriages Act.

³⁹² Section 4(4) of the Recognition of Customary Marriages Act.

³⁹³ *Mashia Ebrahim v Mahomed Essop* 1905 TS 59.

³⁹⁴ *Seedat's Executors v The Master (Natal)* 1917 AD 302.

³⁹⁵ *Ismail v Ismail* 1983 (1) SA 1006 (A).

³⁹⁶ The Births and Deaths Registration Act 51 of 1992; Domestic Violence Act 116 of 1998; Children's Act 38 of 2005; section 10A of the Criminal Proceedings Evidence Act 25 of 1965 and section 195(2) of the Criminal Procedure Act 51 of 1977; section 4(q) read with section 1 of the Estate Duty Act 45 of 1955 and section 2 read with section 31(1) of the Special Pensions Act 69 of 1996.

³⁹⁷ For examples where judiciary extended the benefit to claim in terms of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 to a monogamous spouse of a Muslim marriage see *Daniels v Campbell* 2004(5) SA 331 (CC). See also *Hassan V Jacobs* 2008 4 All SA 350 (C) where the same rights as in the previous case were extended a spouse in a *de facto* polygamous marriage. For examples where a

parties to a purely religious marriage, such marriages do not have full legal recognition in terms of South African law unless solemnised in terms of the Marriage Act or Civil Union Act.³⁹⁸ As this study is engaged with the current marriage law framework and matrimonial legislation regulating marriages in South Africa the requirements and consequences of purely religious marriages falls outside the scope of this study and will therefore not be dealt with.

3.2.4 Life Partnerships

The term life partnership was first coined in the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*³⁹⁹ where it was defined as a same-sex or heterosexual relationship which is akin to that of a marriage relationship. As in the case of purely religious marriages, life partners do not enjoy the same legal recognition and protection of a married couple despite certain Acts or portion thereof and judicial precedents extending some of the spousal benefits to life partners.⁴⁰⁰ It is however noteworthy that the position of same-sex life partners and that of heterosexual life partners differ.

Prior to the enactment of the Civil Union Act same-sex life partners had no legal means by which to enter into a marriage and accordingly the Constitutional Court extended certain spousal benefits to them. Heterosexual life partners were excluded from such benefits on the basis that they had the choice to enter into a marriage if they so wished. Subsequent to the Civil Union Act being promulgated the extension of certain spousal benefits to same-sex life partners remain in place despite same-sex couples now

dependent's loss of support was extended to the surviving spouse of a monogamous Muslim marriage see *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) and *Khan v Khan* 2005(2) SA 272 (T) in respect of a spouse to a de facto polygamous marriage. *Govender v Ragavayah (Women's Legal Centre Trust as Amicus Curiae)* 2009 (3) SA 178 (D) is an example of judicial precedent extending the right to claim in terms of the Intestate Succession Act 81 of 1987 to the surviving partner in a monogamous Hindu marriage.

³⁹⁸ For a discussion on the constitutional arguments advancing the recognition of purely religious marriages on the ground of religion, conscience, belief or culture as well as the right to dignity see *Kalla v The Master* 1994 (4) BCLR 79(T); *Ryland v Edros* 1996 (4) All SA 557 (C); *Daniels v Campbell* 2004 (5) SA 331 (CC); *Hassan v Jacobs* 2009(5) SA 572(CC); Sinclair assisted by Heaton *The Law of Marriage* 265-266 and Bonthuys 2002 SALJ 763, 775-782. See also the draft Muslim Marriages Bill and SALRC Project 59 Islamic Marriages and Related Matters Report July 2003.

³⁹⁹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000(1) BCLR 39 (CC).

⁴⁰⁰ Para 2.3.5.

being able to enter into a marriage. Presently same-sex life partners therefore enjoy the right to intestate succession whilst such a benefit is not extended to their heterosexual counterparts.

3.3 Summary and Conclusion

As a result of a change in society's idea of what a "family" constitutes, the traditional and primarily religious viewpoints of marriage have changed to that of a more inclusive secular democratic view of marriage. Such change in acuity as well as the enactment of the Constitution has resulted in minority groups seeking legal acknowledgment that family life extends beyond monogamous heterosexual married couples. One such change is the Recognition of Customary Marriages Act that has resulted in full legal recognition being bestowed on customary marriages for the first time in the history of South Africa. In addition, the Civil Union Act affords non-traditional same-sex couples the right to enter into legally recognised civil unions. Although the development of legislating in relation to matrimonial law is commendable, it has also resulted in a patchwork of laws that does not necessarily express a coherent set of family law rules. In addition, it is evident from the critical analysis that the extension of certain spousal benefits to life partners and parties to religious marriages has resulted in an incoherent family law and interpersonal framework.

Form the comparative analysis it is evident that there are some differences and inconsistencies between the three pieces of legislation regulating marriages in South Africa. The most significant and anomalous inconsistency relates to the prohibition of minors to enter into a civil union in terms of the Civil Union Act whilst the Marriage Act as well as the Recognition of Customary Marriages Act, despite also requiring that a person must be eighteen years of age to enter into a civil or customary marriage,⁴⁰¹ make provision for a minor to get married.⁴⁰²In terms of the Marriage Act and the

⁴⁰¹ Section 24(1) of the Marriage Act; compare section 3(1) (a) (i) of the Recognition of Customary Marriages Act.

⁴⁰² Section 24(1) of the Marriage Act read with section 18(3) (c) of the Children's Act 38 of 2005 (hereinafter referred to as the "Children's Act"), compare section 3(3) and (4) of the Recognition of Customary Marriages Act. For a general discussion of the capacity of minors to enter into a civil marriage, see Heaton *Bill of Rights* paragraph 3C14.2.

Recognition of Customary Marriages Act, a minor may enter into a marriage provided that he or she has obtained the required consent of his or her parents or guardians⁴⁰³ and, in some cases, either the consent of the presiding officer of a Children's Court⁴⁰⁴ or the consent of the Minister.⁴⁰⁵ In this regard it is striking that in terms of the Marriage Act and the Recognition of Customary Marriages Act, the common benchmark applied in considering whether consent should be granted to a minor wishing to enter into a civil or customary marriage is in the best interest of the child. It is questionable whether the provision of the Civil Union Act which categorically restricts minors from getting married, is justifiable. Prior to evaluating the aforementioned, it is imperative to comprehend what the best interest of the child entails.

The next chapter will shed some light on what the best interest of the child entails by looking at an overview of the legal journey that led to the legalisation of the best interest of the child standard in South Africa.

⁴⁰³ Section 24(1) of the Marriage Act; section 3(3) (a) of the Recognition of Customary Marriages Act read with section 18(3)(c)(i) of the Children's Act. For a general discussion of the consent required for the civil marriage of a minor, see Heaton *South African Family Law* 18-21; Skelton *et al Family Law in South Africa* 36-39. Generally on the consent required in respect of a minor's customary marriage, see Heaton *South African Family Law* 206-207; Skelton *et al Family Law in South Africa* 180-184.

⁴⁰⁴ Section 25(1) of the Marriage Act and section 3(3)(b) of the Recognition of Customary Marriages Act provide that in certain circumstances where the parent/s or guardian/s consent cannot be obtained, the presiding officer of a children's court can consent to the marriage. Whilst section 25(4) of the Marriage Act provides that the Supreme Court has the authority to grant a minor consent to marry should such consent be refused without adequate reasons.

⁴⁰⁵ Section 26(1) of the Marriage Act provides that a boy below the age of 18 years and a girl below the age of 15 years may not marry without the consent of the Minister of Home Affairs, whilst section 3(4)(a) of the Recognition of Customary Marriages Act provides that the Minister or any authorised officer in the public service may grant written permission to a minor who wishes to enter into a customary marriage, provided such intended marriage is desirable and in the interest of the parties.

CHAPTER 4

MINOR MARRIAGES AND “THE BEST INTERESTS OF THE CHILD” PRINCIPLE: A LEGISLATIVE AND JUDICIAL OVERVIEW

4.1 Introduction

This chapter consists of an analysis of “the best interests of the child” principle, with specific focus on matrimonial law governing minors. In fully comprehending the legal nature and origins of “the best interests of the child” principle,⁴⁰⁶ it is important to firstly consider the development of the concept “parental authority” by way of a historical overview. In this regard the position of the *paterfamilias* during the Early Roman times as well as the Roman-Dutch paternal preference approach will be briefly discussed. The overview will be followed by an analysis of the impact international and national instruments have had on the promulgation of child legislation in South Africa. The remainder of the chapter will evaluate “the best interests of the child” principle that is derived from article 3(1) of the United Nations Convention on the Rights of Children which provides that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. In fully comprehending “the best interests of the child” principle as applied within a South African law context, a brief analysis of the wording used in section 28(2) of the Constitution, *inter alia* “paramountcy” and “every matter concerning the child” as well as certain sections of the Children’s Act⁴⁰⁷ will be discussed to ascertain the extent to which the principle should be applied. In providing context to the “best interests of the child” principle, the characterisation of various interests and factors as well as the weighting attached to certain interests when applying the principle will be evaluated. The chapter will conclude with an examination of the different legal approaches

⁴⁰⁶ As derived from Article 3(1) of the United Nations Convention on the Rights of a Child and as constitutionalised in terms of section 28(2) of the Constitution.

⁴⁰⁷ Sections 6, 7 and 9 of the Children’s Act 38 of 2005.

adopted by the judiciary when determining and applying “the best interests of the child” principle within family law and in particular within a matrimonial law framework.

4.2 Parental Authority and the “the Best Interests of the Child” Principle

From chapter two, it is apparent that the South Africa legal system is the product of various legal systems and customs that have influenced and pooled together to form a multi-layered hybrid law system.⁴⁰⁸ The influence of different legal systems on South African family law is also evident when considering the historical development of parental authority within a South African family law context.

Early Roman law recognised the *paterfamilias* (father of the family) as an institution.⁴⁰⁹ The position of *paterfamilias* was awarded to the eldest male in the family, usually the father, and gave him a kind of quasi-ownership in respect of his children and wife.⁴¹⁰ It provided him with the *patria potestas* (power of the father) to decide over all matters relating to the family.⁴¹¹ The *patria potestas* included the right to give his children in marriage regardless of the child’s lack of consent.⁴¹² As Roman marriages allowed for minors to enter into marriages, provided they reached the age of puberty, it was common for minors to be married off on the authority of their *paterfamilias*.⁴¹³ Evidently the application of the *paterfamilias* did not give consideration to individual interests or the best interests of the child when it came to marriage but rather to the interests of the family as determined by the *paterfamilias*. Parental authority was consequently solely enforced by the *paterfamilias*.

⁴⁰⁸ Para 2.3.3.

⁴⁰⁹ In Roman family law the *paterfamilias* was the head of the family that had absolute power to exercise over his wife, children, remote descendants in the male line, as well as slaves regardless of their age. This absolute power included complete control over the limited personal and private rights and duties of all members of the family, *inter alia* the right to punish by death or a child being sold as a slave. Van Zyl *History and Principles of Roman Private Law* 97.

⁴¹⁰ Treggiari *Roman Marriage: Iusti Coniuges* 23-24; Van Zyl *History and Principles of Roman Private Law* 97.

⁴¹¹ Van Zyl *History and Principles of Roman Private Law* 97; Treggiari *Roman Marriage: Iusti Coniuges* 23-24.

⁴¹² Treggiari *Roman Marriage: Iusti Coniuges* 23.

⁴¹³ Van Zyl *History and Principles of Roman Private Law* 100-101; Spiller *A Manual on Roman law* 63.

Similar to the *paterfamilias* having paternal authority over his children, pre-colonial African people were subject to their own indigenous laws that were enforced by an individual chief (head) of the tribe.⁴¹⁴ In terms of indigenous law, the head of the tribe applied indigenous law in making decisions relating to the tribe, including decisions relating to the children born within the tribal community.⁴¹⁵ In terms of indigenous law children born within a tribal community belonged to the tribe.⁴¹⁶ Consequently marital issues were dealt with within the tribal structure.⁴¹⁷ Although parental authority was vested with the parents of a child, it was the tribe and more specifically the head of the tribe, which had the right to sanction any decision relating to *inter alia* possession of the children.⁴¹⁸ This approach consequently focused on the family structure within the tribe and not the individual child or the best interests of the child. Although the customs of indigenous peoples are still recognised and enforced in terms of South African law,⁴¹⁹ it should be noted that “the best interests of the child” principle was introduced into the Recognition of Customary Marriages Act⁴²⁰ so as to ensure compliance with the Constitution. The Recognition of Customary Marriages Act, thus specifically provides that a child’s best interests should be considered in determining whether or not to grant consent to a minor who wishes to enter into a customary marriage.⁴²¹ Consequently present day indigenous law does acknowledge that in addition to the head of a tribe executing a form of individual authority and justice, “the best interests of the child” should also be considered in terms of matrimonial law. With the Dutch colonialization of the Cape in 1652, the Roman-Dutch legal system was adopted in South Africa.⁴²² Even after the British occupation of the Cape in 1806, Roman-Dutch law was and continues to be the common law of South Africa.⁴²³ South African law child law is accordingly based on Roman-Dutch law. Unlike the Roman *paterfamilias*,

⁴¹⁴ Pakenham *The Boer War* 29-37.

⁴¹⁵ Bennett *Customary Law in South Africa* 295; Bennett *Human Rights and African Customary Law: Under the South African Constitution* 61-62.

⁴¹⁶ Boezaart *Child Law in South Africa* 227.

⁴¹⁷ Bennett *Customary Law in South Africa* 295.

⁴¹⁸ Boezaart *Child Law in South Africa* 227 Bennett *Human Rights and African Customary Law: Under the South African Constitution* 61-62.

⁴¹⁹ Section 15(3) of the Constitution provides that “...marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion” must be recognised provided it is consistent with the provisions of the Constitution.

The Recognition of Customary Marriages Act 120 of 1998 was assented to on 20 November 1998 and came into force on 15 November 2000.

⁴²¹ Para. 3.1.3.1.1.

⁴²² Hahlo & Kahn *The South African legal system and its background* 433.

⁴²³ Hahlo & Kahn *The South African legal system and its background* 329-330, 575-576.

Roman-Dutch law viewed parental authority as a shared right between the father and mother of the child.⁴²⁴ Roman-Dutch law did however acknowledge the father as the natural guardian of his child and accordingly provided him with paternal authority.⁴²⁵ The father of a child consequently had the final say in matters relating to the child, including the right to be married.⁴²⁶ Consequently in terms of this approach a child's viewpoint and interests were not paramount.

The paternal preference approach adopted by the Roman-Dutch law system started changing in the case of *Cronje v Cronje*⁴²⁷ when the court ruled that "the father, as natural guardian of the children, is by law entitled to their custody, but that it was subject to any order the court may make".⁴²⁸ The case furthermore ruled that "in all cases the main consideration for the court in making an order with regard to the custody of the children is what is in the best interest of the children themselves".⁴²⁹ The *Cronje* case accordingly signified a vital change in South African family law by recognising the importance of applying a child-centered approach⁴³⁰ as opposed to that of a father's preferential right in custody matters.⁴³¹ It should however be noted

⁴²⁴ *Calitz v Calitz* 1939 AD 56.

⁴²⁵ Kruger <http://uir.unisa.ac.za/bitstream/handle/10500/2545/03chapter2> (Date of use 25 July 2017) 48-53.

⁴²⁶ Kruger <http://uir.unisa.ac.za/bitstream/handle/10500/2545/03chapter2> (Date of use 25 July 2017) 48-53; *Calitz v Calitz* 1939 AD 56 61; *Van Rooyen v Werner* 1892 9 SC 425 at 428.

⁴²⁷ *Cronje v Cronje* 1907 TS 871 (hereinafter referred to as "the *Cronje* case").

⁴²⁸ *Cronje* case para 872.

⁴²⁹ The *Cronje* case 872-874. The preference of awarding custody to the father based on the principle that a father is the natural father of his children hence prima facie entitled to their custody was also challenged in the case of *Tabb v Tabb* 1909 TS 1033. This case was a post-divorce custody matter in which the court deviated from the aforesaid principle by considering the tender age of the children by recognising the interests of the children. See also the case of *Kramarski v Kramarski* 1906 TS 937 where the court deviated from the father-centered approach by acknowledging that children of tender age should be in the custody of their mothers.

⁴³⁰ Section 6 of the Children's Act establishes a child-centred approach by requiring that in "[A]ll proceedings, actions or decisions in a matter concerning a child must- (a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation; (b) respect the child's inherent dignity; (c) treat the child fairly and equitably; (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child; (e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and (f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has". A child-centred approach was described in the *S v M* case para 24 as "a close and individualised examination of the precise real-life situation of the particular child involved. For a discussion on the child-centred approach in general see Heaton 2009 *Journal for Judicial Science* 3-5.

⁴³¹ For a discussion on the departure from the Roman-Dutch law approach to parental authority generally see Muthucumaraswamy 1973 *S. African LJ* 90 131.

that the ruling was only applied in cases where custody of a minor had to be determined in divorce matters.⁴³² In *Fletcher v Fletcher*⁴³³ the courts introduced “the best interests of the child” principle thereby signifying a clear shift away from the paternal preference approach of the Roman-Dutch system. In this case the courts held that “in custody matters the children’s interests must undoubtedly be the main consideration.”⁴³⁴ With the adoption of the Matrimonial Affairs Act⁴³⁵ it became mandatory that the “best interests of the child” principle should be applied in all divorce matters. Consequently case law and statutory changes have resulted in South African law developing the initial Roman-Dutch approach of paternal preference to a more child-centered approach by adopting “the best interests of the child” principle.⁴³⁶ Accordingly what was once only a common law principle applicable in custody matters has become the yardstick that is to be applied in every matter concerning the child.⁴³⁷ The influence international and national instruments have had on the development of children’s rights and in particular “the best interests of the child” principle in South African law will be discussed hereunder.

4.3 Legislative Framework that Underpin “the Best Interests of the Child” Principle

From the aforementioned discussion it is evident that a child’s rights were previously viewed within the broader context of what was deemed best for the family as determined by the *paterfamilias*, the head of a tribal community or the father of a

⁴³² For a discussion on the Roman-Dutch rule that was applied under Dutch and British rule see *Van Rooyen v Werner* 1892 (9) SC 425.

⁴³³ *Fletcher v Fletcher* 1948 (1) SA 130 (A) (hereinafter referred to as the *Fletcher* case) para 145. See also *Townsend-Turner v Marrow* 2004 2 SA 32 (C) where the principle was applied in considering access rights by the grandparents of a minor; *R v H* 2005 6 SA 535 (C).

⁴³⁴ *Fletcher* case para 123.

⁴³⁵ Section 24 of the Matrimonial Affairs Act 37 of 1953.

⁴³⁶ Section 5(1) (b) of the Matrimonial Affairs Act 37 of 1953 states that “on the application of either parent of a minor whose parents are divorced or are living apart, if it is proved that it would be in the interests of the minor to do so, grant to either parent sole guardianship...or sole custody of the minor...”.

⁴³⁷ Section 28(2) of the Constitution. In considering the expansion of the application of “the best interests of the child” principle to a wider field of application, see *Lovell v Lovell* 1980(4) SA 90 (T) where “the best interests of the child was considered and resulted in the removal of the father from the matrimonial home during the divorce process. In *S v F* 1989 1 SA 460(Z) the best interests of a young offender was considered prior to sentencing.

child.⁴³⁸ Widespread recognition of children's rights resulted in the interests of the child becoming more focused on the child's individual rights and well-being rather than being subordinate to his/her parents' parental authority.⁴³⁹ The recognition of children's rights and the need to promulgate legislation to defend and promote such rights has been reinforced by international as well as national treaties.⁴⁴⁰ These treaties identified specific rights of the child and mandated parties to the treaties to promote, protect and enforce such rights by using "the best interests of the child" principle as a guide and yardstick.⁴⁴¹ For purposes of this study the analysis will be restricted to those treaties that include or refer to the best interests of the child.

4.3.1 International Instruments

4.3.1.1 The Declaration of the Rights of the Child of 1924

The Declaration of the Rights of the Child⁴⁴² was one of the initial international instruments to protect the rights of the child and the first to specifically incorporate "the best interests of the child" principle.⁴⁴³ The declaration later became known as the World Child Welfare Charter and aimed at protecting children's' most basic needs.⁴⁴⁴ In 1959 the United Nations General Assembly adopted the United Nations Declaration of the Rights of the Child.⁴⁴⁵ This document was based on the World Child Welfare Charter and included ten principles that acknowledged that a child, by reason of his

⁴³⁸ Para 4.2.

⁴³⁹ Preamble to the United Nations Convention on the Rights of the Child, 1959.

⁴⁴⁰ Article 2.2 of the Declaration of the Rights of the Child, 1959; article 1 of the African Charter on the Rights and Welfare of the Child, 1992.

⁴⁴¹ *Ibid.*

⁴⁴² Commonly referred to as the Declaration of Geneva was adopted by the Save the Children Union in Geneva, Switzerland on February 23, 1923. Declaration on the Rights of Children <http://www.un-documents.net/gdrc1924.htm> (Date of use 25 July 2017).

⁴⁴³ Kaime 2009 *African Journal of Legal Studies* 119-136.

⁴⁴⁴ The Declaration of the Rights of the Child was brought before the General Assembly of the League of Nations in 1924 and was approved in November 1924 and named it the World Child Welfare Charter. The charter was based on five principles to protect the rights of the child. Declaration on the Rights of Children <http://www.un-documents.net/gdrc1924.htm> (Date of use 25 July 2017).

⁴⁴⁵ United Nations Declaration of the Rights of the Child by proclamation of the General Assembly Resolution 44/25 of 20 November 1959 entered into force on 2 September 1990 (hereinafter referred to as "the Declaration of the Rights of the Child"). <https://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf>.

physical and mental immaturity, requires appropriate legal protection, before as well as after birth.⁴⁴⁶ The Declaration of the Rights of the Child provides *inter alia* that “[e]very child shall enjoy all the rights set forth in the declaration and will not be discriminated against on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family”.⁴⁴⁷ One of the most profound principles contained in this declaration is the provision that in the enactment of laws to protect children’s rights “the best interests of the child shall be of paramount consideration”.⁴⁴⁸ This principle, contained in the declaration, is indicative of the widespread shift towards children’s rights by no longer viewing children as the possessions of their parents but to recognise and protect their individual rights and best interest.⁴⁴⁹ The paramountcy principle will be discussed in 4.3.3.2.1. This document was the precursor to the Convention on the Rights of the Child.⁴⁵⁰

4.3.1.2 United Nations Convention on the Rights of the Child (CRC)

In terms of the CRC, the United Nations recognised that children are entitled to special care and assistance and by so doing acknowledged the individuality of a child and the right of a child to have autonomous rights separate from that of his parents.⁴⁵¹ Consequently every state party that ratified the CRC is obliged to apply, protect and enforce such children’s rights imposed by the CRC in protecting and enforcing children’s rights.⁴⁵² In so doing, all state parties are obliged to *inter alia* take all

⁴⁴⁶ Preamble to the Declaration of the Rights of the Child.

⁴⁴⁷ Principle 1 of the Declaration of the Rights of Child.

⁴⁴⁸ Principle 2 states that “[T]he child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration”. For a list of the ten principles on which the World Welfare Charter was based after being endorsed by the United Nations in 1959 generally, see the Declaration of the Rights of the Child <https://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf>. (Date of use 25 July 2017).

⁴⁴⁹ Preamble to the CRC.

⁴⁵⁰ Convention on the Rights of the Child that came into force on 2 September 1990. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (Date of use 25 July 2017) (hereinafter referred to as “the CRC”).
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

⁴⁵¹ Preamble to the CRC.

⁴⁵² Article 2(2) of the CRC states that “[S]tates Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or

appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the CRC with regard to economic, social and cultural rights of the child.⁴⁵³ From the aforesaid it is noteworthy that the CRC does not impose the constitutionalisation of children's rights as in the case of the Convention on the Elimination of All Forms of Discrimination against Women,⁴⁵⁴ but rather the adoption of legislative measures to conform to the provisions of the CRC. Although the CRC makes provision for the protection of several children's rights, this analysis will be restricted to those provisions that are relevant to the study. In this regard article 2 of the CRC specifically protects children against discrimination and places an obligation on state parties to respect such rights and to take all measures to ensure the protection of these rights from discrimination.⁴⁵⁵ The CRC also recognises that children have a viewpoint and mandates all state parties to afford a child the right to express his/her opinion and to give consideration to such opinion by taking into account the age and level of maturity of the child.⁴⁵⁶ Similar to principle 2 of the Declaration of the Rights of the Child, article 3.1 of the CRC provides that:-

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

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- family members". In terms of article 1 a "[c]hild means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".
- 453 Article 4 of the CRC. 195 Countries have ratified the CRC. On 20 January 2015 Somalia ratified the CRC thereby making all African countries signatories to the CRC.
- 454 Article 2 provides that "[S]ates Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure,...". Convention on the Elimination of All Forms of Discrimination against Women
<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#intro> (Date of use 25 July 2017).
- 455 Article 2 of the CRC states that "[States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. States Parties shall furthermore take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members".
- 456 Article 12.1 of the CRC "[States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. Article 12.2 furthermore states that "[F]or this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

By referring to ‘a primary’ consideration it implies that the best interest of a child should compete with other rights.⁴⁵⁷ This provision accordingly does not only mandate that a child’s best interest must be a main consideration in making decisions that affect the child but also that the best interest of the child should be applied in all actions concerning the child. The application of “the best interests of the child” principle is consequently applicable in all fields of the law and not only custody matters. Although South Africa ratified the CRC prior to the 1996 Constitution being endorsed,⁴⁵⁸ section 231(2) of the Constitution stipulates that all treaties are binding on South Africa and should be adhered to.⁴⁵⁹ The Constitution furthermore provides that when interpreting any legislation the reasonable interpretation of the legislation that is consistent with international law should be preferred.⁴⁶⁰ South Africa, as a signatory to the CRC is accordingly bound by the provisions of the CRC and is obliged to review its laws relating to children. The South African commitment to uphold the obligations as imposed by the CRC is evident as several of the provisions contained in the CRC are echoed in the Constitution⁴⁶¹ as well as in the Children’s Act.⁴⁶²

4.3.2 African Instruments

⁴⁵⁷ Skelton 2009 *African Human Rights Law Journal* 486.

⁴⁵⁸ South Africa ratified the CRC on 16 June 1995.

⁴⁵⁹ Section 231(2) of the Constitution states that “[A]n international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

⁴⁶⁰ Section 233 of the Constitution. See also *Bhe and Others v Magistrate, Khayalitsha and Others (Commission for Gender Equality as Amicus Curiae)* 2005 1 SA 580 (CC) where the court gave consideration to the CRC and the African Children’s Charter in deciding whether the customary law rules that gave rise to differential entitlements of children born within a marriage and those born outside the marriage constituted unfair discrimination on the grounds of birth.

⁴⁶¹ The CRC and the Constitution protects the right to life (article 6 of the CRC and section 11 of the Constitution), a child’s right to a name and nationality (article 7 of the CRC and section 28(1)(a) of the Constitution), a right to freedom of expression (article 13 of the CRC and section 16 of the Constitution), thought and conscience and religion (article 14 of the CRC and section 15 of the Constitution), freedom of association (article 15 of the CRC and section 18 of the Constitution), the right to privacy (article 16 of the CRC and section 14 of the Constitution), the right to be free from violence, abuse, neglect, maltreatment and exploration (article 19 of the CRC and section 28(1)(d) of the Constitution), the right to education (article 28 of the CRC and section 29 of the Constitution), the right to be protected from work that may be hazardous to children (article 32 of the CRC and section 28(1)(e) and (f) of the Constitution).

⁴⁶² The CRC and the Children’s Act furthermore provide that children capable of forming their own opinions must be given the right to be heard in all matters affecting the child (article 12 of the CRC and sections 10 and 31 of the Children’s Act).

4.3.2.1 The African Charter on the Rights and Welfare of the Child, 1990

In addition to South Africa being a signatory to the CRC, South Africa also ratified the African Charter on the Rights and Welfare of the Child in 2000.⁴⁶³ As in the case of the CRC, the African Charter was created to safeguard children's rights.⁴⁶⁴ The African Charter accordingly complements the CRC whilst at the same time addressing the unique needs of the African child.⁴⁶⁵ Consequently the African Charter stipulates certain obligations that African countries must comply with to ensure the protection of children's rights.⁴⁶⁶ The African Charter, amongst other things, addresses non-discrimination⁴⁶⁷ and the right of the child to be heard.⁴⁶⁸ Given Africa's colonial past, discrimination and the right to be heard are consequently very important rights with historical significance. The African Charter also mandates that "[I]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".⁴⁶⁹ 'The primary' consideration implies that a heavier weighting should be given to the child's best interest than in the case of the CRC that requires 'a primary consideration'.⁴⁷⁰ It should also be noted that in addition

⁴⁶³ The African Charter on the Rights and Welfare of the Child entered into force on 29 November 1999 (hereinafter referred to as "the African Charter"). South Africa ratified the African Charter on 7 January 2000. In East and South Africa all countries except Somalia and Zambia have ratified the African Charter.

⁴⁶⁴ Preamble to the African Charter.

⁴⁶⁵ Preamble to the African Charter provides "[N]oting with concern that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care".

⁴⁶⁶ Article 1 of the African Charter stipulates that "[M]ember States of the Organization of African Unity, Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter."

⁴⁶⁷ Article 3 of the African Charter states that "[E]very child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status".

⁴⁶⁸ Article 4(1) of the African Charter provides that "[I]n all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law. In addition article 7 of the African Charter provides "[E]very child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws".

⁴⁶⁹ Article 4.1 of the African Charter.

⁴⁷⁰ Skelton 2009 *African Human Rights Law Journal* 486.

to the protection of the child's rights, the African Charter also imposes responsibilities on children.⁴⁷¹ As in the case of the CRC, many of the provisions of the African Charter are embedded in the South African Constitution.⁴⁷²

The profound impact that international as well as African treaties have had on the development of children's rights in South Africa cannot be understated. It is apparent that the aforementioned treaties share four common guiding principles: the first being that a child has the right to be treated equally and not to be discriminated against; secondly, that a child's best interest must be of paramount or primary significance when determining "the best interests of the child"; thirdly, that the determination of a child's best interest is applicable in every matter concerning the child and lastly; that a child that is capable of communicating his/her beliefs has the right to express his/her viewpoints and that such viewpoints must be considered in determining his/her best interest taking into account age and level of mental maturity.

4.3.3 South African Instruments

4.3.3.1 Children's Charter of South Africa, 1992

During June 1992 the International Conference on the Rights of Children in South Africa that focused on the development of a policy on children's rights was held.⁴⁷³ During the summit the Children's Charter of South Africa was drawn up and adopted.⁴⁷⁴ This was the first Children's Charter to be adopted and reflected the voices

⁴⁷¹ Article 31 of the African Charter provides that "[Children have responsibilities towards their families and societies, to respect their parents, superiors and elders, to preserve and strengthen African cultural values in their relation with other members of their communities".

⁴⁷² Right to life (article 5(1) of the African Charter), name and nationality (article 6 of the African Charter), freedom of thought (article 9(1) of the African Charter), conscience and religion (article 7 of the African Charter), expression and association (article 8 of the African Charter), privacy (article 10 of the African Charter), education (article 11(1) of the African Charter), freedom from forms of torture and degrading treatment (article 16(1) of the African Charter), physical and mental abuse, neglect or maltreatment and the protection from economic exploitation and work that may be hazardous (article 15(1) of the African Charter).

⁴⁷³ Preamble to The Children's Charter of South Africa (hereinafter referred to as "the Children's Charter"). http://www.naturalchild.org/advocacy/south_africa/childrens_charter.html (Date of use: 25 July 2017).

⁴⁷⁴ The Children's Charter was approved on 1 June 1992 http://www.naturalchild.org/advocacy/south_africa/childrens_charter.html (Date of use: 25 July 2017).

of over two hundred children that represented the children of South Africa.⁴⁷⁵ In terms of the Children's Charter the need for children to be treated equally and not be discriminated against was emphasised.⁴⁷⁶ Article 3 of the Children's Charter furthermore mandates that:-

"All children have the right to express their own opinions and the right to be heard in all matters that affect his / her rights and protection and welfare. All children have the right to be heard in courtrooms and hearings affecting their future rights and protection and welfare and to be treated with the special care and consideration within those courtrooms and hearings which their age and maturity demands".

Accordingly, although the Children's Charter does not make specific reference to the best interest of the child, it does make provision that children should not be discriminated against and that children have the right to express their own opinions in all matters concerning them.⁴⁷⁷ The Children's Charter consequently reinforces the children's rights as set out in the CRC and the African Charter.

4.3.3.2 The Constitution of the Republic of South Africa, 1996

Section 30(3) of the Interim Constitution of the Republic of South Africa 200 of 1993⁴⁷⁸ provided that:-

"For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount".

The paramountcy of the best interest of the child was consequently only applied as far as it related to section 30 of the Interim Constitution.⁴⁷⁹ Section 30 of the Interim

⁴⁷⁵ The Children's Charter
http://www.naturalchild.org/advocacy/south_africa/childrens_charter.html
(Date of use 25 July 2017).

⁴⁷⁶ Article 1 of the Children's Charter of South Africa of 1992 states that "[A]ll children have the right to protection and guarantees of all the rights of the Charter and should not be discriminated against because of his / her parents or family's colour, race, sex, language, religion, personal or political opinion, nationality, disability or for any other reason".

⁴⁷⁷ Articles 1 and 3 of the Children's Charter.

⁴⁷⁸ Section 30 of the Constitution of the Republic of South Africa 200 of 1993 (hereinafter referred to as "the Interim Constitution").

⁴⁷⁹ Heaton 2009 *Journal for Judicial Science* 2.

Constitution was subsequently replaced with section 28 of the Constitution of the Republic of South Africa, 1996.⁴⁸⁰

Section 28(1) of the Constitution stipulates the socio-economic human rights of children, which were later adopted in the Children's Act, as specific rights.⁴⁸¹ It should be noted that these socio-economic rights are not subject to an internal limitation clause but remain subject to reasonable and proportional limitation as provided for in terms of section 36 of the Constitution.⁴⁸² In addition to the aforesaid rights, section 28(2) of the Constitution provides that:-

“A child’s best interests are of paramount importance in every matter concerning the child”.

Section 28 of the Constitution therefore does not only grant children specific fundamental rights in terms of section 28(1) of the Constitution, but also guarantees the rights of children by imposing an obligation on all courts to give consideration to a child's best interest and to consider the paramountcy of such interests in all matters concerning the child.⁴⁸³ In this regard section 28(2) has been referred to as “an extensive guarantee.”⁴⁸⁴ Accordingly, in addition to rights being conferred to everyone in terms of the Constitution, section 28(2) of the Constitution affords children additional protection.⁴⁸⁵

⁴⁸⁰ The Constitution of the Republic of South Africa 1996 was adopted on 8 May 1996 and promulgated on 18 December 1996.

⁴⁸¹ Section 28(1) of the Constitution states that “(1) Every child has the right— (a) to a name and a nationality from birth; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that— (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be— (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age; (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) not to be used directly in armed conflict, and to be protected in times of armed conflict”.

⁴⁸² *M v S (Centre for Child Law as Amicus Curiae 2008 (3) SA (CC) (hereinafter referred to “the M v S case”)* para 26.

⁴⁸³ Heaton *South African Family Law* 276-277.

⁴⁸⁴ *Sonderup v Tondeli and Another 2001 (1) SA 1172(CC)* para 29.

⁴⁸⁵ Heaton *South African Family Law* 271.

4.3.3.2.1 Interpreting Section 28(2) of the Constitution

In analysing the nature of section 28(2) of the Constitution it is noteworthy that the section does not specifically refer to a right as in the case of section 28(1) of the Constitution. Accordingly some courts apply a common law principle rather than a constitutional right when determining the best interest of the child.⁴⁸⁶ In this regard different judicial interpretations of section 28(2) of the Constitution have resulted in different judicial decisions. For example in *Jooste v Botha*⁴⁸⁷ the court concluded that section 28(2) of the Constitution is a constitutional principle that acts as a directive in promoting the best interest of the child.⁴⁸⁸ In contrast it was decided in the case in *Minister of Welfare and Population Development v Fitzpatrick and Others*⁴⁸⁹ that section 28(2) of the Constitution creates a right independent of the rights listed in section 28(1) of the Constitution.⁴⁹⁰ This interpretation was supported in the case of *M v S*⁴⁹¹ when the court had to consider whether the best interest of the child principle as encapsulated in terms of 28(2) of the Constitution is a separate right or whether it is a right in conjunction with section 28(1) of the Constitution.⁴⁹² The court concluded that “the paramountcy principle should be applied in a meaningful manner without unduly obliterating other valuable and constitutionally protected interests.”⁴⁹³ Accordingly the previous interpretation of *Jooste v Botha* was adapted in the *M v S* case when the Constitutional Court held that section 28(2), read with section 28(1) of the Constitution establishes a set of children's rights that the courts are obliged to enforce.⁴⁹⁴ The court went on to clarify the nature of section 28(2) of the Constitution

⁴⁸⁶ Bonthuys 2006 *International Journal of Law, Policy and the Family* 39.

⁴⁸⁷ *Jooste v Botha* 2000 (2) SA 100 (T) (hereinafter referred to as “the *Jooste case*”).

⁴⁸⁸ In *Jooste v Botha* 2002 2 SA 199 (T) 210C it was held that section 28(2) of the Constitution is a general guideline rather than a substantive legal rule.

⁴⁸⁹ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000(3) SA 422 (C) (hereinafter referred to as “the *Fitzpatrick case*”).

⁴⁹⁰ The *Fitzpatrick case* para 17.

⁴⁹¹ *M v S* 2007 (12) BCLR 1312 (CC) (hereinafter referred to as “the *M v S case*”).

⁴⁹² The *M v S case* para 24.

⁴⁹³ The *M v S case* para 25.

⁴⁹⁴ The *M v S case* para 25. See also *Centre for Child Law v Minister for Justice and Constitutional Development and Others (NICRO as Amicus Curiae)* 2009 (11) BCLR 1105 (CC) para 25 where it was concluded that “[A]mongst other things section 28 protects children against undue exercise of authority. The Rights the provision secures are not interpretive guides. They are not merely advisory. They constitute a real restraint on Parliament. And they are an enforceable precept determining how officials and judicial officers should treat children”.

by asserting that the section is not merely a constitutional guideline, but also an enforceable constitutional right.⁴⁹⁵

In addition to the constitutionalisation of the best interest of the child, the use of the word “paramount” in section 28(2) of the Constitution elevates the application of the best interest of a child to a stricter requirement than that provided for in terms of “the” or “a” primary consideration stipulated in the CRC or the African Charter.⁴⁹⁶ Literally speaking section 28(2) of the Constitution affords every child the right that their best interest must be considered and that such interests should be considered as more important (i.e. paramount) but not exclusive to anything else.⁴⁹⁷ The aforesaid interpretation of the paramountcy principle has however been a controversial topic that was interpreted by the courts in various cases.⁴⁹⁸ In this regard the *M v S* case provided some guidance in the application of the paramountcy principle by concluding that the child's best interests do not always outweigh other competing rights.⁴⁹⁹ In this case, the court established that “the best interests of the child” principle can be limited and should not be superior to other constitutional rights.⁵⁰⁰ The court also emphasised the need to develop the common law in a way that protects and advances children's interests.⁵⁰¹ The ruling of the *M v S* case was reaffirmed in *Centre for Child Law v Governing Body of Hoërskool Fochville and Another*⁵⁰² by also adding that “the fact

⁴⁹⁵ The *M v S* case para 12 the court concluded the interests of young children is an independent consideration in the sentencing process. See also *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 SA 363 (CC) paras 24 -25, holding that a mother suing for a contempt order for her ex-husband's failure to provide for maintenance pursuant to a divorce decree had a constitutional claim under the best interest section 28(2).

⁴⁹⁶ Article 3(1) of the CRC requires that the best interest of the child should be of “a primary” consideration, whilst article 4(1) of the African Charter requires the best interest of the child should be “the primary” consideration.

⁴⁹⁷ Heaton 2009 *Journal for Judicial Science* 4. See also the *M v S* case para 25 stating that “[T]he word paramount is emphatic. Coupled with the far-reaching phrase ‘in every matter concerning the child’ and taken literally, it would cover virtually all laws and all forms of public action, since every view would not have a direct or indirect impact on children, and thereby concern them”.

⁴⁹⁸ The *Fitzpatrick* case; *Sonderup v Tondeli and Another* 2001 (1) SA 1172(CC); *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC).

⁴⁹⁹ The *M v S* case para 25.

⁵⁰⁰ The *M v S* case para 26. See also Heaton *South African family Law* 277 for a discussion on the fact that there are no hierarchy of rights.

⁵⁰¹ The *M v S* case para 21. For a discussion on the South African legal approach in applying the best interest of the child principle generally, see Clark 2017 *SALJ* 86-87.

⁵⁰² *Centre for Child Law v Governing Body of Hoërskool Fochville and Another* 2015(4) All SA 572.

that the best interest of the child are paramount do not mean that they are absolute, but a starting point for the balancing of rights.”⁵⁰³

The ambit of section 28(2) of the Constitution is furthermore in respect of “every matter” concerning a child and is not restricted to “all matters” concerning a child as provided for in terms of the Interim Constitution, the Children’s Act as well as the CRC.⁵⁰⁴ Accordingly the determination of what constitutes the best interest of the child has become “a benchmark in the review of all proceedings in which decisions are taken regarding children.”⁵⁰⁵ In addition to the aforesaid, article 3(1) of the CRC specifically states that a child’s best interest shall be considered, as opposed to may be considered, in all actions concerning the child. South Africa, as a signatory of the CRC, is therefore obliged to consider the best interest of the child in every matter concerning the child as part of its responsibilities under the CRC.⁵⁰⁶ The application of “the best interests of the child” principle has accordingly been extended from a principle previously only applied in custody disputes to an application that affects every aspect of a child’s life.⁵⁰⁷

The criteria for determining what constitutes the best interest of the child, the various factors that should be considered (as embedded in terms of section 7(1) of the Children’s Act⁵⁰⁸), the weightings attached to the different factors as well as the approaches adopted by the judiciary in determining the best interest of the child will be discussed in para 4.4 hereunder.

⁵⁰³ *Centre for Child Law v Governing Body of Hoërskool Fochville and Another* 2015(4) All SA 572 (SCA) para 27.

⁵⁰⁴ Section 28(2) of the Constitution as opposed to article 3(1) of the CRC, article 4(1) of the African Charter and section 30(3) of the Interim Constitution requiring that the best interest of the child should be applied to all matters concerning the child. It should be noted that section 9 of the Children’s Act only requires the application of the best interest of the child “In all matters concerning the care, protection and well-being of a child.

⁵⁰⁵ In *Grootboom v Oostenberg Municipality* 2000 3 BCLR (C) 2881.

⁵⁰⁶ Article 3(1) of the CRC states that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

⁵⁰⁷ The best interest of the child was considered in the following cases: In *Centre for Child Law v Minister of Justice and Constitutional Development* 2009(11) BCLR 1105 (CC) the sentencing of a minor was considered whilst the interest of a young child was independently considered as a factor in the sentencing process in the case of *M v S*. In *S v Myburgh* 2007 (1) SACR 11(W) as well as in *S v Kika* 1998(2) SACR 428 (W) the sentencing of a parent that was convicted of a crime was considered. In *S v Mbhokani* 2009 (1) SACR 533 (T) the court gave consideration to the testimony of a minor who was a victim of crime, whilst the education of minors were considered in the case of *Head of Mpumalanga Department of Education v Hoërskool Ermelo* 2010(3) BCLR 177 (CC).

⁵⁰⁸ Children’s Act 38 of 2005 (hereinafter referred to as “the Children’s Act”).

4.3.3.3 The Children's Act 38 of 2005

The Children's Act was signed into law in June 2006.⁵⁰⁹ In terms of section 2(c) of the Children's Act, the Act was promulgated to supplement the constitutional rights bestowed on children as well as give effect to the obligations imposed on South Africa as a signatory of international and national treaties.⁵¹⁰ In giving consideration to the obligations imposed by the treaties, the South African Law Review Commission⁵¹¹ reviewed the Child Care Act.⁵¹² The SALRC designed a list of principles derived from international law as well as from South African common law and case law to guide decision-makers in the implementation of the Children's Act.⁵¹³ The principles recommended by the SALRC⁵¹⁴ were adopted as general guidelines in chapter two of the Children's Act.⁵¹⁵ Some of the guiding principles included that "[a]ny court or any person making any decision or taking any action under this Act in respect of any child must always ensure that such decision or action is in the best interests of the child."⁵¹⁶ The guidelines furthermore provide that "[t]he best interests of a child must be determined having regard to all relevant facts and circumstances affecting the child and having regard to the objects, principles and guidelines set out in this Act, in the

⁵⁰⁹ The Children's Act was assented to on 8 June 2006.

⁵¹⁰ Section 2(b) (iv) of the Children's Act.

⁵¹¹ South African Law Review Committee on project 110, Discussion Paper 103 (hereinafter referred to as "the SALRC").
http://www.justice.gov.za/salrc/dpapers/dp103_exesum_2002.pdf (Date of use: 15 July 2017). For a discussion on the findings and recommendations made by the SALRC see South African Law Commission Discussion Paper 103 on project 110 Review of the Child Care Act, February 2002. <http://salawreform.justice.gov.za/dpapers/dp103.pdf> (Date of use 15 July 2017).

⁵¹² Child Care Act 74 of 1983.

⁵¹³ As the Child Care Act 74 of 1983 did not contain a list of principles to guide decision-makers in the implementation of its provisions the SALRC designed objectives derived from principles contained in international law such as the African Charter on the Rights and Welfare of the Child, from policy documents (such as the IMC's Interim Recommendations for the Transformation of the Child and Youth Care System), from South African common law and case law, as well as from accepted social work practice. S A Law Commission Executive Summary review of the Child Care Act, December 2001 (v)
http://www.justice.gov.za/salrc/dpapers/dp103_exesum_2002.pdf (Date of use: 15 July 2017).

⁵¹⁴ S A Law Commission Executive Summary review of the Child Care Act, December 2001 (v)
http://www.justice.gov.za/salrc/dpapers/dp103_exesum_2002.pdf.

⁵¹⁵ Section 6 of the Children's Act.

⁵¹⁶ S A Law Commission Executive Summary review of the Child Care Act, December 2001 (v)
http://www.justice.gov.za/salrc/dpapers/dp103_exesum_2002.pdf (Date of use: 15 July 2017).

Constitution and in any other law”.⁵¹⁷ A child’s meaningful participation in decision-making is also acknowledged in terms of the recommendations.⁵¹⁸

In terms of section 6(1) of the Children’s Act the Act should be applied in all aspects of legislation relating to a child and consequently provides guidance in the implementation of all actions by any organ of state when it relates to children rights.⁵¹⁹ Section 6 of the Children’s Act therefore establishes a child-centred approach in relation to all matters concerning the child.⁵²⁰ The Children’s Act furthermore mandates that in all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.⁵²¹ The principle is however subject to lawful limitation as provided for in terms of section 36 of the Constitution.⁵²² Section 9 of the Children’s Act furthermore requires that the paramountcy of the child’s best interests must apply in all matters concerning a child’s care, protection and well-being.

In addition to the aforesaid, section 6(2) of the Children’s Act gives recognition to the rights bestowed on children in terms of the Constitution, *inter alia* the right not to be discriminated against,⁵²³ the right to be treated in a fair, equitable manner⁵²⁴ and the right to respect the child’s inherent dignity.⁵²⁵ This section furthermore requires that in all proceedings, actions and decisions concerning the child, the child’s rights as

⁵¹⁷ S A Law Commission Executive Summary review of the Child Care Act, December 2001 (v) http://www.justice.gov.za/salrc/dpapers/dp103_exesum_2002.pdf.

⁵¹⁸ S A Law Commission Executive Summary review of the Child Care Act, December 2001 (v) http://www.justice.gov.za/salrc/dpapers/dp103_exesum_2002.pdf (Date of use: 15 July 2017).

⁵¹⁹ Section 6 of the Children’s Act provides that “(a) [T]he general principles set out in this section guide the implementation of all legislation applicable to children, including this Act; (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general”.

⁵²⁰ Heaton 2009 *Journal for Judicial Science* 3.

⁵²¹ Section 9 of the Children’s Act. It should be noted that the Convention on the Elimination of All Forms of Discrimination Against Women also requires that the best interest of the child should be of paramount importance, whilst article 3(1) of the CRC and article 4 of the African Charter requires that the best interest should be of primary importance.

⁵²² Section 36 of the Constitution provides that “[T]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose”.

⁵²³ Section 6 (2) (d) of the Children’s Act.

⁵²⁴ Section 6(2) (c) of the Children’s Act.

⁵²⁵ Section 6(2) (b) of the Children’s Act.

contained in the Constitution and the Children's Act should be respected, protected and promoted.⁵²⁶

In keeping with the protection of child's rights, as well as in determining the best interests of the child, section 10 of the Act provides that each child that is of such an age and maturity and stage of development as to be able to participate in proceedings, actions or decisions concerning him/her, participate in such process and that such views should be considered in determining the best interests of that child.⁵²⁷ This provision therefore affords a child the right to be heard by expressing his/her views and requires decision makers to give consideration to such viewpoints.

It is noteworthy that despite the Children's Act not defining the best interests of the child, it does provide a list of fourteen factors that must be considered when applying the best interest of the child.⁵²⁸ The factors listed in terms of section 7(1) of the Children's Act will be discussed in para 4.4 hereunder.

4.4. Determining "the Best Interests of the Child"

4.4.1 The Criteria for Determining "the Best Interests of the Child": The Best Interest Standard

"The best interests of the child" is described as "a golden thread that runs through the fabric of law" in all decisions relating to the child.⁵²⁹ Although reference is made to the best interests of the child principle in international and national instruments as well as the Children's Act and the Constitution, the principle is not defined. Consequently some authors question the appropriateness of applying a principle that is vague, ill-defined and susceptible to misuse due to the subjective viewpoints of decisions makers.⁵³⁰ All the same in the *Fitzpatrick* case, Judge Goldstein held that the best

⁵²⁶ Section 6(2) (a) of the Children's Act.

⁵²⁷ Section 10 of the Children's Act. In *Lubbe v De Plessis* 2001 (4) SA 57 (C) it was held that if a child has sufficient maturity as well as intellectual and emotional functioning, the child's preference should be considered by the court. In *Soller v G* 2003 (5) SA 430 (W) the child's preference and viewpoint was considered as the determination factor.

⁵²⁸ Section 7 of the Children's Act.

⁵²⁹ *Petersen v Maintenance Officer and Others* 2004 (2) BCLR 205 (C) para 20.

⁵³⁰ Bekink & Bekink 2004 *de Jure* 21; Clark 2000 *Stellenbosch Law Review* 3.

interest's principle was specifically designed not to be exhaustive so as to allow it to be flexible and adaptable. The principle can be applied to a case based on the particular case's own merits so as to determine the best interest of a specific child as an individual.⁵³¹ In *AD and DD V DW and Others*⁵³² the constitutional court also concluded that "courts were obliged to adopt a flexible approach focussed on what was in the best interest of the particular child in the particular situation."⁵³³

Prior to the promulgation of the Children's Act⁵³⁴ and in the absence of a clear definition as to what constituted the best interests of the child, decision makers had to rely on judicial precedents for guidance.⁵³⁵ The most significant case in which a list of factors was compiled in determining the best interest of the child was *McCall v McCall*.⁵³⁶ The factors listed in this case as well as in the *Martens v Martens*⁵³⁷ case were considered in drafting the best interest standard as encapsulated in section 7(1) of the Children's Act.⁵³⁸ Section 7 consequently provides decision makers with fourteen factors that should be considered, when relevant, as a guide when determining the best interests of the child.⁵³⁹

These factors are:-

- (a) *The nature of the personal relationship between-*
 - (i) *The child and the parents, or any specific parent; and*

⁵³¹ The *Fitzpatrick* case para 18.

⁵³² *AD and DD V DW and Others (The Centre for Child Law (Amicus Curiae) and The Department of Social Development (Intervening Party)* 2008 (4) BCLR 359 (CC).

⁵³³ *AD and DD V DW and Others (The Centre for Child Law (Amicus Curiae) and The Department of Social Development (Intervening Party)* 2008 (4) BCLR 359 (CC) para 12.

⁵³⁴ The Children's Act was affirmed on the 8 June 2006.

⁵³⁵ In *Van Deijl v Van Deijl* 1996 SA 206 (R) the court provided economic, social, moral and religious considerations as well as emotional ties as guidelines to determine the best interest of the child. In *French v French* 1971 4 SA 298 (W) the suitability of the care parents was emphasised in determining what constituted the best interest of the child.

⁵³⁶ *McCall v McCall* 1994 3 SA 201 (C) 204J-205G.

⁵³⁷ *Martens v Martens* 1991 (4) SA 287 (T).

⁵³⁸ Heaton 2009 *Journal for Judicial Science* 8.

⁵³⁹ Section 7(1) of the Children's Act. It should be noted that although section 7(1) of the Children's Act specifically states that the listed factors must be considered when applying the best interest of the child standard, section 6(2)(a) of the Children's Act broadens the application of section 7(1) to all proceedings, actions or decisions concerning a child. For a discussion on the application of section 7 of the Children's Act generally, see Heaton 2009 *Journal for Judicial Science* 8.

- (ii) *The child and any other care-giver or person relevant in those circumstances;*
- (b) *The attitude of the parents, or any specific parent, towards-*
 - (i) *The child; and*
 - (ii) *The exercise of parental responsibilities and rights in respect of the child;*
- (c) *The capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;*
- (d) *The likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-*
 - (i) *Both or either of the parents; or*
 - (ii) *Any brother or sister or other child, or any other care-giver or person, with whom the child has been living;*
- (e) *The practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;*
- (f) *The need for the child-*
 - (i) *To remain in the care of his or her parent, family and extended family; and*
 - (ii) *To maintain a connection with his or her family, extended family, culture or tradition;*
- (g) *The child's-*
 - (i) *Age, maturity and stage of development;*
 - (ii) *Gender;*
 - (iii) *Background; and*
 - (iv) *Any other relevant characteristic of the child;*
- (h) *The child's physical and emotional security and his or her intellectual, emotional, social and cultural development;*
- (i) *Any disability that a child may have;*
- (j) *Any chronic illness from which a child may suffer;*
- (k) *The need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;*
- (l) *The need to protect the child from any physical or psychological harm that may be caused by -*
 - (i) *Subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or*
 - (ii) *Exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;*
- (m) *Any family violence involving the child or a family member of the child; and*
- (n) *Which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.*

In considering the aforesaid factors it is noteworthy that section 7(1) of the Children's Act provides a closed list of fourteen factors that should be considered when

determining the child's best interest. Heaton is however of the view that the exclusion of any other relevant factor from the determination process would result in the decision maker not being able to determine the best interests of the child.⁵⁴⁰ She furthermore submits that it is doubtful whether the omission of a relevant factor, when considering the best interest of the child, would be constitutionally justifiable.⁵⁴¹ Accordingly in determining what constitutes the best interest of a child, the decision makers should not only apply the listed factors of the best interest standard but also any other relevant factor.⁵⁴²

4.4.2 The Application of “the Best Interests of the Child” Principle: An Evaluation

From the aforementioned it is clear that the best interest of the child is applicable in all fields of law.⁵⁴³ Furthermore that section 28(2) requires that the best interest of the child must be of paramount importance⁵⁴⁴ and lastly that the best interest of the child principle applies to “every matter”⁵⁴⁵ concerning a child. Despite the aforesaid the application of the best interest standard is intricate.⁵⁴⁶ As a result of a lack of objective standards for determining the best interests of a child, decision makers have to apply their discretion.⁵⁴⁷ Firestone and Weinstein furthermore comment that applying an adversarial legal system in determining the best interest of the child may further diminish the discretion of the objective decision makers.⁵⁴⁸ This, the fact that decision

⁵⁴⁰ Heaton 2009 *Journal for Judicial Science* 8.

⁵⁴¹ Heaton *South African family Law* 165; Heaton 2009 *Journal for Judicial Science* 3. It is striking that except for sections 7(1) (g) and (h) the remainder of the factors are mostly relevant when determining primary care-giving and contact rights of a child.

⁵⁴² Heaton *South African Family Law* 163-164.

⁵⁴³ Heaton *South African family Law* 276-277. For judicial precedents refer to para 95.

⁵⁴⁴ Section 28 (2) of the Constitution as opposed to Article 3(1) of the CRC requiring that the best interest of the child should be of “a primary” consideration, whilst article 4(1) of the African Charter requires the best interest of the child should be “the primary” consideration and section 9 of the Children’s Act requiring that the best interest of a child is of paramount importance.

⁵⁴⁵ Section 28(2) of the Constitution as opposed to article 3(1) of the CRC, article 4(1) of the African Charter and section 30(1) of the Interim Constitution requiring that the best interest of the child should be applied to all matters concerning the child. It should be noted that section 9 of the Children’s Act only requires the application of the best interest of the child “In all matters concerning the care, protection and well-being of a child”.

⁵⁴⁶ Heaton 2009 *Journal for Judicial Science* 8-9.

⁵⁴⁷ The extents of the judicial discretion granted in terms of section 25(4) of the Marriage Act will be discussed in para 4.5.

⁵⁴⁸ Firestone & Weinstein 2004 *Family Court Review* 203.

makers apply different approaches when defining the best interest of the child, as well as the individualised nature of each child's circumstances, add to a very profound and subjective method of determining the best interest of a child.⁵⁴⁹

As far as the approach applied by the judiciary is concerned, Judge Sachs in the case of *M v S* advocated that a child-centred approach should be adopted by conducting "a close and individualised examination of the precise real-life situation of the particular child involved."⁵⁵⁰ He also expressed that "to apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned."⁵⁵¹ In lieu of the aforesaid it is evident that applying a general approach to a group of minors would in all likelihood infringe on the best interests of an individual child.⁵⁵² Accordingly it can be argued that the best interest of the child can only be determined if a child-centred or individualised approach is applied as opposed to that of a general one-size-fits-all approach.⁵⁵³ In the case of *Nel v Byliefeldt and Another*,⁵⁵⁴ Basson J held that "the best interests standard is problematic in that, it is (i) indeterminate, (ii) members of the legal profession have different perspectives on the concept, (iii) the way in which the criterion is interpreted and applied by different countries and courts is influenced largely by social, political and economic conditions of the country concerned".⁵⁵⁵ However, the Court recognised that the contextual nature and inherent flexibility of section 28 of the Constitution also constitutes the source of its strength.⁵⁵⁶ Indeterminacy of outcome is not a weakness, and each particular factual situation rather than a predetermined formula will determine which factors secure the best interests of the child.⁵⁵⁷ The latter standpoint is supported especially considering that each case must be considered on its own unique circumstances.⁵⁵⁸

⁵⁴⁹ Heaton *South African Family Law* 165 Bonthuys 2006 *International Journal of Law, Policy and the Family* 22.

⁵⁵⁰ The *M v S* case para 24.

⁵⁵¹ *Ibid.*

⁵⁵² Reyneke 2016 *PELJ* 15.

⁵⁵³ For a discussion on the application of a child centered approach in determining the best interest of the child generally, see Reyneke *PELJ* 2016 4; Heaton 2009 *Journal for Judicial Science* 5-6.

⁵⁵⁴ *Nel v Byliefeldt and Another* (27748/2015) [2015] ZAGPPHC 386 (11 May 2015) (hereinafter referred to as "the *Nel* case").

⁵⁵⁵ The *Nel* case para 23.

⁵⁵⁶ The *Nel* case para 24.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Bonthuys 2006 *International Journal of Law, Policy and the Family* 22; Heaton 2009 *Journal*

In the *M v S* case the court further held that in applying a wholly individualised approach to determine a child's best interest it is imperative that the child's viewpoints be considered.⁵⁵⁹ Prior to the Children's Act little weight was placed on the viewpoints of the child.⁵⁶⁰ In *HG v CG*⁵⁶¹ Judge Chetty contended that as a result of section 28(2) of the Constitution children are given the opportunity to participate in any decision affecting him/her and accordingly that the views of the child have to be considered where a child is of an age and level of maturity to make an informed decision.⁵⁶² This judgement is consistent with section 10 of the Children's Act that specifically makes provision that "a child of such an age, maturity and stage of development to understand the nature of the process and the consequences thereof must be given an opportunity to express his/her view."⁵⁶³ This provision consequently allows the child to participate in the decision making process and mandates the decision maker to give due consideration to the viewpoint of the child. This provision is also in line with the CRC.⁵⁶⁴ In addition to section 10 of the Children's Act, section 14 of the Act furthermore provides that "[E]very child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court". Section 28(1) (h) of the Constitution also provides children the specific right "[t]o have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result". The right for a child to have access to court and to participate in matters concerning him/her is accordingly constitutionally protected. As far as the assessment process is concerned, it is evident from the discussion in para 4.3.3.2.1 that the paramountcy of the best interest of the child is not an absolute right but rather a starting point for the

for *Judicial Science* 5.

⁵⁵⁹ The *M v S* case para 24-25.

⁵⁶⁰ *Jackson v Jackson* 2002 (2) SA 303 (SCA). For a discussion on the right of a child to be heard in general, see Clark 2017 SALJ 89.

⁵⁶¹ *HG v CG* 2010 (3) SA 352 (ECP).

⁵⁶² *HG v CG* 2010 (3) SA 352 (ECP) para 6.

⁵⁶³ Section 10 of the Children's Act states that "[E]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration". In *Lubbe v du Plessis* 2001 (4) SA 57 (C) the court held that if a child has sufficient maturity, intellectual and emotional functioning should the court should give serious consideration to the child's preference.

⁵⁶⁴ Article 12 of the CRC. See para 4.3.1.2.

balancing of rights.⁵⁶⁵ This viewpoint was shared in *P v P*⁵⁶⁶ that resolved that the determination process should be based on a “value judgement”. In *De Reuck v Director of Public Prosecutions*⁵⁶⁷ the court furthermore determined that section 28(2) of the Constitution is interrelated and interdependent and accordingly forms a single constitutional value system that cannot veto other fundamental rights contained in the Bill of Rights.⁵⁶⁸ Therefore the paramountcy principle must be balanced with the fundamental rights of other individuals that have a vested interest in the matter, be assessed on proportionality and be applied in a meaningful manner without unduly obliterating other valuable and constitutionally protected interests.⁵⁶⁹

Accordingly, decision makers have to firstly determine the needs of the child by way of an assessment of the relevant factors set out in section 7(1) of the Children’s Act.⁵⁷⁰ In addition to the subjective nature of identifying the relevant factors that may be relevant to a specific case when considering the best interests of the child, they need to attach different weightings to each factor. This process is also susceptible to different interpretations as different courts may apply different weightings to different factors.⁵⁷¹ The relevant factors may also appear to be conflicting especially considering that some courts may interpret the paramount consideration of the child to mean that the child’s interest should take priority.⁵⁷² Accordingly some authors argue that in applying section 7 of the Children’s Act, section 28(2) of the Constitution, should be read with the list of factors to ensure that the best interests of the child is of paramount importance.⁵⁷³

⁵⁶⁵ *Centre for Child Law v Governing Body of Hoërskool Fochville and Another* 2015(4) All SA 572 (SCA) para 27.

⁵⁶⁶ *P v P* 2007 3 All SA 9 (SCA).

⁵⁶⁷ The *M v S* case para 15; *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC).

⁵⁶⁸ *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC) 432A-C. See also *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC); the *M v S* case para 25.

⁵⁶⁹ *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC) 432A-C. See also *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000(3) SA 422 (CC); *Sonderup v Tondeli and Another* 2001 (1) SA 1172(CC); *LS v AT and Another* 2001 (2) BCLR 152 (CC); the *M v S* case para 37.

⁵⁷⁰ For a discussion on the subjective nature of determining the best interest of the child generally, see Salter 2012 *Theoretical Medicine and Bioethics* 186-196.

⁵⁷¹ Lapsatis 2012 *St John’s Law Review* 675. For a discussion on the six versions of the best Interest standard as well as the individualistic and relational models for decision making generally, see Salter 2012 *Theoretical Medicine and Bioethics* 179- 187.

⁵⁷² Lapsatis 2012 *St John’s Law Review* 675-678.

⁵⁷³ Bosman-Sadie and Corrie *A Practical Approach to the Children’s Act*.

In addition to attaching different weightings to different relevant factors, the relevant factors should be balanced against competing interests whilst giving due consideration to the rights of the child and the obligations of public authorities, service providers and caregivers towards the child. Lastly a proportionality assessment must be applied in determining what constitutes the best interest of the child.⁵⁷⁴ The objective of determining the best interest of the child is consequently to find a durable solution by balancing an individual child's circumstances in such a manner so as to make a decision that would safeguard the rights of the child concerned and promote his/her well-being.⁵⁷⁵

Consequently, as a result of the judiciary interpreting section 28(2) of the Constitution differently, as well as the subjective nature of identifying relevant factors in determining the best interest of the child and attaching different weightings to competing interests, the determination of what constitutes the best interest of the child is often unpredictable. At the same time it may be argued that the unpredictability in determining the best interest of the child is not necessarily undesirable as by applying a predetermined formula for the sake of certainty or predictability may be contrary to the best interests of the child.⁵⁷⁶

4.5 The Application of “the Best Interest of the Child” Principle within a South African Marriage Law Framework*

4.5.1 Marriages in terms of the Marriage Act 25 of 1961 and the Recognition of Customary Marriages Act 120 of 1998

As discussed in para 3.2.1.3.1 minors, due to their impaired judgement from mental maturity, have limited capacity to act and are therefore not able to enter into a civil or

* Parts of this paragraph are based on sections of the author's LLM dissertation *The Legal Paradox of the Civil Union Act* (University of South Africa, 2014). The author would like to thank Prof J Heaton for her valuable comments.

⁵⁷⁴ Heaton *South African family Law* 166. See also *S v Makwanyana* 1995 (6) BCLR 665 (CC) and *Hay v B* 2003 (3) SA 492 (W).

⁵⁷⁵ Separated Children in Europe Programme, Statement of Good Practice, 4th Revised Edition, Save the Children, UNHCR, UNICEF, 2009, p. 15.

⁵⁷⁶ The *M v S* case para 24.

customary marriage without obtaining the required written consent.⁵⁷⁷ The requirement of consent in terms of a minor entering into a civil marriage is accordingly regulated in terms of sections 24 and 25 of the Marriage Act 25 of 1961 and section 3 of the Recognition of Customary Marriages Act 120 of 1998 respectively. It should however be noted that in terms of section 3(3)(b) of the latter Act, section 25 of the Marriage Act 25 of 1961 applies in cases where the consent of the parent or legal guardian cannot be obtained in terms of customary marriages.

In terms of the Marriage Act 25 of 1961 a minor who did not obtain the required consent or if the required consent was refused by it by the parents, legal guardians or the Minister of the Children's Court, may approach the High Court for consent.⁵⁷⁸ Consequently in terms of section 25(4) of the Marriage Act 25 of 1961 the High Court in turn will only interfere with parental authority if:-

*“[t]he parent, guardian or commissioner of child welfare in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the Supreme Court of South Africa: Provided that such a judge shall not grant such consent unless he is of the opinion that such refusal of consent by the parent, guardian or commissioner of child welfare is without adequate reason and contrary to the interests of such minor”.*⁵⁷⁹

In interpreting the aforesaid legislation it was decided in *C v T*⁵⁸⁰ that the court has an “unfettered discretion.”⁵⁸¹ Accordingly in deciding whether to grant consent to marry, the main consideration was whether the minor would be prejudiced by a refusal to marry and not necessarily whether the parents' reasons for such refusal were adequate.⁵⁸² Contrary to the aforesaid in *Allcock v Allcock and Another*⁵⁸³ the court concluded that section 25(4) of the Marriage Act 25 of 1961 does not provide a judge

⁵⁷⁷ Section 24(1) of the Marriage Act provides that “[n]o marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing”. It is noteworthy that in terms of section 24(2) of the Marriage Act a divorced or widowed minor who was previously married in terms of a civil or customary marriage attained majority upon entering into the first marriage and therefore does not need to obtain consent in respect of the second civil or customary marriage.

⁵⁷⁸ Section 25(1) of the Marriage Act.

⁵⁷⁹ Section 25(4) of the Marriage Act.

⁵⁸⁰ *C v T* 1965 (2) SA 239 (O).

⁵⁸¹ *Ibid.*

⁵⁸² *Ibid.*

⁵⁸³ *Allcock v Allcock and Another* 1969 (1) SA 427 (N).

“unfretted discretion.”⁵⁸⁴ Accordingly a judge must apply his mind to both requirements and all the circumstances including the superior advantages which the parents will have in such an intimate decision before deriving at a decision as to whether or not to grant consent.⁵⁸⁵

In *B v B and Another*⁵⁸⁶ the court emphasised that the two considerations, namely whether the parents’ refusal was without “adequate reason” as well as whether it is contrary to the interest of the minor to refuse consent, should be considered in conjunction with each other before deriving at a conclusion.⁵⁸⁷ In terms of the aforesaid Judge Milne held that in addition to the aforesaid considerations, the court must also, “having weighed up the reasons for the parental refusal, [and] decide by its own objective standard whether there is sufficient reason to justify such refusal and in doing so it must be of paramount importance whether it will be in the best interest of the minor to allow the minor to marry”.⁵⁸⁸ From the aforesaid it is evident that with a section 25(4) of the Marriage Act 25 of 1961 application, all circumstances must be considered and weighed up against each other whilst considering the best interests of the child as a paramount consideration. In addition it is evident that the court cannot effectively give consideration to such an application without providing a minor an opportunity to express his/her views.⁵⁸⁹

4.5.2 Civil Unions in terms of the Civil Union Act 17 of 2006

4.5.2.1 Differentiation within the South African Marriage Law Framework

⁵⁸⁴ *Allcock v Allcock and Another* 1969 (1) SA 427 (N) p 429.

⁵⁸⁵ The *B* case p 497.

⁵⁸⁶ *B v B and Another* 1983 (1) SA 496 (N) (hereinafter referred to as “the *B* case”).

⁵⁸⁷ The *B* case p 497.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ See also the case of *Lalla v Lalla and Another* 1973 (2) SA 561 (D) where the court referred the dispute for oral evidence after the intended bride applied to the court for consent to marry after the parents refused their consent. On hearing the evidence of the applicant the court held that the parents of the applicant erred in refusing the applicant permission to marry and that it will be in her best interest to allow her to marry. In this case the testimony of the applicant was fundamental in deciding her best interest thereby emphasising the need to afford children an opportunity to express their viewpoint in deriving at a decision.

The Civil Union Act prohibits all minors (regardless of their sexual orientation) from entering into a civil union.⁵⁹⁰ This prohibition does not only disregard section 28(2) of the Constitution by not considering the possibility whether or not it may be in the child's best interest, but also differs from the provisions of the Marriage Act 25 of 1961 as well as the Recognition of Customary Marriages Act 120 of 1998 by outright prohibition.⁵⁹¹

The Marriage Act 25 of 1961 as well as the Recognition of Customary Marriages Act 120 of 1998, allow for a minor may enter into a marriage provided that he or she has obtained the required consent of his or her parents or guardians⁵⁹² and in some cases, the consent of either the presiding officer of a children's court⁵⁹³ or the consent of the Minister.⁵⁹⁴ A minor may therefore enter into a civil or customary marriage but not a civil union. Accordingly one needs to consider whether section 1 of the Civil Union Act which unconditionally restricts marriageable age, is justifiable.

⁵⁹⁰ Section 1 of the Civil Union Act clearly prescribes that the partners to a civil union must be 18 years of age or older. It can therefore be inferred that even if a minor was previously married in terms of the Marriage Act or the Recognition of Customary Marriages Act, and is now single, he or she still may not enter into a civil union. See also paragraph 3.2.1.

⁵⁹¹ Although the Marriage Act and the Recognition of Customary Marriages Act require that a heterosexual couple must both be 18 years of age or older to enter into a marriage, the Acts make provision for a minor to get married. Section 24(1) of the Marriage Act read with section 18(3) (c) of the Children's Act 38 of 2005 (hereinafter referred to as the "Children's Act"), compare section 3(3) and (4) of the Recognition of Customary Marriages Act. For a general discussion of the capacity of minors to enter into a civil marriage, see Heaton *Bill of Rights* paragraph 3C14.2.

⁵⁹² Section 24(1) of the Marriage Act; section 3(3) (a) of the Recognition of Customary Marriages Act read with section 18(3)(c)(i) of the Children's Act. For a general discussion of the consent required for the civil marriage of a minor, see Heaton *South African Family Law* 18-21; Skelton *et al Family Law in South Africa* 36-39. Generally on the consent required in respect of a minor's customary marriage, see Heaton *South African Family Law* 206-207; Skelton *et al Family Law in South Africa* 180-184.

⁵⁹³ Section 25(1) of the Marriage Act and section 3(3) (b) of the Recognition of Customary Marriages Act provide that in certain circumstances where the parent/s or guardian/s consent cannot be obtained, the presiding officer of a children's court can consent to the marriage. Whilst section 25(4) of the Marriage Act provides that the Supreme Court has the authority to grant a minor consent to marry should such consent be refused without adequate reasons.

⁵⁹⁴ Section 26(1) of the Marriage Act provides that a boy below the age of 18 years and a girl below the age of 15 years may not marry without the consent of the Minister of Home Affairs, whilst section 3(4)(a) of the Recognition of Customary Marriages Act provides that the Minister or any authorised officer in the public service may grant written permission to a minor who wishes to enter into a customary marriage, provided such intended marriage is desirable and in the interest of the parties.

4.5.2.2 Section 1 of the Civil Union Act: Disregarding “the Best Interests of the Child” Principle

Section 28(2) of the Constitution stipulates that “[a] child’s best interests are of paramount importance in every matter concerning the child”. As indicated in para 4.4 above, “the best interests of a child” are determined by considering the best interests standard in terms of section 7 of the Children’s Act. Section 7(1) furthermore provides that when determining “the best interests of the child”, the best interest standard of a child should be applied. Accordingly consideration must be given to various personal circumstances surrounding the child. Therefore when applying the best interest standard a child’s age, maturity, and stage of development and any other relevant characteristic of the child⁵⁹⁵ must be taken into consideration. The categorical exclusion of minors from civil unions accordingly ignores “the best interests of a child”, which should be paramount in every matter concerning the child in terms of section 28(2) of the Constitution. The Children’s Act furthermore provides that,

“[s]ubject to any lawful limitation, all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and all other rights and principles as set out in terms of the Children’s Act”.⁵⁹⁶

It can therefore be concluded that categorically banning all minors from entering into a civil union, without first determining the best interests of the child, does not respect, protect, or promote the best interests of the minor. This blatant disregard of a minor child’s best interest can accordingly be regarded as a violation of section 28(2) of the Constitution that provides that “[a] child’s best interests are of paramount importance in every matter concerning the child”. In addition it can also be argued that section 1 of the Civil Union Act violates “the best interests of the child” principle as provided for in terms of section 9 of the Children’s Act.

4.5.2.3 Section 1 of the Civil Union Act: A Violation of a Minor’s Rights to

⁵⁹⁵ Section 7(1) (g) (i) and (iv) of the Children’s Act.

⁵⁹⁶ Section 6(2) (a) of the Children’s Act.

Equality and Dignity?

It can furthermore be argued that the prohibition of a minor from entering into a civil union constitutes an unjustifiable violation of a minor's constitutional rights to equality and dignity. In terms of section 9(1) of the Constitution "[e]veryone is equal before the law and has the right to equal protection by and benefit of the law". Accordingly by prohibiting a minor from entering into a civil union whilst other matrimonial legislation allows for same, amounts to differentiation. In determining whether such differentiation violates section 9(1) of the Constitution, consideration should be given to the guiding principles set out by the Constitutional Court in *Harksen v Lane NO*.⁵⁹⁷ The *Harksen* test requires that one must firstly establish whether a law or conduct differentiates between people or categories of people, and if so, whether such differentiation bears a rational connection to a legitimate governmental purpose.⁵⁹⁸ In this regard it is doubtful whether disallowing minors to enter into a civil union whilst allowing them to enter into a civil or customary marriage, possibly in a desire to promote "traditional family structures", can be regarded as a lawful limitation.

As a result of section 1 of the Civil Union Act a clear differentiation is created between minors who wish to enter into a civil union and minors wanting to enter into civil or customary marriages. It is doubtful, considering that minors are permitted to get married in terms of the Marriage Act and the Recognition of Customary Marriages Act whilst the Civil Union Act prohibits a minor from entering into a civil union, whether the differentiation created by section 1 of the Civil Union Act bears a rational connection between the limitation of fundamental rights and a legitimate governmental purpose.⁵⁹⁹ It can therefore be argued that a minor that wishes to enter into a civil union is not treated equally before the law and does not receive equal protection and benefit of the law and that such prohibition accordingly violates section 9(1) of the Constitution.

In addition to the aforementioned it can be argued that the aforementioned differentiation amounts to unfair discrimination in terms of section 9(3) of the Constitution. In terms of section 1 of the Civil Union Act, the Civil Union Act

⁵⁹⁷ *Harksen v Lane NO* 1998 (1) SA 300 (CC) (hereinafter referred to as the "*Harksen case*").

⁵⁹⁸ Currie and De Waal *The Bill of Rights Handbook* para 9.2.

⁵⁹⁹ Currie and De Waal *The Bill of Rights Handbook* para 7.2.

differentiates on the grounds of age, marital status, and sexual orientation (in the case of same-sex minors). These are all grounds which are automatically presumed to be unfair in terms of section 9(5) of the Constitution.⁶⁰⁰ Once again, in establishing whether such discrimination is indeed unfair, the guidelines as set out by the *Harksen* case must be applied. In establishing the unfairness of the discrimination, the *Harksen* test focuses primarily on the impact the discrimination has on the complainant and others in his or her situation.⁶⁰¹ In this regard, the fact that same-sex minors have no lawful means of entering into a legally recognised relationship perpetuates a sense of inferiority and implies that same-sex minors cannot have their family life acknowledged and protected by law. It can consequently be concluded that section 1 of the Civil Union Act unfairly discriminates against same-sex minors on the grounds of their age and sexual orientation.

In addition to the aforementioned, section 10 of the Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”. The right to dignity includes the right to family life.⁶⁰² The exclusion of minors from the right to enter into a civil union accordingly denies such same-sex couples the right to formalise their relationships by way of civil unions.⁶⁰³ Accordingly a minor wishing to enter into a civil union is deprived of the opportunity to enjoy the same status, entitlements, and responsibilities afforded to minors who enter into a civil or customary marriage. In this regard same-sex minors are particularly deprived of such benefit as heterosexual minors may still choose to enter into a civil or customary marriage.⁶⁰⁴ Automatically prohibiting a minor from entering into a civil union can therefore be regarded as a violation of a minor’s right to dignity.

In considering whether the provisions of section 1 of the Civil Union Act constitute a violation of minors’ rights to equality and dignity, one should contemplate whether such

⁶⁰⁰ Currie and De Waal *The Bill of Rights Handbook* paras 9.3 and 9.4.

⁶⁰¹ The *Harksen* case para 53. See also Currie and De Waal *The Bill of Rights Handbook* para 9.2(b).

⁶⁰² *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 28 where the Constitutional Court held that legislation which significantly impairs the ability of individuals to achieve personal fulfillment in an aspect of life that is of central importance to them will constitute an infringement of the right to dignity.

⁶⁰³ Heaton *South African Family Law* 194.

⁶⁰⁴ For a general discussion of the constitutional arguments regarding the position of same-sex minors, see Van Schalkwyk 2007 *De Jure* 168.

provisions can be justified in terms of section 36 of the Constitution. In justifying the limitation of minors' rights to equality and dignity, the law must firstly be of general application.⁶⁰⁵ Secondly the limitation must be imposed for reasons that are reasonable and justifiable in an open and democratic society based on human dignity and equality.⁶⁰⁶ In comparing the Marriage Act and the Recognition of Customary Marriages Act to the Civil Union Act, it is evident that the Civil Union Act imposes a subjective and absolute constraint on minors from entering into a civil union whilst the former Acts permit minors to marry. Therefore it can be concluded that the Civil Union Act is not a law of general application especially considering the South African matrimonial legislation framework. Even if consideration is given to Sinclair's assumptions that the exclusion of minors from entering into civil unions may have been based on a "mistaken inconsistency or on a moral basis",⁶⁰⁷ such reasons cannot be considered as reasonable and justifiable to impose a limitation on minors' rights to equality and dignity. Accordingly the exclusion of minors from entering into civil unions cannot be justifiable in terms of section 36 of the Constitution and is therefore an unjustifiable violation of minors' rights to equality and dignity.⁶⁰⁸

4.5.2.4 Section 1 of the Civil Union Act: A Violation of International and National Instruments

The provisions of the CRC as well as the African Charter were discussed under para 4.3. In terms of the CRC as well as the African Charter a child's best interest must receive primary consideration in all matters concerning the child.⁶⁰⁹ In addition to the aforesaid section 28(2) of the Constitution, as well as section 9 of the Children's Act, require that a child's best interest must be given paramount consideration in all matters concerning the child. In so doing section 28(1)(h) of the Constitution, as well as section 10 of the Children's Act, require that a child that is of a mature age and stage of

⁶⁰⁵ Section 36 of the Constitution.

⁶⁰⁶ *Ibid.*

⁶⁰⁷ Sinclair 2008 *International Survey of Family Law* 408.

⁶⁰⁸ For a discussion of the best interest of the minor and the violation of a minor's right to enter into a civil union, see De Ru 2010 *THRHR* 560-562.

⁶⁰⁹ Article 3(1) of the CRC and article 4(1) of the African Charter.

development, should be afforded the opportunity to express his/her views and that such views should be given consideration.⁶¹⁰

Section 1 of the Civil Union Act categorically prohibits all minor from entering into a civil union.⁶¹¹ Therefore a minor cannot enter into a civil union even if the parents or legal guardians of the minor consents to such union. Accordingly section 1 of the Civil Union Act does not underpin the application of “the best interests of the child” principle.⁶¹² It is therefore evident that section 1 of the Civil Union Act is in violation of article 3(1) of the CRC, article 4(1) of the African Charter as well as section 28(2) of the Constitution of South Africa and section 9 of the Children’s Act.

It can furthermore be argued that the categorical prohibition of minors to enter into civil unions is also in conflict with the International Convention on Consent to Marriage, Minimum Age for Marriages, and Registration of Marriage of 1962.⁶¹³ In this regard section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights, international law must be considered. South Africa became a signatory of the aforementioned Convention in 1993, thereby undertaking to integrate legislative measures that specify a minimum age for marriage but allow a “competent authority” to “grant a dispensation as to age, for serious reasons, in the interest of the intending spouses”.⁶¹⁴ In terms of the provisions of the Convention a minor’s interests must be considered prior to setting an age requirement. It is evident from the abovementioned discussion that section 1 of the Civil Union Act, that categorically ban all minors from entering into a civil union, does not consider minor’s interests. Accordingly it can be concluded that section 1 of the Civil Union Act is in conflict with the Convention.

Finally it can be contended that restricting civil unions to adults, results in a new form of marginalisation⁶¹⁵ and that section 1 of the Civil Union Act is therefore in conflict with the judgment in the *Fourie* case. In terms of the *Fourie* case it was held that “the remedy in its context and application must provide equal protection and must not

⁶¹⁰ See paras 4.3.3.2.1 and 4.3.3.3 respectively.

⁶¹¹ See also paragraph 3.2.1.2.

⁶¹² See also paragraph 3.2.1.2.1.

⁶¹³ The International Convention on Consent to Marriage, Minimum Age for Marriages and Registration of Marriage of 1962 (hereinafter referred to as the “Convention”).

⁶¹⁴ Article 2 of the Convention.

⁶¹⁵ De Ru 2010 *THRHR* 563.

create new forms of marginalisation”.⁶¹⁶ Considering the aforementioned as well as the Constitutional demand that all laws and conduct be consistent with the provisions of the Bill of Rights, and that any inconsistency (law or conduct) with the Constitution be declared invalid to the extent of the inconsistency,⁶¹⁷ it is submitted that section 1 of the Civil Union Act fosters inequality and discrimination and should accordingly be declared invalid as far as it prohibits minors from entering into civil union.⁶¹⁸

4.6 Summary and Conclusion

In terms of section 28(2) of the Constitution “the best interests of the child” principle must be applied in every matter concerning the child. It is furthermore evident from the afore-going discussion that a child’s best interest must be given paramount consideration in every matter concerning the child. In establishing the same, an integral part of determining the best interest of the child is to afford the child (that is capable of forming a viewpoint) the opportunity to express his/ her viewpoints. These common goals are also reflected in terms of international and national instruments governing children’s rights. As a signatory of the CRC South Africa has not only constitutionalised children’s rights in terms of section 28 of the Constitution but also promulgated legislation in support of protecting such children’s rights.

It is therefore striking that section 1 of the Civil Union Act categorically excludes all minors from entering into a civil union without giving any consideration to “the best interests of the child” principle. Accordingly, section 1 of the Civil Union Act is not only in violation of section 28(2) of the Constitution and section 9 of the Children’s Act but also does not conform to article 3(1) of the CRC nor article 4(1) of the African Charter that dictates that the best interest of the child must be of primary consideration in all matters concerning the child. Article 12 of the CRC as well as 4(2) of the African Charter is furthermore disregarded as the Civil Union Act does not afford a minor child the opportunity to express his/her viewpoints.

⁶¹⁶ *Fourie* case paras 150 and 152.

⁶¹⁷ Section 172(1) (a) of the Constitution.

⁶¹⁸ For a discussion of the best interest of the minor and the violation of a minor’s right to enter into a civil union, see De Ru 2010 *THRHR* 560-562.

In addition to section 1 of the Civil Union Act disregarding “the best interests of the child” principle the various matrimonial legislation presently regulating marriages in South Africa result in differentiation. In this regard same-sex minors are particularly prejudiced as heterosexual minors may still exercise the option to enter into a civil or customary marriage in terms of the Marriage Act and the Recognition of Customary Marriages Act respectively. This differentiation has been shown to violate minors’ (and in particular same-sex minors) rights to equality and dignity.

The next chapter will consider alternative marital systems by conducting a historical and comparative analysis of the South African, Dutch and Canadian marriage systems. In this regard the comparative research method may offer an alternative workable strategy for South Africa matrimonial law.

CHAPTER 5

THE ASSIMILATION OF SOUTH AFRICAN MARRIAGE LEGISLATION: A COMPARATIVE ANALYSIS

5.1 Introduction

In chapter three the current legislative framework regulating marriages in South Africa was analysed. From the chapter it was evident that the Civil Union Act was promulgated as a result of a Constitutional Court ruling in terms whereof the legislator was required to promulgate remedial legislation to address the unconstitutionality of section 30(1) of the Marriage Act as well as the traditional definition of marriage. The analysis showed that the categorical exclusion of minors from entering into a civil union differs from the Marriage Act as well as the Recognition of Customary Marriages Act, as the latter Acts make provision for minors to enter into a marriage provided they obtain the required consent. The impact the aforesaid differentiation has on minors' rights to equality and dignity as well as the inadvertency of applying the "the best interests of the child" principle in terms of civil unions was analysed in chapter four.

Considering the differentiation and inequality resulting from the application of three different statutes regulating marriages in South Africa and in particular civil marriages being regulated by the Marriage Act and the Civil Union Act, it is important, when proposing law reform, to consider marriage law systems that have been challenged with similar circumstances as that of South Africa. Consequently, as other African countries do not permit same-sex marriages,⁶¹⁹ a comparative analysis will be conducted between South African marriage legislation and that of the Dutch and Canadian law systems.⁶²⁰ In this regard South Africa,⁶²¹ as in the case of the

⁶¹⁹ See also paragraph 5.2.

⁶²⁰ The analyses will exclude Quebec as Quebec is based on the civil law system whilst the remainder of Canada is based on the common law system. The World Factbook www.cia.gov/library/publications (Date of use: 10 January 2017).

⁶²¹ South Africa became a signatory of the CRC on 29 January 1993 whilst the ratification date

Netherlands⁶²² and Canada⁶²³ are signatories of the CRC and accordingly obliged to ensure that children are not discriminated against,⁶²⁴ that the best interest of the child shall be a primary concern in all actions concerning children⁶²⁵ as well as ensure that the child's view is considered in respect of judicial and administrative proceedings.⁶²⁶

In addition to the Dutch marriage system being the first to recognise the need for a gender-neutral marriage system, the historical link that South African law shares with the Netherlands, make the Dutch marriage law system an appropriate sounding board to consider alternative approaches. The Dutch Constitution, unlike the South African and Canadian Constitution, does not permit judicial review and accordingly the Dutch judiciary is disinclined to review legislation. Consequently, in addition to analysing the approach to marital law reform adopted by the Dutch, the impact judicial reviews has had on the promulgation of a gender-neutral marriage law system in Canada will also be considered. A comparison will be drawn accordingly between two different approaches to marriage law reform. The approach adopted by the Dutch, in terms whereof law reform took place by way of judicial process, and secondly the approach adopted by Canada in terms whereof marriage law reform took place by way of specific judicial review declaring the exclusion of same-sex couples from marriage as unconstitutional.

The chapter will accordingly include a concise overview of the legislation that regulates Dutch and Canadian marriages as well as the most profound influences that have led to the development of the Dutch and Canadian gender-neutral marriage law legislations. The various forms of interpersonal relationships recognised in the Netherlands as well as Canada will be mentioned briefly. Throughout the analysis, the

was 16 June 1995. Signatories of the CRC
http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRC (Date of use: 15 October 2017).

622 The Netherlands became a signatory of the CRC on 26 January 1990 whilst the ratification date was 6 February 1995. Signatories of the CRC
http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRC (Date of use: 15 October 2017).

623 Canada became a signatory of the CRC on 28 May 1990 whilst the ratification date was In 1991. Signatories of the CRC
http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRC (Date of use: 15 October 2017).

624 Article 2 of the CRC.

625 Article 3 of the CRC.

626 Article 12 of the CRC.

focus will however be on the legal position of minors wishing to enter into a marriage or institution akin to that of a marriage. Ultimately, the chapter evaluates whether a single defined system that allows for a gender-neutral marriage, such as in the case of the latter two systems, would not have been a better alternative to the promulgation of a separate Act to govern same-sex marriages that inherently violates “the best interests of the child” principle as well as minors’ rights to equality and dignity.

5.2 The Position in Africa

Despite some countries in Africa having promulgated anti-discrimination laws concerning sexual orientation and allowing homosexuality,⁶²⁷ many African countries still outlaw homosexuality⁶²⁸ as it is viewed by several African leaders as foreign to the African culture.⁶²⁹ In addition to cultural beliefs, many African countries oppose same-

⁶²⁷ Benin, Burkina Faso, Cape Verde (2004), Central African Republic, Chad, Congo, Côte d’Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Gabon, Guinea-Bissau (1993), Lesotho, Madagascar, Mali, Mozambique, Niger, Rwanda, São Tomé & Príncipe and Seychelles (2016). For a list of countries that have promulgated anti-discrimination laws based on sexual orientation see, Laws on Homosexuality in African Nations <https://www.loc.gov/law/help/criminal-laws-on-homosexuality/homosexuality-laws-in-african-nations.pdf> (Date of use: 5 October 2017).

⁶²⁸ Algeria, Angola, Botswana, Burundi, Cameroon, Comoros, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Malawi, Mauritania, Mauritius, Morocco, Namibia, Nigeria, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe. For a list of countries that outlaw homosexuality see, Laws on Homosexuality in African Nations <https://www.loc.gov/law/help/criminal-laws-on-homosexuality/homosexuality-laws-in-african-nations.pdf> (Date of use: 5 October 2017). In terms of article 29 of the Burundian Constitution, 2005 a “Marriage between two people of the same sex is prohibited”. Section 1 of the Nigeria: Same-sex Marriage (Prohibition) Act, 2013 prohibits same-sex marriages whilst section 5 imposes a penalty of fourteen years imprisonment if a person is convicted of entering into a same-sex marriage. It should also be noted that although Uganda’s Anti Homosexuality Act, 2014 was ruled invalid on a technical aspect by the Constitutional Court of Uganda, the Act do provide that life imprisonment be imposed on a person that is convicted of a homosexual offence.

⁶²⁹ Amnesty International Facts and Figures https://www.amnestyusa.org/files/making_love_a_crime_-_facts_figures.pdf (Date of use: 17 October 2017). For a discussion on the influence different cultural beliefs and religions may have on the social and morality viewpoints relating to homosexuality generally, see Finke & Adamczyk <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4119762/> (Date of use: 5 October 2017).

sex marriages on the basis of religion.⁶³⁰ Countries such as Sudan⁶³¹, Southern Somalia, certain northern states in Nigeria⁶³² and Mauritania,⁶³³ which are predominantly Islamic, condemn homosexuality by death.⁶³⁴ The majority of African countries therefore still regard marriage as a union between heterosexual people.⁶³⁵ It should be noted that although Melilla and Ceuta⁶³⁶ as well as Mayotte⁶³⁷ permit same-sex marriages, these countries are foreign territories of Africa and accordingly fall under Spanish and French law respectively.⁶³⁸ South Africa is accordingly the only country in Africa that legally recognises same-sex marriages.⁶³⁹ Accordingly, as African countries do not recognise same-sex marriages, the South African marriage law system will be compared to that of the Dutch and Canadian marriage law systems.

⁶³⁰ For a discussion on the Christian and non-Judeo Christian viewpoints in respect of homosexuality as well as the influence personal religious beliefs may have on disapproving attitudes about homosexuality generally, see Adamczyk & Pitt <http://www.sciencedirect.com/science/article/pii/S0049089X09000039> (Date of use: 17 October 2017).

⁶³¹ In Sudan the death penalty is imposed for same-sex sexual behaviour codified under Sharia and implemented countrywide. For a discussion on punitive responses to same-sex sexual relations under Sharia codes, see Rehman & Polymenopoulou 2013 *Fordham International Law Journal* 2-35.

⁶³² In twelve northern states of Nigeria and the southern parts of Somalia the death penalty for same-sex sexual behavior is implemented provincially. Laws on Homosexuality in African Nations <https://www.loc.gov/law/help/criminal-laws-on-homosexuality/homosexuality-laws-in-african-nations.pdf> (Date of use: 5 October 2017).

⁶³³ In Mauritania the death penalty for same-sex sexual behaviour is codified under Sharia but not known to be implemented for same-sex behaviour specifically. Laws on Homosexuality in African Nations <https://www.loc.gov/law/help/criminal-laws-on-homosexuality/homosexuality-laws-in-african-nations.pdf> (Date of use: 5 October 2017).

⁶³⁴ Amnesty International Facts and Figures https://www.amnestyusa.org/files/making_love_a_crime_-_facts_figures.pdf (Date of use: 17 October 2017).

⁶³⁵ *Ibid.*

⁶³⁶ Melilla and Ceuta are autonomous cities of Spain. In terms of Spanish law all anti-gay discrimination is banned. Same-sex marriages have been legally recognised in Melilla and Ceuta since 2005. Mayotte is an overseas department of France. According to French law all anti-gay discrimination is banned whilst same-sex marriages have been legalised since 2013.

⁶³⁷ Mayotte is an overseas department of France. According to French law all anti-gay discrimination is banned whilst same-sex marriages have been legalised since 2013.

⁶³⁸ Laws on Homosexuality in African Nations <https://www.loc.gov/law/help/criminal-laws-on-homosexuality/homosexuality-laws-in-african-nations.pdf> (Date of use: 5 October 2017).

⁶³⁹ Laws on Homosexuality in African Nations <https://www.loc.gov/law/help/criminal-laws-on-homosexuality/homosexuality-laws-in-african-nations.pdf> (Date of use: 5 October 2017). It should however be noted that non-sexual same-sex marriages amongst woman are allowed amongst certain ethnic groups in Kenya, Nigeria and south Sudan especially in cases where a women is childless; Amnesty International Facts and Figures https://www.amnestyusa.org/files/making_love_a_crime_-_facts_figures.pdf (Date of use: 17 October 2017).

5.3 The Dutch Marriage Law Framework*

5.3.1 Overview of the Development of Dutch Marriage Law

The Netherlands has a constitutional monarchy and a civil law legal system.⁶⁴⁰ As a result of “small changes”⁶⁴¹ to legislative development⁶⁴² as well as the liberal social structure of the Netherlands,⁶⁴³ the Netherlands became the first country to legally recognise same-sex marriages by adopting legislation that provides for a gender-neutral marriage law system.⁶⁴⁴

Prior to the recognition of same-sex marriages, a marriage was regarded as a monogamous union between a man and a woman that were both eighteen years of age or older.⁶⁴⁵ The inclusion of the words “on any other grounds whatsoever” in terms of article 1 of the Dutch Constitution⁶⁴⁶ resulted in homosexuality becoming a prohibited ground of discrimination. During 1990, two cases were brought before the Dutch judiciary that challenged the possible legal recognition of same-sex marriages in the Netherlands.⁶⁴⁷ The basis on which the matters were brought before the judiciary

* Parts of paragraph 5.3 are based on sections of the author’s LLM dissertation *The Legal Paradox of the Civil Union Act* (University of South Africa, 2014). The author would like to thank Prof J Heaton for her valuable comments.

⁶⁴⁰ A civil law system’s main principles are codified which serves as the primary source of law. South African Law Reform Commission Discussion Paper 104 project 118 <http://www.justice.gov.za/salrc/dpapers/dp104.pdf> (Date of use: 17 October 2017).

⁶⁴¹ For a discussion on the “small change” theory suggesting that by steadily moving a country towards full recognition of same-sex couples’ rights, legislation regarding same-sex persons is developed by either perceiving change to be small or sufficiently reduced in impact, see Waaldijk *Small change* 437-440.

⁶⁴² For a general discussion on the sequence of legislative developments in the Netherlands that led to the legalisation of same-sex marriages, see Waaldijk 2000 *Canadian Journal of Family Law* 62; Sumner 2002 *Maastricht Journal of European and Comparative Law* 31-33.

⁶⁴³ Generally on the various social characteristics of the Netherlands *inter alia* being the most gay/lesbian-friendly country, being a secular state and having a firm tradition of supporting minority groups, see Waaldijk *Small change* 438-439.

⁶⁴⁴ Same-sex marriages were legally recognised in the Netherlands on 1 April 2001.

⁶⁴⁵ South African Law Reform Commission Discussion Paper 104 project 118 <http://www.justice.gov.za/salrc/dpapers/dp104.pdf> (Date of use: 17 October 2017).

⁶⁴⁶ Article 1 of the Dutch Constitution provides that “[a]ll persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted”.

⁶⁴⁷ Rb Amsterdam 13 February 1990 (1990) *NJCM* 456-460 and Hoge Raad (Dutch Supreme Court) 19 October 1990, *NJ* 1992, 129. In these cases the courts had to consider whether article 30 of the *Burgerlijk Wetboek* 1992 (hereinafter referred to as the “Dutch Civil Code”) could be interpreted to include same-sex couples and, secondly, whether the exclusion of same-sex couples from getting married may constitute an infringement on certain individual rights and therefore discriminate against same-sex couples. For a discussion of the legal issues

was twofold. It was firstly argued that article 30 of the *Burgerlijk Wetboek*⁶⁴⁸ was not gender specific and that same-sex marriages could therefore be solemnised in terms of the existing legislation.⁶⁴⁹ As same-sex couples were not allowed to enter into a marriage, the second argument was based on inequality and discrimination.⁶⁵⁰ Although the first argument was not upheld by either the District Court of Amsterdam or the Dutch Supreme Court,⁶⁵¹ the Dutch Supreme Court made no ruling as to whether the denial of certain individual rights to same-sex couples was discriminatory.⁶⁵² Unlike the South African law system allowing for judicial review of statutes, the Dutch Supreme Court was of the view that the judiciary did not have the *locus standi* to remedy claims of inequality and inferred that Parliament should address the issue by way of legislation.⁶⁵³ As a result of the aforesaid and growing social pressures the legislator formed the First Kortmann Commission to investigate whether the denial of same-sex couples from entering into a marriage constitutes discrimination.⁶⁵⁴ The Commission recommended that a registration system for same-sex and heterosexual couples be established outside of marriage.⁶⁵⁵ The registration system would provide for the establishment of an institution, in addition to marriage, that would provide same-sex couples similar rights and duties to those afforded to married heterosexual couples.⁶⁵⁶ Notwithstanding the first 1994 Partnership Bill⁶⁵⁷ excluding heterosexual couples,⁶⁵⁸ the Act on Registered Partnerships⁶⁵⁹ resulted in

that the courts had to decide, see Maxwell 2001 *Arizona Journal of International and Comparative Law* 142-148.

648 Article 30 of the *Burgerlijk Wetboek* states that “*De wet beschouwt het huwelijk alleen in zijn burgerlijke betrekkingen*”.

649 Maxwell 2001 *Arizona Journal of International and Comparative Law* 142-148.

650 *Ibid.*

651 In HR 19 October 1990, NJ 1992, 129 it was held that “*een huwelijk tussen personen van hetzelfde geslacht niet mogelijk is*”.

652 Maxwell 2001 *Arizona Journal of International and Comparative Law* 142-148.

653 Article 120 of the Constitution of the Kingdom of the Netherlands 2008 provides that “[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts”. In contrast section 172(1) of the Constitution allows for judicial review to determine the constitutionality of legislation.

654 Curry-Sumner www.cjcl.org/111/art111-8.doc (Date of use: 15 October 2017); Boele Woelki *Registered partnership* 51-52.

655 *Leefvormen* (Lifestyles) was published by the First Kortmann Committee on 20 December 1991. For a general discussion on the two proposed schemes suggested by the First Kortmann Committee, see Curry-Sumner www.cjcl.org/111/art111-8.doc (Date of use: 15 October 2017).

656 Boele Woelki *Registered partnership* 51-52.

657 Bill no 23761.

658 *Kamerstukken II* 1993-1994, 23, 761 no 3, 2.

659 Act of 5 July 1997, *Staatsblad*, 1997, 324, “*Wet van 5 juli 1997 tot wijziging van Boek 1 van het Burgerlijk Wetboek en van het Wetboek van Burgerlijk Rechtsvordering in verband met opnemings daarin van bepalingen voor het geregistreerd partnerschap*” (hereinafter referred to as the “Act on Registered Partnerships”). Book 1 of the Dutch Civil Code was supplemented by

the creation of a new institution akin to marriage applicable to both same-sex and heterosexual couples.⁶⁶⁰ Despite registered partnerships having similar consequences to those of a Dutch marriage,⁶⁶¹ marriages were reserved for heterosexual couples. The mere fact that Dutch heterosexual couples could choose between a marriage and a registered partnership was indicative of the institutions having different social status.⁶⁶² Consequently registered partnerships did not receive the same social status to that of a Dutch marriage.⁶⁶³ Accordingly the promulgation of the Act on Registered Partnerships resulted in a dual system that permitted heterosexual couples a choice between either entering into a Dutch marriage or a registered partnership, whilst same-sex couples were not afforded such a choice.⁶⁶⁴ As a result of the aforementioned, registered partnerships were regarded as a second-class form of marriage.⁶⁶⁵ The similarity between the aforementioned and the dual but separate Acts applied in terms of South African marriage law is strikingly similar to that raised in chapter three of the study.⁶⁶⁶

In April 1996, a non-binding resolution⁶⁶⁷ was adopted in terms whereof “full equality”⁶⁶⁸ in terms of same-sex couples and marital legislation was demanded. The resolution was as a result of an increase in social⁶⁶⁹ and political pressure⁶⁷⁰ in the

adding Chapter 5a entitled “Registered partnership”. In terms of article 1:80 of the Dutch Civil Code, “[e]en person kan tegelijkertijd slechts met een andere person van hetzelfde of andere geslacht een geregistreerd patnerschap aangaan.”

⁶⁶⁰ For a discussion on the arguments that led to heterosexual couples being included in the Act on Registered Partnerships, see Waaldijk 2004 *NELR* 572. See *Kamerstukken II* 1994-1995, 22, 700 no. 5 in respect of the controversial memorandum that led to the amendment of the Partnership Bill to include heterosexual couples and to be aligned with the formalities and consequences of a Dutch marriage.

⁶⁶¹ For a general discussion on the differences between a registered partnership and a marriage, see Sumner 2002 *Maastricht Journal of European and Comparative Law* 35-36.

⁶⁶² Sumner 2002 *Maastricht Journal of European and Comparative Law* 35-38.

⁶⁶³ Waaldijk *Small change* 447.

⁶⁶⁴ Boele Woelki *Registered partnership* 45.

⁶⁶⁵ *Kamerstukken, II*, 1994-1995, 22,700 no 5, 5; *Kamerstukken, II*, 1995-1996, 23,761 no 7, 10.

⁶⁶⁶ See also paragraph 3.2.1.3 for a general discussion. For a discussion of the second-class status of same-sex couples who enter into a civil union, see Bilchitz and Judge 2007 *SAJHR* 478-486; De Vos and Barnard 2007 *SALJ* 824-826; Barnard 2007 *SAJHR* 522-525; De Ru 2010 *THRHR* 564-565.

⁶⁶⁷ Parliamentary Papers 1995/96, 22700/18 (replacing 22700/9); proposed by Ms Van der Burg (from the labour party) and Mr. Dittrich (from the Democratic Party); adopted on 16 April 1996.

⁶⁶⁸ For a general discussion on the meaning of “full equality”, see Waaldijk 1994 *Australasian Gay & Lesbian Law Journal* 50.

⁶⁶⁹ For a general discussion on the “normalization of homosexuality” and the Dutch public opinion supporting same-sex marriages, see Theiss *Same-sex Marriage* 34-36.

⁶⁷⁰ The majority of political parties were in favour of same-sex marriages. For a discussion on the Dutch political culture based on the idea of sexual practice being regarded as a private matter

Netherlands.⁶⁷¹ As a result of this resolution, the Second Kortmann Committee was established. The committee recommended that, in addition to marriage, provision should be made for same-sex couples to marry either by way of a registered partnership or an institution akin to that of a marriage.⁶⁷² It is noteworthy that the Second Kortmann Committee definitively recommended that no more than two marital institutions should co-exist in terms of Dutch marriage legislation. Notwithstanding the aforementioned some Committee members emphasised three core categories of opposition to the recommendation, namely the principle of equality, the impact it would have on the social understanding of marriage and the repercussions of same-sex marriages in terms of international laws.⁶⁷³

The majority group⁶⁷⁴ recognised the developing nature of marriage and emphasised that the principle of equality is more important than all other issues.⁶⁷⁵ Acknowledging that marriage is defined in terms of religious terms,⁶⁷⁶ as well as recognising the right to freedom of religion, they contended that same-sex marriages were a civil rights issue and therefore an issue of equality.⁶⁷⁷ Accordingly, the majority's position was that same-sex couples can only be treated equally if they were allowed to enter into a marriage, despite the fact that they are unable to reproduce. In turn, the minority group was of the view that as same-sex couples cannot reproduce, the equality principle is not an obstacle as same-sex couples are not equal to heterosexual couples.⁶⁷⁸ In addition to the aforesaid, the minority group also argued that same-sex marriages would have a destructive effect on heterosexual marriages and family life.⁶⁷⁹ Accordingly the minority group was in favour of restricting the institution of marriage to

and the "de-pillarisation" of society allowing for an integrated society with no clear political majority, see Theiss *Same-sex Marriage* 12.

⁶⁷¹ *Kamerstukken, II*, 1995-1996, 22,700 nos 18 and 14; *Handelingen, II*, 1995-1996, 4883-4884.

⁶⁷² Kortmann Commission, *Commissie inzake openstelling van het burgerlijk huwelijk voor personen van hetzelfde geslacht*, The Hague: Ministry of Justice 1997, 17-21, Chapter 4.

⁶⁷³ *Ibid.*

⁶⁷⁴ Majority was obtained by agreeing that the presumed paternity of a spouse should not apply in the case of two women, but that both women would automatically obtain joint authority over a child born from a married lesbian couple. The committee thereby reduced the number of issues involved in the debate about same-sex marriages.

⁶⁷⁵ For a general discussion on the recommendations of the Second Kortmann Commission, see Curry-Sumner <http://papers.ssrn.com/sol3/papers.cfm> (Date of use: 15 October 2017).

⁶⁷⁶ Article 6 of the Dutch Constitution provides that "[e]veryone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law".

⁶⁷⁷ Theiss *Same-sex Marriage* 30-38.

⁶⁷⁸ Curry-Sumner www.cjcl.org/111/art111-8.doc (Date of use: 15 October 2017).

⁶⁷⁹ *Ibid.*

heterosexual couples.⁶⁸⁰ As far as the possible repercussions of same-sex marriages could have on international law, the majority group claimed that the legal acknowledgment of same-sex marriages could have a progressive effect in terms of worldwide recognition.⁶⁸¹

Despite the minority group's opposition, it is important to note that the Netherlands is a secular state and that there is accordingly little religious affiliation. Consequently only a small minority of the Dutch population was opposed to same-sex marriages.⁶⁸² The aforesaid is of great significance, as religion was not, as in the case of South Africa, a barrier in passing same-sex marriage legislation in the Netherlands.⁶⁸³

In considering the recommendations of the Second Kortmann Committee, the Dutch Government refused to extend same-sex couples the right to marriage during the February 1998 elections.⁶⁸⁴ The rationale for the refusal to extend marriage to same-sex couples was based on the fact that they were of the view that same-sex couples have been extended virtual equality of rights by the promulgation of legislation permitting registered partnerships.⁶⁸⁵ Subsequent to the 1998 elections the same alliance remained in power. During the negotiations for a new cabinet another resolution demanding the introduction of a same-sex marriage bill was tabled.⁶⁸⁶ Despite the Christian Democrats opposing the bill, the Act Opening Marriage to Same-Sex Couples of 21 December 2000⁶⁸⁷ came into operation on 1 April 2001. The Dutch managed to retain one marital institution by amending Article 1:30 of Book 1 of the Dutch Civil Code to allow for two people of the same or opposite sex to conclude a marriage. Accordingly the Dutch managed to achieve full equality for same-sex couples wishing to get married by enacting gender-neutral legislation.

⁶⁸⁰ *Ibid.*

⁶⁸¹ Curry-Sumner www.cjcl.org/111/art111-8.doc (Date of use: 15 October 2017).

⁶⁸² Theiss *Same-sex Marriage* 33, 37-38.

⁶⁸³ Theiss *Same-sex Marriage* 33, 37-38 as well as paragraph 2.3.5.

⁶⁸⁴ *NRC Handelsblad*, (07.02.1993), 3.

⁶⁸⁵ Waaldijk *Small changes* 448.

⁶⁸⁶ *Kamerstukken, II*, 1997-1998, 22,700 nos 26 and 27; *Handelingen, II*, 1997-1998, 5642-5643.

⁶⁸⁷ Act of 21 December 2000, *Staatsblad*, 2001, 9, *Wet van 21 December 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met openstelling huwelijk* (hereinafter referred to as the "Act Opening Marriage to Same-Sex Couples"). Article 1:30(1) of the Dutch Civil Code was amended by inserting article 1:30(1) into article 30. Article 1:30(1) provides that "[e]en huwelijk kan worden aangegaan door twee personen van verschillend of van gelijk geslacht".

From the aforesaid the following is noteworthy for purposes of the analyses. Firstly, that the Dutch Constitution prohibited discrimination “on any other ground” and this therefore included sexual orientation. Secondly that as the Dutch legal system is based on civil law, as well as the fact that the Dutch Constitution does not provide for judicial review of acts, court challenges in terms of marriage law have been mostly unsuccessful.⁶⁸⁸ As a result of the aforesaid, the development of Dutch marriage legislation and in particular a gender-neutral marital system has taken place by way of Parliamentary procedures.⁶⁸⁹ Thirdly that the legislative processes that led to the development of Dutch marriage law took place by way of “small changes” over a period of time.⁶⁹⁰ Furthermore, that the Legislator played an active role in the development of Dutch marital legislation.⁶⁹¹ Lastly, as the Dutch marriage law system only allows for a civil marriage, the Dutch have managed to separate the secular and religious components of marriage.⁶⁹² All this, as well as the fact that the Netherlands is a secular state, significantly contributed to the Dutch enacting a gender-neutral marital system.

5.3.2 Formalising Interpersonal Relationships in the Netherlands

Currently there are three methods by which a Dutch couple, regardless of their sexual orientation, may formalise their monogamous interpersonal relationship, namely a civil marriage, a registered partnership, or a contract.⁶⁹³ South African marriages concluded in terms of the Recognition of Customary Marriages Act fall outside the scope of this comparison and will accordingly be excluded from this discussion.

5.3.2.1 Civil Marriages

The Dutch marriage system provides for a single form of marriage, namely a civil marriage⁶⁹⁴ that is available to both same-sex and heterosexual couples⁶⁹⁵ who wish

⁶⁸⁸ Waaldijk 2004 *NELR* 578.

⁶⁸⁹ Waaldijk *Small change* 438-439.

⁶⁹⁰ Waaldijk *Small change* 438-439; Waaldijk 2004 *NELR* 578.

⁶⁹¹ Waaldijk 2004 *NELR* 579.

⁶⁹² Waaldijk *Small change* 438-439.

⁶⁹³ *Ibid.*

⁶⁹⁴ Article 1:30(2) of the Dutch Civil Code states that “[T]he law considers a marriage only in its legal civil relationships”.

⁶⁹⁵ Article 1:30(1) of the Dutch Civil Code was amended by *De Wet Opstelling Huwelijk* of 21 December 2000 which inserted article 1:30(1) into article 30. Article 1:30(1) of the Dutch Civil

to enter into a monogamous marriage relationship.⁶⁹⁶ The parties to the marriage must have the required capacity to act. In this regard a person wishing to enter into a Dutch marriage must have the mental capacity⁶⁹⁷ to enter into a marriage as well as be eighteen years of age or older.⁶⁹⁸ Minors between the ages of sixteen and eighteen can however get married provided they obtain the required consent from their parents or guardians.⁶⁹⁹ As in the case of South African marriage law, the Dutch Civil Code also provides that a minor may apply to the court for permission to enter into a marriage (in the event of it being refused by his/her parents).⁷⁰⁰ In this regard it is noteworthy that in terms of articles 1:251(a) and 1:253a of the Dutch Civil Code the “best interest of the child” criteria is applied when considering the change of authority in respect of a minor child.

In addition to monogamy, couples intending to enter into a marriage must have consensus.⁷⁰¹ The parties to the wedding must also be single, not involved in an

Code states that statutory rules have only effect for the civil relationship between the spouses in respect of “[a] marriage that may be entered into by two persons of a different or of the same gender (sex)”.

⁶⁹⁶ In terms of article 1:33 of the Dutch Civil Code Dutch marriages are monogamous in nature.

⁶⁹⁷ Article 1:32 of the Dutch Civil Code.

⁶⁹⁸ Article 1:31 of the Dutch Civil Code provides that (1) “[A] man and a woman must both have reached the age of eighteen years in order to be allowed to enter into a marriage”. (2) “[N]o impediment to a marriage as meant in the previous paragraph exists when the persons who intend to enter into a marriage with each other have both reached the age of sixteen years and the woman submits a declaration of a medical doctor that she is pregnant or that she already has brought a child into the world”. Article 1:31(3) furthermore provides that “[T]he Minister of Justice may, for compelling reasons, grant dispensation from the requirement mentioned in paragraph 1”. See also article 1:233 of the Dutch Civil Code that defines a minor as “persons who have not yet reached the age of eighteen years and who are not married or registered as a partner in a registered partnership, nor have been married or registered as a partner in a registered partnership and who have not been declared of age pursuant to Article 1:253”.

⁶⁹⁹ Article 1:35 of the Dutch Civil Code provides that (1) “[A] minor is not allowed to enter into a marriage without the approval of his parents”. Article 1:35 (2) furthermore provides that “[W]here the mental capacity of one of the parents is disturbed in such a way that he is unable to determine his will or to understand the significance of his declaration, his approval is not required”. Article 1:35(3) also provides that “[A] minor under guardianship needs an additional approval of his legal guardian”.

⁷⁰⁰ Article 1:36 of the Dutch Civil Code states that “[A]s far as the approval, required under the previous Article, cannot be obtained, the minor may request the Sub-district Court to grant him a substitute authorisation”.

⁷⁰¹ In terms of article 1:67 of the Dutch Civil Code “[T]he prospective spouses must explicitly give their consent to the marriage. Article 1:67(1) of the Dutch Civil Code also provides that “[T]he prospective spouses must state before the Registrar of Civil Status and in the presence of the witnesses that they accept each other as husband and wife and that they will faithfully fulfil all duties which the law connects to their marital status”.

existing registered partnership⁷⁰² nor be related to each other within the prohibited degrees of affiliation.⁷⁰³

As far as formalities are concerned, notice of the intended marriage must be given to the Registrar of Civil Status of the municipality where at least one of the parties are domiciled⁷⁰⁴ whereafter a formal notice will be issued.⁷⁰⁵ It should be noted that in cases where a minor is a prospective spouse, the Registrar has to confirm whether the minor is under custodial control or interim guardianship, and if so, immediately inform the Juvenile Court or the Foundation as referred to in terms of article 1(f) of the Youth Care Act of the intended marriage.⁷⁰⁶ In addition, the marriage should take place in public in the town hall (unless one of the parties cannot attend the town hall due to a properly proven statutory hindrance)⁷⁰⁷ before the Registrar of Civil Status and in the presence of at least two and at the most four adult witnesses.⁷⁰⁸ In terms of Dutch marriage law a marriage may only be solemnised by the Registrar of Civil Status whereafter a religious blessing may take place.⁷⁰⁹ In addition to the aforementioned a Dutch marriage must be registered by way of civil registration.⁷¹⁰

⁷⁰² Article 1:42 of the Dutch Civil Code states that “[P]ersons who enter into a marriage with each other, may at this moment not be united already in a registered partnership”.

⁷⁰³ Article 1:41 (1) of the Dutch Civil Code prohibits marriage within familial relationships. It states that “[A] marriage cannot be entered into between persons who, either by birth or otherwise, have a legal familial relationship with each other in the ascending or descending line or as brothers, sisters or brother and sister. Article 1:41(2) however does provide that “[F]or compelling reasons the Minister of Justice may grant dispensation from this prohibition to those persons who only by means of an adoption are related to each other as brothers, sisters or brother and sister”.

⁷⁰⁴ In terms of article 1:43 of the Dutch Civil Code, the notice of marriage must be given in person or by means of a written declaration which indicates sufficiently that the prospective spouses have the intention to marry each other, whereafter the Registrar of Civil Status draws up a certificate of formal notice of marriage.

⁷⁰⁵ In terms of article 1:46 of the Dutch Civil Code the certificate of formal notice of marriage is valid for one year from the date it was drawn up.

⁷⁰⁶ Article 1:47(2) of the Dutch Civil Code.

⁷⁰⁷ Article 1:64 of the Dutch Civil Code.

⁷⁰⁸ Article 1:63 of the Dutch Civil Code.

⁷⁰⁹ Article 1:68 of the Dutch Civil Code dictates that “[N]o religious ceremonies may take place before the parties have shown to the foreman of the religious service that the marriage has been contracted before a Registrar of Civil Status”.

⁷¹⁰ Article 1: 67(2) of the Dutch Civil Code provides that “[I]nstantly after this statement has been made, the Registrar of Civil Status shall declare that the parties are now lawfully joined in matrimony and he will draw up a marriage certificate in respect of that”. Article 1: 78 of the Dutch Civil Code also provides that “[T]he existence of a marriage which has been contracted in the Netherlands can be proven exclusively by means of a marriage certificate or of a certificate of conversion of a registered partnership into a marriage”.

Accordingly, except for the presumption of paternity not applying to same-sex civil marriages,⁷¹¹ the requirements for entering into, concluding and dissolving a Dutch marriage are the same in terms of heterosexual and same-sex couples.⁷¹²

5.3.2.2 Registered Partnerships

In terms of article 1:80a(1) of the Dutch Civil Code, a person regardless of their gender, and who is eighteen years of age or older can enter into an *akte van registratie van partnership* (registered partnership).

A registered partnership can only be entered into by persons that, at the time of the registration of the partnership, are single.⁷¹³ In addition, notice of the intended registered partnership must be given to the Registrar of Civil Status of the municipality where one of the parties is located.⁷¹⁴ Ultimately the registration process takes place by means of a certificate of registration of partnership drawn up by a Registrar of Civil Status.⁷¹⁵

In terms of article 1:80 (b) of the Dutch Civil Code, the legal consequences of a civil marriage are also applicable to that of a registered partnership.⁷¹⁶ There are however two significant differences between a marriage and registered partnership, in that a registered partnership can be terminated by *inter alia* mutual agreement⁷¹⁷ or by converting the relationship into a marriage.⁷¹⁸ In addition to the aforesaid, registered partners cannot partake in inter-country adoptions.⁷¹⁹ The partner of the biological

⁷¹¹ Articles 1:199 (a) and (b) of the Dutch Civil Code. For a general discussion of the rule that a spouse in a lesbian marriage automatically has joint parental authority over a child born during that marriage, unless the biological father acknowledged that the child was his before the birth of the child, see Smith and Robinson 2010 *PELJ* 42.

⁷¹² It is noteworthy that article 28 of the Dutch Constitution, which relates to the marriage of the king or queen, still refers to a marriage as between a man and a woman. Accordingly the king and queen are not permitted to enter into a same-sex marriage.

⁷¹³ Article 1:80a (2) of the Dutch Civil Code.

⁷¹⁴ Article 1:80 a (4) of the Dutch Civil Code.

⁷¹⁵ Article 1:80a (3) of the Dutch Civil Code.

⁷¹⁶ Article 1:80(b) of the Dutch Civil Code.

⁷¹⁷ Article 1:80(c) (1) (c) of the Dutch Civil Code.

⁷¹⁸ Article 1:80(c) (1) (e) of the Dutch Civil Code. For a discussion on “lightning divorce” whereby a marriage can easily be transformed into a registered partnership thereby allowing for the dissolution of a registered partnership without the intervention of a court, see Boele Woelki *Registered partnership* 49-50.

⁷¹⁹ See footnote 36 above.

parent of a child born in a registered partnership is furthermore not acknowledged as the parent of such a child⁷²⁰ despite both parties automatically exercising shared responsibility in respect of such a child.⁷²¹

5.3.2.3 Contracts

In addition to a marriage or a registered partnership, a couple (regardless of their sexual orientation) may also elect to enter into a contract to regulate their relationship and in particular the consequences thereof.⁷²² As in the case of South Africa, (where certain spousal benefits were extended to life partners and in particular same-sex life partners) Dutch domestic relationships are not regulated by legislation.⁷²³ Accordingly, the patrimonial consequences of a domestic relationship are regulated by the terms of the contract, which in turn is not enforceable against third parties and only applies *inter partes*.⁷²⁴

5.3.3 South African and Dutch Civil Marriage Law Systems: A Comparison

In terms of the South African marriage law system, certain couples (heterosexual) may choose to enter into either a civil marriage or a civil union. Accordingly two different methods exist for heterosexual couples to legalise their relationship. Same-sex couples in turn can only enter into a civil union. Despite two separate Acts regulating civil marriages and civil unions respectively, the legal consequences of a civil marriage and that of a civil union are identical.⁷²⁵ As in the case of South Africa, Dutch marriages and registered partnerships have similar legal consequences.⁷²⁶ Consequently, it may be argued that South African and Dutch couples are not really given “a real choice,

⁷²⁰ Articles 1:199 of the Dutch Civil Code.

⁷²¹ Article 1:253(aa) of the Dutch Civil Code. See also the Paternity rule of Article 1:199 (a) and (b) of the Dutch Civil Code. For a general discussion of the legal position of registered partners in respect of a child born during the relationship, see Smith and Robinson 2010 *PELJ* 43.

⁷²² Waaldijk 2004 *NELR* 578.

⁷²³ For a general discussion on the extension of spousal benefits to cohabitating couples in a *duurzaam gemeenschappelijke huishouding* (lasting joint household), see Waaldijk 2004 *NELR* 570.

⁷²⁴ Waaldijk 2004 *NELR* 570-571.

⁷²⁵ Section 13(1) of the Civil Union Act.

⁷²⁶ Article 1:80(b) of the Dutch Civil Code.

but rather a hollow shell”⁷²⁷ when choosing the manner in which to legalise their relationships. It should be noted that neither South Africa nor the Dutch family law systems have legislation to regulate life partnerships.⁷²⁸

Despite the similarities, there are differences between the South African and Dutch marriage law systems. Firstly, in terms of the South African marriage law system, provision is made that a religious or *ex officio* marriage officer may solemnise a marriage or a civil union.⁷²⁹ In turn, the Dutch law system only recognises a marriage that is solemnised by the Registrar of Civil Status.⁷³⁰ As indicated in para 5.3.1 the aforesaid is a significant difference between the South African and the Dutch marriage systems as the Dutch’s marriage system differentiates between the religious and secular components of a civil marriage, whilst the South African marriage system does not. It may be argued that this difference was key to the Dutch marriage system being able to amend existing legislation instead of promulgating legislation that specifically allowed for same-sex marriages.

Secondly, South African marriage law only allows for the dissolution of a civil marriage or union by way of divorce or death.⁷³¹ In contrast the Dutch system makes provision that a registered partnership can also be changed into a marriage.⁷³² The fact that a registered partnership can be terminated by mutual consent furthermore allows for the termination of the relationship by way of a contract and not judicial intervention.⁷³³

Thirdly, South Africa allows for two ostensibly separate but equal Acts to regulate civil marriages and civil unions. In addition, the Marriage Act excludes same-sex couples from entering into a civil marriage.⁷³⁴ As a result of the application of two separate Acts to regulate marriages in South Africa differences such as the exclusion of minors from entering into a civil union whilst allowing minors to enter into a civil marriage results in anomalies within the South African marriage law system. In contrast, the Dutch

⁷²⁷ Curry-Sumner *The Netherlands* 274.

⁷²⁸ Smith and Robinson 2010 *PELJ* 46.

⁷²⁹ Sections 2 and 3 of the Marriage Act compared to section 1 of the Civil Union Act.

⁷³⁰ Article 1:30(2) of the Dutch Civil Code.

⁷³¹ Sections 4 and 5 of the Divorce Act in respect of civil marriages read with section 13(1) of the Civil Union Act in respect of civil unions.

⁷³² Article 1:149(e) of the Dutch Civil Code.

⁷³³ Article 1:80c of the Dutch Civil Code.

⁷³⁴ Common law definition of marriage and section 30(1) of the Marriage Act.

marriage system is regulated by a single Act, the Dutch Civil Code⁷³⁵ that is available to both heterosexual and same-sex couples. The Dutch marriage system accordingly provides for a single form of marriage that is gender-neutral.⁷³⁶ It is the latter difference between the South African and Dutch marriage systems that is significant in considering law reform. In this regard the Dutch managed to amend article 1:30 of the Dutch Civil Code to include same-sex couples, thereby retaining one institution that is gender-neutral instead of promulgating a second Act to allow for same-sex marriages. In considering the submissions made in chapter three and four it may be argued that the Dutch approach, to amend existing legislation, was not only the most uncomplicated way to allow for same-sex marriages, but also the more correct approach in guaranteeing full equality for same-sex couples.

Lastly it should be noted that the recognition of same-sex marriages in South Africa was the result of a Constitutional Court ruling that demanded the enactment of remedial legislation within a twelve month period to allow for same-sex marriages. In contrast the recognition of same-sex marriages in the Netherlands was the result of “small changes” that gradually developed over a period of five years.

From the foregoing it is evident that the South African approach is based on the judiciary initiating legislative reform to Parliament whilst conversely the Dutch approach is based on Parliament passing new legislation for implementation by the judiciary.

5.4 The Canadian marriage Law Framework (excluding Quebec)

5.4.1 Overview of the Development of Canadian Marriage Law

Canada is governed by a confederation with a parliamentary democracy.⁷³⁷ In terms of section 52(2) of the Constitutional Act, 1982 the Canadian Constitution is defined as consisting of the Canada Act, 1982 which includes the Constitutional Act, 1982 as

⁷³⁵ Article 1:30(2) of the Dutch Civil Code.

⁷³⁶ Article 1:30(1) of the Dutch Civil Code.

⁷³⁷ Section 52(1) of the Charter provides that “ The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.

well as all acts referred to in the schedule which includes the Constitutional Act of 1867 and the British North America Act of 1867. The Constitution Act, 1982 also encompasses the Canadian Charter of Human Rights and Freedom⁷³⁸ that bestows basic fundamental rights on all Canadian citizens.⁷³⁹ The Charter and in particular section 15(1)⁷⁴⁰ thereof, that guarantees equality and non-discrimination, has played an instrumental role in the development of Canadian matrimonial law and the enactment of the Civil Marriage Act.⁷⁴¹ With the introduction of a gender-neutral marriage definition in terms of the Civil Marriage Act,⁷⁴² Canada became the first country outside Europe to legalise same-sex marriages.⁷⁴³

As in the case of the Dutch settlers in South Africa, early European settlers brought with them Christian marriage teachings when they settled in Canada.⁷⁴⁴ It should be noted that due to the scope of the study the position of the native people of Canada (First Nations) will not be discussed. Accordingly the Canadian definition of marriage was based on Christendom and interpreted by Lord Penzance in the case of *Hyde v Hyde and Woodmansee* as the “voluntary union for life of one man and one woman, to the exclusion of all others”.⁷⁴⁵ Accordingly as in the case of South Africa, marriage was not defined in terms of a statute. As Canada’s legal system is based on the common law system,⁷⁴⁶ the definition of marriage was accordingly interpreted in terms

⁷³⁸ Canadian Charter of Human Rights and Freedom is found in Schedule B of the Constitution Act of 1982 (hereinafter referred to as “the Charter”).

⁷³⁹ Sec 1 of the Charter states that “[T]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

⁷⁴⁰ Sec 15 of the Charter provides that “[E]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” came into effect in 1985.

⁷⁴¹ Civil Marriage Act S.C. 2005 assented to on 20 July 2005 (hereinafter referred to as “the Civil Marriage Act”).

⁷⁴² Section 2 of the Civil Marriage Act defines a “[M]arriage, for civil purposes, is the lawful union of two persons to the exclusion of all others”.

⁷⁴³ Hurley Bill C-38 The Civil Marriages Act
<https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017).

⁷⁴⁴ History of Marriage and Divorce
<http://thecanadianencyclopedia.ca/en/article/history-of-marriage-and-divorce/> (Date of use: 15 October 2017).

⁷⁴⁵ *Hyde v Hyde and Woodmansee* 1866 L.R.1P & D 130 p116 (hereinafter referred to as “the *Hyde v Hyde* case”). It should be noted that marriage is defined in terms of the common law and that the only statutory reference to the definition of marriage is made in terms of section 1.1 of the Modernization of benefits and Obligations Act 2000.

⁷⁴⁶ “A common law system of law refers to the ancient law of England based upon societal

of the traditional common law definition of marriage as is evident from the *Hyde* case.⁷⁴⁷

As in the case of South Africa, the Canadian legal system makes provision for judicial review of legislation.⁷⁴⁸ Canadian legislative jurisdiction is however shared between a federal Parliament (that has exclusive legislative jurisdiction in respect of marriage and divorce) and provincial legislatures (that have exclusive jurisdiction in respect of the solemnisation of marriages within the province).⁷⁴⁹ As a result of the application of judicial review as well as the implementation of section 15(1) of the Charter that guarantees equality before and under the law and equal protection and benefit of the law without discrimination,⁷⁵⁰ courts were confronted with heterosexual partners (that chose not to get married) as well as same-sex partners (that could not get married) requesting the extension of certain spousal benefits that was previously reserved for married couples.⁷⁵¹ Accordingly provincial as well as federal courts gradually started

customs and recognized and enforced by the judgments and decrees of the courts". Legal Dictionary <https://legal-dictionary.thefreedictionary.com/Common+law+system> (Date of use: 15 October 2017).

⁷⁴⁷ For a discussion on the interpretation of marriage prior to the enactment of the Charter and in particular the use of the British case *North v Matheson* (1974), 24 R.F.L. 112 (Man.Co.Ct) as well as *Corbett v Corbett* (1970) 2 All E.R.33, p48(P.D.A.) in interpreting same-sex marriages generally, see Hurley Bill C-38 The Civil Marriages Act <https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use : 15 October 2017).

⁷⁴⁸ Section 24(1) of the Charter provides that "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

⁷⁴⁹ Sections 91(26) of the British North American Act, 1867 provides that "[I]t shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, Marriage and Divorce". In terms of sections 92(12) and 92(13) of the British North America Act, 1867 "[I]n each Province the Legislature may exclusively make Laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say, the solemnization of marriage in the province". It should be noted that Canada has a constitutional model in terms whereof more than one Constitution exists that is read together in considering constitutional matters.

⁷⁵⁰ Sec 15 of the Charter provides that "[E]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

⁷⁵¹ In British Columbia, Saskatchewan, Manitoba, Ontario, Newfoundland, Labrador and Nova Scotia various legislative measures were implemented to extend certain benefits to same-sex couples. In this regard Nova Scotia and Manitoba made provision for a civil registration scheme in respect of unmarried heterosexual or same-sex couples whilst Quebec implemented a civil

giving recognition to the rights of heterosexual as well as same-sex partners that were not in a marriage relationship.⁷⁵² It is noteworthy that Canada, as in the case of South Africa, extended spousal benefits on an *ad hoc* basis which was underpinned by judicial review.

In addition, as in the case of the South African Constitution,⁷⁵³ the Charter also guarantees the right to equality and prohibits discrimination. Such rights can however be limited if demonstrably justified.⁷⁵⁴ In this regard it was held in *Layland v Ontario (Minister of Consumer and Commercial Relations)*⁷⁵⁵ that “under the common law of Canada applicable to Ontario a valid marriage can take place only between a man and a woman and that persons of the same-sex do not have the capacity to marry one another”.⁷⁵⁶ The court furthermore ruled that the federal common law did not violate section 15(1) of the Charter.⁷⁵⁷

Although section 15(1) of the Charter makes specific reference to certain prohibited grounds of discrimination, the Supreme Court of Canada held in *Andrews v Law*

union regime that resembled the rights and obligations of marriage. In Alberta “adult interdependent partner” in terms of the Interdependent Relationships Act, 2002 was incorporated in respect of family related provincial statutes see Hurley Bill C-38 The Civil Marriages Act <https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017).

⁷⁵² For a discussion on statutory entitlements extended to same-sex couples generally, see Hurley Bill C-38 The Civil Marriages Act <https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017).

⁷⁵³ Section 9(1) of the South African Constitution provides that “[E]veryone is equal before the law and has the right to equal protection and benefit of the law”. Section 9(3) of the South African Constitution provides that “[T]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”.

⁷⁵⁴ Sec 1 of the Charter states that “[T]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In terms of section 36 of the South African Constitution “[T]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. The similarity between section 1 of the Charter and section 36 of the South African Constitution is noteworthy.

⁷⁵⁵ *Layland v Ontario (Minister of Consumer and Commercial Relations)* (1993), 104 D.L.R. (4th) 214 (Ont. Ct. Gen.Div).

⁷⁵⁶ *Ibid.*

⁷⁵⁷ *Ibid.*

*Society of British Columbia*⁷⁵⁸ that “sexual orientation” and “marital status” could be prohibited grounds of discrimination as they are analogous to those grounds listed in section 15 of the Charter.⁷⁵⁹ It was also on this basis that the courts held in *Miron v Trudel*⁷⁶⁰ that the exclusion of heterosexual cohabitants from accidental benefits was in violation of section 15(1) of the Charter and could not be demonstrably justified.⁷⁶¹ Further to the ruling of the *Andrews* case, it was held in *Law v Canada*⁷⁶² that in addition to a distinction being based on a listed ground of discrimination, such discrimination should also impair human dignity.⁷⁶³ Consequently as in the case of the South Africa’s *Fourie* case, the extension of spousal benefits up until the *Law* case, did not address whether same-sex marriages should be legally recognised.⁷⁶⁴

Following the *Andrews* case, the Supreme Court of Appeal was confronted with the question of equality rights in relation to sexual orientation. In *Egan v Canada*⁷⁶⁵ sexual orientation was recognised as an analogous ground of discrimination in terms of section 15(1) of the Charter.⁷⁶⁶ Despite the aforesaid, the Supreme Court of Canada denied the applicants old age security on the basis that only heterosexual couples have the capacity to procreate children and therefore Parliament was of the view that special support should be given to the institution of marriage by denying same-sex couples such benefits.⁷⁶⁷

⁷⁵⁸ *Andrews v Law Society of British Columbia* 1989 1 S.C.R.(hereinafter referred to as “the *Andrews* case”).

⁷⁵⁹ The *Andrews* case 143.

⁷⁶⁰ *Miron v Trudel* 1995 13 R.F.L. 1 S.C.C.

⁷⁶¹ *Ibid.*

⁷⁶² *Law v Canada* 1999 1 S.C.R.

⁷⁶³ *Law v Canada* 1999 1 S.C.R. 497.

⁷⁶⁴ Butler and Kirkby Same-sex Marriage, Divorce and Families: Selected Recent Developments http://publications.gc.ca/collections/collection_2016/bdp-lop/bp/YM32-2-2013-74-eng.pdf (Date of use: 15 October 2017). See also *Vriend v Alberta* 1998 1 S.C.R. 493 where it was held that Alberta’s human rights codes violated section 15 of the Charter and *Little Sisters Book and Art Emporium v Canada* 2000 2 S.C.R. 1120 where the obstruction of the importation of books that catered for gay and lesbian customers were found to be in violation of section 15 of the Charter.

⁷⁶⁵ *Egan v Canada* [1995] 2 S.C.R. 513 (hereinafter referred to as “the *Egan*” case).

⁷⁶⁶ In the *Egan* case the court ruled that the definition of spouse in terms of the Old Age Security Act R.S.C. 1985 C0-9 was discriminative and violated section 15 of the Charter but that such discrimination was justified in terms of section 1 of the Charter.

⁷⁶⁷ The *Egan* case p.536-537.

In the Ontario case of *M v H*⁷⁶⁸ the Supreme Court of Canada recognised the need for acceptance of same-sex parents by ruling that the term “spouse” in terms of section 29 of the Ontario’s Family Law Act R.S.O.1990 was in violation of section 15(1) of the Charter thereby affording same-sex spousal support.⁷⁶⁹ This was the first case to challenge the constitutionality of the definition of spouse.⁷⁷⁰ It should be noted that although same-sex marriages were still not legally recognised by federal legislation, same-sex marriages were gradually being recognised by provincial governments by redefining the definition of marriage on the basis of equality rights.⁷⁷¹

As a result of the aforesaid ruling, the federal government enacted the Modernization of Benefits and Obligations Act of 2000.⁷⁷² The enactment of this Act did not only acknowledge same-sex or heterosexual “common-law partners”⁷⁷³ in terms of sixty eight federal statutes⁷⁷⁴ but also confirmed a distinction between the common law definition of marriage and a partnership.⁷⁷⁵ Considering the aforesaid as well as the fact that section 52(1) of the Constitution Act provides that “any law that is inconsistent with the Constitution of Canada is of no force or effect” it is understandable that the constitutionality of the common law definition of marriage was destined to be found unconstitutional.

⁷⁶⁸ *M v H* [1999] 2 S.C.R. 3, affirming (1996), 142 D.L.R. (4th) 1, 31 O.R. (3rd) 417 (Ont.C.A.) (hereinafter referred to as “the *M v H* case”).

⁷⁶⁹ Section 29 of the Ontario Family Law Act R.S.O. 1990 has subsequently been amended to a gender-neutral definition of “spouse”.

⁷⁷⁰ *M v H* case. Section 29 of the Ontario Family Law Act excluded same-sex partners from applying for spousal support on termination of the relationship.

⁷⁷¹ Same-sex marriages were legally recognised in Ontario on 10 June 2003, in British Columbia on 8 July 2003, in Quebec on 19 March 2004, In Yukon on 14 July 2004, in Manitoba on 16 September 2004, in Nova Scotia on 24 September 2004, in Saskatchewan on 5 November 2004, in Newfoundland and Labrador on 21 December 2004 and in New Brunswick on 23 June 2005. With the enactment of the federal Civil Marriage Act on 20 July 2005 same-sex marriages were legally recognised in the remaining provinces of Alberta, Prince Edward Island, Nunavut and the Northwest territories. Hurley Bill C-38 The Civil Marriages Act <https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017).

⁷⁷² Modernization of Benefits and Obligations Act S.C. 2000 accented on 29 June 2000.

⁷⁷³ A “common-law partner” was defined as a person that cohabitates with another in a conjugal relationship for at least one year.

⁷⁷⁴ A list of the federal statutes acknowledging common-law partners can be accessed from Modernisation of Benefits and Obligations Act <http://laws-lois.justice.gc.ca/PDF/M-8.6.pdf> (Date of use: 15 October 2017).

⁷⁷⁵ Section 1.1 of the Modernization of Benefits and Obligations Act 2000 stated that “[T]he amendments to this Act do not affect the meaning of the word “marriage”, that is the lawful union between one man and one women to the exclusion of all others”.

In *Halpern et al v Canada (Attorney General)*⁷⁷⁶ the common law definition of marriage was challenged in Ontario when the Supreme Court of Justice found the definition to be unconstitutional as it violated section 15(1) of the Charter.⁷⁷⁷ Although the British Columbia Supreme Court initially ruled in favour of the refusal to issue marriage licenses to same-sex couples in the *Eagle Canada Inc. v Canada (Attorney General)*⁷⁷⁸ case, the British Columbia Court of Appeal overturned the ruling by confirming the invalidation of the traditional common law definition of marriage.⁷⁷⁹ The aforesaid ruling was in line with the ruling in *Barbeau v British Columbia (Attorney General)*⁷⁸⁰ that held that the exclusion of same-sex marriages was in violation of same-sex couples' right to equality.⁷⁸¹ Quebec followed the aforesaid decisions of Ontario and British Columbia by ruling in the case of *Hendricks c Quebec (Procureur General)*⁷⁸² that section 5 of the 2001 Federal Law Clinic Harmonization Act, No.1 violated section 15(1) of the Charter. It is noteworthy that the rulings in respect of the *Halpern* case as well as the *Hendricks* cases were suspended for two years to allow federal legislation time to revise federal marital legislation.⁷⁸³ Despite the two year suspension of the declaration in respect of the *Halpern* case, the Ontario Court of Appeal invalidated the common law definition of marriage and redefined it as "the voluntary union for life of two persons" thereby legalising same-sex marriages in Ontario in June 2003.⁷⁸⁴ The British Columbia Court of Appeal made a similar ruling in July 2003 whilst Quebec followed suit in March 2004.⁷⁸⁵ Accordingly the inability of

⁷⁷⁶ *Halpern et al v Canada (Attorney General)* 2001 B.C.S.C. 1365 (hereinafter referred to as "the *Halpern* case"). In this case seven gay and lesbian couples were unsuccessful in applying for their marriage licenses from the City of Toronto.

⁷⁷⁷ The *Halpern* case 1365. The ruling was made on 10 June 2003. In determining whether section 15(1) of the Charter was violated a three stage inquiry is applied. Firstly the court needs to determine whether the impugned law draws a formal distinction, secondly whether such distinction is based on an analogous ground and lastly whether such differentiation is discriminate. *Halpern* case para 61.

⁷⁷⁸ *Eagle Canada Inc. v Canada (Attorney General)* 2003, 38 R.F.L. (5th) 32 (B.C.C.A.), reversing the ruling (2001), 88 C.R.R. (2nd) 322 (B.C.S.C.).

⁷⁷⁹ *Eagle Canada Inc. v Canada (Attorney General)* 2003, 42 R.F.L. (5th) 341 (B.C.C.A.).

⁷⁸⁰ *Barbeau v British Columbia (Attorney General)* 2003 BCCA.

⁷⁸¹ *Barbeau v British Columbia (Attorney General)* 2003 BCCA 251.

⁷⁸² *Hendricks c Quebec (Procureur General)*, [2002] R.J.Q. 2506 (hereinafter referred to as "the *Hendricks* case").

⁷⁸³ Hurley Bill C-38 The Civil Marriages Act <https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017).

⁷⁸⁴ For a discussion on the reasons for the court decision generally, see Hurley Bill C-38 The Civil Marriages Act <https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017).

⁷⁸⁵ Hurley Bill C-38 The Civil Marriages Act

same-sex couples to procreate was no longer found to be substantive to justify discrimination against same-sex couples and same-sex couples were afforded the right to marry in British Columbia, Ontario and Quebec.⁷⁸⁶

In 2002 and as a result of provincial governments recognising same-sex marriages, a discussion paper⁷⁸⁷ was released by the federal Department of Justice addressing how federal policy and legislation could encompass same-sex marriages. As a result of the Ontario Court of Appeal ruling dated 10 June 2003 the Committee adopted a motion to support the *Halpern* ruling.⁷⁸⁸

In lieu of the aforesaid cases, the federal government requested the Supreme Court of Canada in a constitutional reference, to review and consider the constitutionality of proposed legislation that would extend to same-sex marriages.⁷⁸⁹ The Court had to determine whether the Canadian Parliament had the authority to legalise same-sex marriages.⁷⁹⁰ Secondly, whether the Charter would protect religious officials from the compulsory performance of same-sex marriages if it was against their beliefs and lastly whether heterosexuality as a requirement for marriage was in line with the Charter.⁷⁹¹ The court unanimously ruled in *Re Same-sex Marriage*,⁷⁹² that the definition of “marriage” was not contained in the Constitution and that Parliament therefore had the authority to redefine marriage.⁷⁹³ In addition the court held that such

<https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017). The provinces of Yukon, Manitoba, Nova Scotia, Saskatchewan, Newfoundland, Labrador and New Brunswick later on took the same stance as Ontario, British Columbia and Quebec.

⁷⁸⁶ Hurley Bill C-38 The Civil Marriages Act

<https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017).

⁷⁸⁷ Marriage and Legal Recognition of Same-sex Unions: A Discussion Paper.

⁷⁸⁸ Hurley Bill C-38 The Civil Marriages Act

<https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017).

⁷⁸⁹ Hogg 2006 *International Journal of Constitutional Law* 716.

⁷⁹⁰ *Ibid.*

⁷⁹¹ Hogg 2006 *International Journal of Constitutional Law* 716. It should be noted that a fourth question was later added requesting the Supreme Court reference to decide on whether the current marriage legislation (only allowing for heterosexual marriages) was consistent with the Carter.

⁷⁹² *Re Same-Sex Marriage* [2004] 3 S.C.R. 698 para 43 (hereinafter referred to as “the *Re Same-Sex Marriage* case”). See also Hurley Bill C-38 The Civil Marriages Act <https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017) for a discussion on the legislative development that led to the enactment of the Civil Marriages Act.

⁷⁹³ Hogg 2006 *International Journal of Constitutional Law* 717.

proposed legislative amendments would be in line with section 15(1) of the Charter.⁷⁹⁴ It should be noted that the court did not consider a civil union (as an alternative to marriage) as it would imply that “civil unions were less worthy of respect than opposite–sex unions.”⁷⁹⁵

On 1 February 2005, the Civil Marriage Act was tabled and after passing the House of Commons and Senate it was enacted after receiving Royal Ascent on 20 July 2005 as chapter 33 of the Statute of Canada for 2005.⁷⁹⁶ Consequently the enactment of the Civil Marriage Act was the result of judicial reviews. In terms of the Civil Marriage Act the definition of marriage was codified thereby expanding the traditional common law definition as applied in the *Hyde* case to include same-sex marriages.⁷⁹⁷ In terms of the Civil Marriage Act, emphasis is placed on Parliament’s commitment to uphold the Constitution of Canada, and section 15 of the *Canadian Charter of Rights and Freedoms* that guarantees that “every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination”.⁷⁹⁸ It is furthermore noteworthy that the preamble of the Civil Marriage Act states that “only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity in breach of the *Canadian Charter of Rights and Freedoms*”.⁷⁹⁹

5.4.2 Formalising Interpersonal Relationships in Canada

5.4.2.1 The Civil Marriage

⁷⁹⁴ For a discussion on the meaning of marriage in the Constitution, whether a “civil union” would be an alternative to marriage and the impact religion would have on the solemnisation of same-sex marriages generally, see Hogg 2006 *International Journal of Constitutional Law* 712.

⁷⁹⁵ For a discussion on the findings *Re Same-Sex Marriage* generally, see Hogg 2006 *International Journal of Constitutional Law* 718-719; Hurley Bill C-38 The Civil Marriages Act <https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017).

⁷⁹⁶ Hurley Bill C-38 The Civil Marriages Act <https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017).

⁷⁹⁷ Section 2 of the Civil Marriage Act.

⁷⁹⁸ Preamble to the Civil Marriage Act.

⁷⁹⁹ *Ibid.*

As indicated earlier, marriage is governed by federal and provincial legislation.⁸⁰⁰ In terms of federal law, Parliament has exclusive authority in regulating capacity to marry, whilst provincial governments have exclusive authority in respect of formal validity of marriage.⁸⁰¹ In terms of the federal Civil Marriage Act, a marriage for civil purposes is defined as “the lawful union of two persons to the exclusion of all others”.⁸⁰² Due to the gender-neutral definition of marriage, Canada provides for a single form of marriage equally applicable to monogamous heterosexual and same-sex couples.

As in the case of South African as well as Dutch marriage legislation, the parties entering into a Canadian civil marriage must have the capacity to act.⁸⁰³ Accordingly parties to the marriage must have the mental capacity to understand the nature of their actions and be of a certain age.⁸⁰⁴ In terms of the Civil Marriage Act, the age of marriage is set at sixteen years or older.⁸⁰⁵ The Civil Marriage Act furthermore provides that “[N]o person who is under the age of sixteen years may contract marriage.”⁸⁰⁶ As provincial legislation regulates procedural requirements of a marriage, such as *inter alia* the ceremonial nature of the marriage including the issuance of licenses, publication of banns and similar formal rules, provincial legislation also set the age of majority.⁸⁰⁷ Accordingly the age of majority varies across provinces and is either set at eighteen or nineteen years of age.⁸⁰⁸ Minors between the ages of sixteen and either eighteen or nineteen (depending on the province) must

⁸⁰⁰ Sections 91(26) and 92(12) – (13) of the British North American Act.

⁸⁰¹ Hurley Bill C-38 The Civil Marriages Act
<https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017).

⁸⁰² Section 2 of the Civil Marriage Act.

⁸⁰³ *Ibid.*

⁸⁰⁴ Section 2.1 of the Civil Marriage Act states that “[M]arriage requires the free and enlightened consent of two persons to be the spouse of each other”.

⁸⁰⁵ Section 2(2) of the Civil Marriage Act states that “[N]o person who is under the age of sixteen years may contract marriage”.

⁸⁰⁶ Section 2.2 of the Civil Marriage Act.

⁸⁰⁷ For a discussion on the legislative authority of the federal and provincial governments generally see Hurley Bill C-38 The Civil Marriages Act
<https://lop.parl.ca/Content/LOP/LegislativeSummaries/38/1/c38-e.pdf> (Date of use: 15 October 2017).

⁸⁰⁸ In Alberta, Manitoba, Ontario, Prince Edward Island, Quebec and Saskatchewan the age of majority is eighteen years of age, whilst in Yukon, Nunavut, Nova Scotia, Northern Territories, Newfoundland and Labrador, New Brunswick the age of majority is nineteen years of age. Age of majority <https://www.thoughtco.com/age-of-majority-in-canada-510008> (Date of use: 15 October 2017).

accordingly obtain the consent of their parents/guardians prior to entering into a marriage.⁸⁰⁹

In addition to monogamy, couples intending to enter into a marriage must have consensus. Section 2.1 of the Civil Marriage Act requires that the parties to the marriage must give their enlightened consent.⁸¹⁰ The parties to the marriage must also be single and not related to each other within the prohibited degrees of affiliation.⁸¹¹

As far as the formalities are concerned, a couple needs to apply for a marriage license.⁸¹² It should be noted that such marriage license is only valid for a certain period of time and applicable to a certain province. If parties get married in a church a marriage license may not be a requirement as the intended marriage would have complied with the banns requirement.⁸¹³ It should also be noted that although civil marriages have always been possible in Canada, marriages were mostly seen as a religious rite.⁸¹⁴ As in the case of South Africa, Canadian marriage law provides that a marriage can be solemnised by either a clergy or *ex-officio* officer.⁸¹⁵ In terms of section 2 of the Charter a religious official has the right to object to conduct religious

⁸⁰⁹ Sections 19 and 20 of the Marriage Act S.C. 2005 c.33 regulate the form of consent required in respect of minors wishing to enter into a marriage in Prince Edward Island. Sections 20 of the Solemnization of Marriage Act 2013 c 28 regulates the consent required for a minor wishing to enter into a marriage in Nova Scotia. Section 25 of the Marriage Act 1995 Chapter M-4.1 stipulates the consent required in respect of minors in Saskatchewan. Section 18 of the Marriage Act CCSM c M50 regulates the consent requirement in respect of minors in Manitoba. Section 19 of the Marriage Act 2009 C16 regulates the consent of minors wishing to enter into a marriage in Newfoundland and Labrador. Section 28 of the Marriage Act [RSBC 1996] chapter 282 stipulates the position in respect of British Columbia. Sections 19-20 of the Marriage Act 2000 Chapter M5 regulates the consent requirement of minors in respect of Alberta. Section 5-6 of the Marriage Act R.S.O. 1990 chapter M.3 regulates the consent requirement in respect of minors in Ontario. Similar provisions are made in respect of Brunswick and Quebec.

⁸¹⁰ Section 2.1 of the Civil Marriage Act states that “[M]arriage requires the free and enlightened consent of two persons to be spouses of each other”.

⁸¹¹ Section 3 of the Civil Marriage Act.

⁸¹² The application for a marriage license is regulated by provincial legislation and may therefore differ from province to province. The majority of provincial legislation however requires that an application for a wedding license must be filed with the registrar general of the province, that when the license is issued it should bear a date and that such license will be valid for a limited period of time. See for example section 16 and 17 of the Marriage Act [RSBC 1996] chapter 282 in respect of the province of Ontario.

⁸¹³ The issuing of marriage licenses are regulated in terms of provincial legislation. See for example section 20 of the Marriage Act [RSBC 1996] Chapter 282 in respect of the province of Ontario.

⁸¹⁴ Butler and Kirkby Same-sex Marriage, Divorce and Families: Selected Recent Developments http://publications.gc.ca/collections/collection_2016/bdp-lop/bp/YM32-2-2013-74-eng.pdf (Date of use: 15 October 2017).

⁸¹⁵ Section 3 of the Civil Marriage Act.

or civil same-sex marriages if it is against his religion or beliefs. This provision is also made in terms of the Civil Marriage Act preamble by providing that “[n]othing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs”. Section 3 of the Civil Marriage Act also provides that “[o]fficials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs”. It is however noteworthy that a civil marriage officer does not have the right to decline the solemnisation of same-sex marriages on the basis of their religious beliefs.⁸¹⁶ This position differs from the South African Civil Union Act that provides that *ex officio* officers do have the right to decline the solemnisation of same-sex marriages.⁸¹⁷

5.4.2.2 Common law Relationship

Although specific benefits are recognised in terms of common-law relationships in Canada, Canadian law does not provide for common-law marriages.⁸¹⁸ In terms of Canadian law, a relationship is regarded as a common law relationship after the couple (regardless of their sexual orientation) has cohabitated for a period of at least one year.⁸¹⁹ It should however be noted that as common law relationships are regulated by provincial legislation, the degree of legal recognition as well as the period of cohabitation varies across Canadian provinces.

⁸¹⁶ For a discussion on the constitutionality of disallowing civil officials the right to decline the solemnisation of same-sex marriages on the basis of religion in general, see Butler and Kirkby Same-sex Marriage, Divorce and Families: Selected Recent Developments http://publications.gc.ca/collections/collection_2016/bdp-lop/bp/YM32-2-2013-74-eng.pdf (Date of use: 15 October 2017).

⁸¹⁷ Section 6 of the Civil Union Act.

⁸¹⁸ Why confusing common law relationships with marriage can be a costly mistake <http://business.financialpost.com/personal-finance/why-confusing-common-law-relationships-with-marriage-can-be-a-costly-mistake> (Date of use: 15 October 2017).

⁸¹⁹ Government of Canada <http://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=346&top=14> (Date of use: 15 October 2017).

Common law relationships have similar rights and obligation than that of a marriage, especially when it comes to legal, parental and financial matters.⁸²⁰ Depending on where a couple in a common-law relationship resides, such couples mostly have the same legal and taxation rights and responsibilities as married couples after residing together for a period of one year.⁸²¹

As a result of Canada having shared judicial legislative authority, each province regulates common-law relationships. Accordingly although reference is made to the term “common law” in terms of federal documents,⁸²² and consequently various federal laws include "common-law status," that is applied *ex lege* as soon as a couple (regardless of their gender) have lived together in a conjugal relationship for a period of time, the legal definition of common-law relationships are dealt with in terms of provincial jurisdiction.⁸²³ Consequently, in some cases a couple involved in a common-law relationship will have the same rights as married couples under federal law.⁸²⁴ Common-law relationships include same-sex relationships.⁸²⁵

In terms of section 29 of the Ontario Family Law Act, common-law spouses are recognised when dealing with spousal support issues. In this regard a couple should be living together for a period of at least three consecutive years before being regarded as a common-law relationship. It is noteworthy that section 29 of the Ontario Family Law Act allows for spousal support, it does not afford common-law partners to have statutory right in respect of patrimonial assets.

⁸²⁰ Common law Relationships <http://www.commonlawrelationships.ca/canada/> (Date of use: 15 October 2017).

⁸²¹ *Ibid.*

⁸²² The Canadian Department of Citizenship & Immigration Act S.C. 1994, C.31 defines a common-law relationship as “a person who is living in a conjugal relationship with another person of either the same-sex or opposite sex and has done so for a period of at least one year. The Canada Revenue Agency Act S.C. 1999 c.17 states that a common-law relationship is acknowledged if “at least one of the following circumstances are applicable:- the couple has been living in a conjugal relationship for at least twelve continuous months; the couple are parents of a child by birth or adoption; or one of the couple has custody and control of the other partner's child (or had custody and control immediately before the child turned 19 years of age) and the child is wholly dependent on that person for support”.

⁸²³ Common law Relationships <http://www.commonlawrelationships.ca/canada/> (Date of use: 15 October 2017).

⁸²⁴ *Ibid.*

⁸²⁵ *In M v H* the Supreme Court of Canada ruled that same-sex partners should also be included in common-law relationships.

In Quebec, common-law partnerships are not recognised as a form of marriage.⁸²⁶ Consequently the Civil Code of Quebec⁸²⁷ explicitly applies to common-law partners that are in "de facto unions." In 2002 the Civil Code of Quebec was amended to give recognition to a "civil union" that is akin to marriage and available to same-sex and heterosexual partners.⁸²⁸

In British Columbia, "common-law marriage" does not appear in any legislation.⁸²⁹ Despite the aforesaid, partners are entitled to certain spousal benefits inter alia spousal support and inheritance.⁸³⁰

Nova Scotia acknowledges a common-law relationship if a couple has cohabitated in a monogamous relationship for a period of two years.⁸³¹ In New Brunswick, the required period of cohabitation is three years unless the couple had a natural or adopted child together.⁸³² Alberta has included common-law relationships in terms of the Adult Interdependent Relationship Act, which may be applicable to two people living together in a marriage-like relationship for a period of three years.⁸³³

5.4.3 South African and Canadian Marriage Law Systems: A Comparison⁸³⁴

One of the most significant similarities shared by South Africa and Canada is the fact that their legal systems provide for judicial review of legislation. In addition, the South

⁸²⁶ Civil Code of Quebec SQ 1991 c 64.

⁸²⁷ *Ibid.*

⁸²⁸ In terms of the Civil Code an individual who wish to form a civil union are subject to the same rules as for a marriage. They must therefore be at least 18 years of age; not be within the prohibited degrees of affiliation, must be single and publically consent to the union in the presence of two witnesses. Civil unions <https://web.archive.org/web/20150627081218/http://www.justice.gouv.qc.ca/english/publications/generale/union-civ-a.htm> (Date of use: 15 October 2017).

⁸²⁹ Common law Relationships <http://www.commonlawrelationships.ca/bc/> (Date of use: 15 October 2017).

⁸³⁰ *Ibid.*

⁸³¹ Common law Relationships <http://www.commonlawrelationships.ca/nova-scotia/> (Date of use: 15 October 2017).

⁸³² Common law Relationships <http://www.commonlawrelationships.ca/new-brunswick/> (Date of use: 15 October 2017).

⁸³³ Common law Relationships <http://www.commonlawrelationships.ca/alberta/> (Date of use: 15 October 2017).

⁸³⁴ It should be noted that for purposes of this study, the comparison will exclude customary marriages.

African Constitution is very similar to that of the Canadian Constitution. In this regard section 15 of the Canadian Charter, as in the case of section 9 of the South African Constitution, guarantees the right to equality and to not be discriminated against on specific grounds. Although the South African Constitution specifically provides that sexual orientation is a ground of discrimination,⁸³⁵ the Canadian judiciary has concluded that sexual orientation is an analogous ground in terms of section 15 of the Charter and therefore discriminatory.⁸³⁶ As a result of judicial review of legislation as well as the anti-discrimination and equality rights embedded in the Constitutions of both South Africa and Canada, courts have been confronted with cases questioning whether the exclusion of same-sex couples from the institution of marriage was constitutional. Ultimately marriage law reform took place in South Africa as well as Canada as a result of judicial rulings.

Despite the aforesaid, the processes that have led to marriage law reform in Canada and South Africa differ significantly. As a result of the shared federal and provincial legislative authority, the recognition of same-sex couples' rights to equal treatment and later on same-sex marriages took place on an *ad hoc* basis in different provinces.⁸³⁷ Despite provincial recognition of same-sex marriages, same-sex marriages were only legal on a federal level with the promulgation of the Civil Marriage Act.⁸³⁸ Accordingly, the legal recognition of same-sex couples' benefits and ultimately same-sex marriages in Canada developed gradually over a period of time and in such a way that allowed for social acceptance.⁸³⁹ In this regard, the promulgation of the Civil Marriages Act was the result of the Supreme Court of Canada recommending the enactment of a single statute to provide for heterosexual and same-sex couples to enter into a marriage.⁸⁴⁰ This process adopted by the Canadian government accordingly allowed for public debate.⁸⁴¹ Conversely same-sex marriages in terms of South African law

⁸³⁵ Section 9(3) of the South African Constitution.

⁸³⁶ Section 15 of the Canadian Charter does not specifically list sexual orientation as a prohibited ground of discrimination.

⁸³⁷ Mostacci E *Same-sex couples before National, Supranational and International Jurisdictions* 75-77.

⁸³⁸ Mostacci E *Same-sex couples before National, Supranational and International Jurisdictions* 82-85.

⁸³⁹ Mostacci E *Same-sex couples before National, Supranational and International Jurisdictions* 74.

⁸⁴⁰ *Ibid.*

⁸⁴¹ Mostacci E *Same-sex couples before National, Supranational and International Jurisdictions* 77-78.

took place more rapidly and as a result of specific provisions in terms of the Constitution.⁸⁴² In this regard it was as a result of the Constitutional ruling in the *Fourie* case that the South African Parliament had to enact remedial legislation within a period of one year from the date of the judgment.

Canadian marriage legislation also provides that only a religious marriage officer may object to the solemnisation of same-sex marriages on the basis that such a union is against his/her religion and beliefs.⁸⁴³ Accordingly a civil marriage officer does not have such an option. This position is also different to the South African position that provides that a civil marriage officer does have the discretion to decline to officiate same-sex unions on the basis of his/her religious beliefs.⁸⁴⁴

In addition to the different processes that were followed in enacting legislation that encompassed same-sex marriages in South Africa and Canada, Canada also only provide for a single form of marriage that is applicable to heterosexual and same-sex couples. In this regard it should be noted that minors, regardless of their sexual orientation are treated the same and that a minor must obtain the consent from their parents /guardians prior to entering into a Canadian marriage. In South Africa, a separate Act was promulgated to allow for same-sex and heterosexual marriages. As discussed in chapter three, the application of the Civil Union Act precludes all minors from entering into a civil union. The anomaly that arises as a result of the application of two separate Acts that has the same legal consequences has already been discussed in chapter three.

5.5 Summary and Conclusion

The Netherlands enacted the Act on Registered Partnerships to provide for an alternative institution to marriage that is applicable to heterosexual and same-sex couples. In terms of the aforesaid Act, similar rights and duties are given to spouses

⁸⁴² Mostacci E *Same-sex couples before National, Supranational and International Jurisdictions* 74.

⁸⁴³ Section 3 of the Civil Marriage Act.

⁸⁴⁴ See paragraph 3.2.

and partners.⁸⁴⁵ The enactment of the Act on Registered Partnerships emphasised the fact that same-sex couples were not worthy of marriage. With the promulgation of the Act Opening Marriage to Same-Sex Couples and the amendment of Article 1:30 of Book 1 of the Dutch Civil Code, same-sex couples achieved full equality. The amendment of the Dutch Civil Code resulted in the Netherlands providing for a single institution of marriage that is applicable to heterosexual and same-sex monogamous couples. As far as the requirements for marriage are concerned, it should be noted that a minor may enter into a Dutch marriage provided he/she has obtained the required consent. In this regard, it is striking that unlike in South Africa, there is no differentiation made between heterosexual and same-sex minors.

Contrary to the marriage law reform approach adopted by the Dutch, Canadian marriage law reform was the result of judicial rulings finding that the exclusion of same-sex couples from marriages was discriminatory and unconstitutional. As a result of legislative power being shared by federal and provincial governments, same-sex marriages were legally recognised in certain provinces of Canada whilst marriage was still reserved for heterosexual couples in terms of the federal government. As the definition of marriage was the exclusive responsibility of the federal government, federal legislation ultimately had to redefine the definition of marriage to ensure that it is in line with the ideals of the Charter. This was done with the promulgation of the Civil Marriage Act that provides for a single form of marriage.

In South Africa, instead of following the Dutch or Canadian example of either amending existing legislation to incorporate same-sex marriages or by enacting a single statute applicable to same-sex and heterosexual monogamous marriages, the legislator opted to promulgate a separate Act to accommodate same-sex marriages. The application of dual Acts to regulate South African marriages however results in inequality as it inter alia questions the categorical exclusion of minors from entering into a civil union without considering “the best interests of the child.” The approaches adopted by the Dutch as well as the Canadian legislator do not only simplify matrimonial law by applying a single form of marriage regardless of sexual orientation but also provide for true equality without discrimination.⁸⁴⁶

⁸⁴⁵ Boele Woelki *Registered partnership* 51-52.

⁸⁴⁶ Preamble of the Civil Marriage Act.

CHAPTER 6

THE APPLICATION OF “THE BEST INTERESTS OF THE CHILD” WITHIN A MARRIAGE LAW FRAMEWORK: THE RESEARCH DESIGN AND METHODOLOGY

6.1 Introduction

This chapter consists of a description of the research paradigm, design, methodology and methods of data collection and analyses applied in this study. In comprehending how individuals interpret their worlds by way of their own experiences relating to a specific phenomenon, a descriptive and interpretivist research design is employed in this study.⁸⁴⁷ Accordingly a qualitative research approach⁸⁴⁸ is followed whilst the framework of the study is founded on the interpretivist paradigm.⁸⁴⁹ As far as the data gathering techniques of the study are concerned, the process of data collection can be divided into two sequential stages, firstly a documentary analysis and secondly the collection and analysis of data obtained from the semi-structured interviews conducted with participants. The techniques in data collection and analysis are discussed later in this chapter.

During the initial part of the study, non-interactive modes of inquiries are applied by way of a legal historical analysis⁸⁵⁰ as well as a comparative research analysis method.⁸⁵¹ The legal historical analysis investigated the development of the current

⁸⁴⁷ Maree *First Steps in Research* 49-50.

⁸⁴⁸ Qualitative research comprise of the collection of data that is mostly in written or spoken language or observed and transcribed into language. Data analysis is mostly conducted by identifying and categorizing themes. Quantitative research methods comprises of the collection of data in the form of numbers and the analysis thereof by way of statistics. Blanche, Durrheim and Painter *Research in Practice* 46-47.

⁸⁴⁹ An interpretivist paradigm refers to the study of theory and practice of interpretation. Maree *First Steps in Research* 58.

⁸⁵⁰ Historical analysis refers to the se of primary and secondary sources as well as running records and recollections that is critically analysed and cross-checked to give meaning to a phenomenon. Maree *First Steps in Research* 73.

⁸⁵¹ Comparative research methods refers to the systematic establishment of similarities and

South African marriage law framework and in particular the impact the provisions of the Civil Union Act have had on minor children's constitutional rights and in particular section 28(2) of the Constitution. In addition to the aforesaid, a comparative analysis is conducted between the South African, Dutch and Canadian marriage law systems in considering possible suggestions on law reform. Accordingly the initial phase of the study is conducted by using qualitative research methods to analyse primary sources⁸⁵² (such as the Constitution, relevant legislations and case laws) as well as secondary sources⁸⁵³ (by way of a synthesis of relevant text books, articles and books relating to "the best interests of the child").

The second part of the study incorporates interactive modes of inquiry by way of semi-structured interviews.⁸⁵⁴ In studying the phenomenon,⁸⁵⁵ ten family advocates within KwaZulu-Natal were interviewed to collect rich descriptive data from the participants' experiences. The participants were selected by way of a purposive selection process.⁸⁵⁶ The data collected from the interviews was analysed by way of an interpretive analysis approach⁸⁵⁷ and by applying a thematic analysis method. In considering the trustworthiness of the study and especially the analysis of the data and the process of coding common themes, a colleague (presently completing her doctoral degree in the field of law) peer examined the results. The identity of the participants was kept confidential whilst the interviewing and data collection processes complied with the ethical considerations of the University of Zululand. The findings concluded from the data analysis, combined with the findings of the literature studied in terms of the initial phase of the study, provided valuable and insightful information relating to whether or not, section 1 of the Civil Union Act amounts to a violation of the Constitution and in particular section 28(2) thereof.

differences between cases. Maree *First Steps in Research* 73.

⁸⁵² Primary sources refer to original source text. Maree *First Steps in Research* 73.

⁸⁵³ Secondary sources refers to the work or writings of other scholars. Maree *First Steps in Research* 73.

⁸⁵⁴ For a discussion on the different modes of inquiry applied in terms of qualitative research generally, see Maree *First Steps in Research* 34.

⁸⁵⁵ Phenomenological analysis is concerned about human existence and experience rather than metaphysical reality. Davies 2007 *Doing a Successful Research Project* 135-137; Blanche, Durrheim and Painter *Research in Practice* 463.

⁸⁵⁶ Purposive selection is based on careful selection of cases that are reflective of the population under study. Blanche, Durrheim and Painter *Research in Practice* 563.

⁸⁵⁷ Interpretive analysis refers to interpretation of intended meaning. Blanche, Durrheim and Painter *Research in Practice* 560.

6.2 Research Paradigm

*“Paradigms represent what we think about the world (but cannot prove). Our actions in the world, including the actions we take as inquirers, cannot occur without reference to those paradigms: As we think, so we do act”.*⁸⁵⁸

A research paradigm can be regarded as a set of interconnected practices or general philosophical assumptions and norms that define the nature of a research study by way of three dimensions.⁸⁵⁹ The first dimension, ontology⁸⁶⁰ stipulates the nature of a central aspect of the world that is to be studied and what information can be known from it.⁸⁶¹ The second dimension, epistemology⁸⁶², relates to the interpretation, definition and rationalization that give rise to a certain perspective or world-view.⁸⁶³ Research methodology, being the third dimension, refers to the manner in which a researcher goes about studying “the meaning that lies behind social action.”⁸⁶⁴ Therefore a paradigm can be regarded as the organising principle used to interpret reality.⁸⁶⁵ As qualitative research is focused on the understanding of a phenomenon within a specific environment, it also allows for the interpretation of the phenomenon “through the eyes of the participants.”⁸⁶⁶ The qualitative research approach is accordingly an iterative process⁸⁶⁷ requiring flexibility. Consequently in selecting an organising principle that would best allow for the interpretation and understanding of the research findings of this study, an interpretivist paradigm was identified.

An interpretivist paradigm is based on the assumption that a human phenomenon is different from natural phenomena.⁸⁶⁸ In applying an interpretivist paradigm the

⁸⁵⁸ Lincoln and Guba *Naturalistic inquiry* 15.

⁸⁵⁹ Blanche, Durrheim and Painter *Research in Practice* 6-7; Maree *First Steps in Research* 47.

⁸⁶⁰ Ontology can be defined as the nature and form of reality whereby people construct social meaning through their interactions with the world. Maree *First Steps in Research* 52-54.

⁸⁶¹ Blanche, Durrheim and Painter *Research in Practice* 6-7.

⁸⁶² Epistemology refers to the method of “knowing the nature of reality, thereby assuming a relationship between the knower and the known.” Maree *First Steps in Research* 54-55.

⁸⁶³ Maree *First Steps in Research* 47-55.

⁸⁶⁴ Blanche, Durrheim and Painter *Research in Practice* 7.

⁸⁶⁵ Maree *First Steps in Research* 48.

⁸⁶⁶ Maree *First Steps in Research* 50-51.

⁸⁶⁷ *Iterative* refers to a methodological, repetitive, and recursive process in qualitative data Analysis sage Research Methods <http://methods.sagepub.com/reference/encyc-of-case-study-research/n185.xml> (Date of use: 5 November 2017).

⁸⁶⁸ Maree *First Steps in Research* 58-60.

researcher, by way of interacting with the participants and listening to their perspectives, interprets what the participants regard to be real for them based on their subjective experiences and then makes use of qualitative research techniques in gathering and analysing such data.⁸⁶⁹ Accordingly interpretive research underscores the need for collecting rich data.⁸⁷⁰ The application of an interpretivist paradigm is thus based on certain assumptions *inter alia*:-

- that human life can only be comprehended by concentrating on people's subjective experiences;
- that reality is a human product that is socially constructed;
- that the human mind is the purposive basis of how meaning is constructed;
- that human behaviour is affected by understanding of the social world; and
- that our understanding of a phenomenon affects the manner in which we approach research.⁸⁷¹

The ontology of this study accordingly relates to the expansion of the research question to a particular research design where the participants can engage in the study based on their experiences within a social context and provide truthful data in responding to the research question.⁸⁷² As humans have an intrinsic drive to create meaning, the participants (family advocates as professionals participating in child related matters) are viewed as active agents who make meaning of what constitutes the best interests of a child.⁸⁷³ Consequently, epistemologically the participants are co-creators of knowledge.⁸⁷⁴ The intention of the research is therefore to understand and interpret these meanings.⁸⁷⁵ For this reason, interpretivist findings facilitate the development of a different understanding of the outcomes.⁸⁷⁶

6.3 Research Design

⁸⁶⁹ Blanche, Durrheim and Painter *Research in Practice* 273-274.

⁸⁷⁰ Blanche, Durrheim and Painter *Research in Practice* 38-39.

⁸⁷¹ Maree *First Steps in Research* 59-60.

⁸⁷² Maree *First Steps in Research* 54-60.

⁸⁷³ Maree *First Steps in Research* 58-60.

⁸⁷⁴ Maree *First Steps in Research* 55-58.

⁸⁷⁵ Babbie and Mouton *The practice of social research* 28.

⁸⁷⁶ Maree *First Steps in Research* 58-60.

Research design refers to a strategy which links the researcher's assumptions and research question/s with the criteria applied in selecting research data, the method employed in gathering research data, the approach adopted in analysing the research data and the selection of the participants to the study.⁸⁷⁷ It should however be noted that despite six types of qualitative research design being identified,⁸⁷⁸ the designs may overlap and be further refined.⁸⁷⁹ Ultimately the research design/s should answer the research question.⁸⁸⁰ Research design is accordingly instrumental in generating the required data to answer the research question.⁸⁸¹

In establishing a research design that would validate the findings, the following aspects need to be considered:-

- what the research wants to accomplish;
- the theoretical paradigm informing the research;
- the context within which the research is conducted; and
- the research methods and techniques applied in gathering and analysing the data.⁸⁸²

The first part of the study applied the historical (comparative) research design, whilst the latter part of the study identified grounded theory as the most suitable qualitative research design for purposes of this study. By applying a historical (comparative) research design, an understanding of past events is obtained.⁸⁸³ Accordingly the study allows for a deeper understanding of the development, rationale and decisions made that has led to the current legislation regulating South African marriages as well as the application of “the best interests of the child” principle in all matters concerning a minor child. The application of grounded theory in turn allows for continuous comparative analysis as the researcher moves in and out of the data collection and

⁸⁷⁷ Maree *First Steps in Research* 70.

⁸⁷⁸ For a discussion on the six types of qualitative research designs, including conceptual studies, historical research, action research, case study research, ethnography and grounded theory generally, see Maree *First Steps in Research* 70-78.

⁸⁷⁹ Maree *First Steps in Research* 70.

⁸⁸⁰ *Ibid.*

⁸⁸¹ *Ibid.*

⁸⁸² Blanche, Durrheim and Painter *Research in Practice* 37.

⁸⁸³ Maree *First Steps in Research* 73-74.

the analysis process.⁸⁸⁴ Accordingly by analysing data that is systematically gathered and analysed, theory is developed.⁸⁸⁵

Historical research can be described as a process whereby sources, relevant to the study, are interpreted and analysed.⁸⁸⁶ Accordingly, historical research is generally descriptive in nature as it establishes a foundation and understanding of past experiences by critically and analytically scrutinising documentation, thereby investigating past trends and relating them to present and future trends.⁸⁸⁷ Such trends are identified by utilising primary (the original source) as well as secondary sources (scholarly work relating to the study).⁸⁸⁸ To ensure the validity of applying the historical research method, the researcher analytically analysed and scrutinised various documents by way of cross-checking data.⁸⁸⁹

In chapter 5 of the study, a comparative study is conducted between the South African, Dutch and Canadian marriage law systems. Comparative research comprises of the methodical examination of primary and secondary sources in identifying relationships and variances between the cases under study.⁸⁹⁰ In terms of the comparative research design applied in the study, the researcher systematically compared similarities and differences between societies or systems.⁸⁹¹ For purposes of trustworthiness of the study various documentary sources are consulted to ensure accuracy and the corroboration of data especially as far as the first part of the study is concerned.⁸⁹²

The second phase of the study includes the use of semi-structured interviews. An interview is defined as a two-way communication in which questions are put to the participants with the aim of gaining rich descriptive data in respect of the participants' ideas, opinions and behaviour.⁸⁹³ Accordingly the second phase of the study is inductive⁸⁹⁴ by nature and focusses on grounding theory by applying systematic

⁸⁸⁴ Strauss & Corbin *Grounded Theory Methodology* 217-225.

⁸⁸⁵ *Ibid.*

⁸⁸⁶ Maree *First Steps in Research* 72-73.

⁸⁸⁷ *Ibid.*

⁸⁸⁸ Maree *First Steps in Research* 73.

⁸⁸⁹ *Ibid.*

⁸⁹⁰ Maree *First Steps in Research* 73-74.

⁸⁹¹ Maree *First Steps in Research* 73.

⁸⁹² Maree *First Steps in Research* 73-74.

⁸⁹³ Maree *First Steps in Research* 87.

⁸⁹⁴ Inductive analyses refers to making general assumptions based on the observation of people's behaviour in specific cases. Blanche, Durrheim and Painter *Research in Practice* 4; Maree *First Steps in Research* 99.

observation⁸⁹⁵ of participants' experiences rather than developing a theory and then testing it empirically.⁸⁹⁶ Grounded theory entails the following processes:-

- Collecting data by way of social interaction such as conducting semi-structured interviews with participants;
- Data analysis by comparing the data, coding and categorizing the data as well as assessing the similarities and differences in social interactions in establishing a "core idea";
- Theory delimitation to confirm or disconfirm the relationship between the concepts; and
- Theory definition by way of an explanation of the investigated phenomenon.⁸⁹⁷

When presenting data collection and data analysis, interpretive descriptive design borrows from grounded theory.⁸⁹⁸ In this study, the application of interpretive descriptive design is especially relevant when considering and analysing the subjective experiences of the participants whilst at the same time learning more from the comprehensive patterns within the phenomenon under study.⁸⁹⁹ As the researcher is an insider to the interviews, the manner in which the data is collected as well as the method of analysis is paramount to ensure that the researcher is not influenced or biased as a result of the participants' subjectivity.⁹⁰⁰ To ensure that the research results are valid, the researcher emphasised the relevance of the participants' perceptions in respect of the best interests of the child within a marriage law framework.⁹⁰¹

Interpretive descriptive design accordingly provides meaning to data gathered during a research study. It involves continuous assessments of data (obtained by way of documentary evidence and/or interviews) observing comparisons and variances.⁹⁰² It

⁸⁹⁵ Systematic observation is guided by concrete research questions and design. Blanche, Durrheim and Painter *Research in Practice* 6-7.

⁸⁹⁶ Maree *First Steps in Research* 77.

⁸⁹⁷ Maree *First Steps in Research* 78.

⁸⁹⁸ Maree *First Steps in Research* 77-78. Strauss & Corbin *Grounded Theory Methodology* 217-285.

⁸⁹⁹ Blanche, Durrheim and Painter *Research in Practice* 273; Maree *First Steps in Research* 99.

⁹⁰⁰ Maree *First Steps in Research* 79.

⁹⁰¹ Blanche, Durrheim and Painter *Research in Practice* 167-169.

⁹⁰² Blanche, Durrheim and Painter *Research in Practice* 273-275.

accordingly provides an understanding of how people experience life and make sense thereof. The basis of interpretive descriptive design is to provide for a qualitative study of a clinical phenomenon to enable the researcher to identify themes and create an interpretive description thereof.⁹⁰³ To accomplish same, interpretive descriptive design is applied in terms of small sample sizes and by employing data collection methods such as documentary analysis and interviews.⁹⁰⁴ Accordingly interpretive descriptive design provides for multiple data collection strategies which in turn ensure the validity of the study.⁹⁰⁵

In addition to the researcher obtaining meaning of data gathered by way of an interpretive design, descriptive design allows for the description (not the explanation) of a specific phenomenon by way of examining a phenomenon in real-life situations and gaining in-depth meaning.⁹⁰⁶ The key aim in the study is to provide for an accurate description of the phenomenon of “the best interests of the child” within a marriage law framework. In arriving at such description, the researcher identified the offices of the family advocate (as a particular group of people) to determine their opinions and contributions towards this research study. Consequently, in accomplishing the desired results for the study, the participants must feel comfortable to discuss the research topic and questions put to them during the interview.⁹⁰⁷ At the same time it is imperative that the questions put to the participants are diverse and relevant to enable the researcher enough data to observe and describe the observations.⁹⁰⁸ The data that was gathered included the transcribed interviews and the researcher’s personal notes compiled during and after each interview. The notes and transcription were read and reread on numerous occasions to enable the researcher to seek connection between the transcription and the research study. Accordingly the majority of data collected in descriptive design is qualitative.⁹⁰⁹ The selected research design should therefore encompass the methods applied in sampling, data gathering and data analysis applied in executing the research.⁹¹⁰

⁹⁰³ *Ibid.*

⁹⁰⁴ Blanche, Durrheim and Painter *Research in Practice* 48-50.

⁹⁰⁵ Babbie and Mouton *The Practice of Social Research* 281.

⁹⁰⁶ Blanche, Durrheim and Painter *Research in Practice* 167; Maree *First Steps in Research* 78-79.

⁹⁰⁷ Blanche, Durrheim and Painter *Research in Practice* 297.

⁹⁰⁸ Blanche, Durrheim and Painter *Research in Practice* 273-277.

⁹⁰⁹ Blanche, Durrheim and Painter *Research in Practice* 166-168.

⁹¹⁰ Blanche, Durrheim and Painter *Research in Practice* 47-49.

6.4 Research Methodology

The methods employed in sampling the data, gathering the data as well as analysing the data in terms of this study can be presented in two consecutive phases.

6.4.1 Phase 1: Data analysis

6.4.1.1 Selection of Documents and Data Gathering

Documentary analysis includes primary and secondary sources.⁹¹¹ The aim of using documents as a data gathering technique is to focus on all forms of written communications that are relevant to the phenomenon being studied.⁹¹² The researcher accordingly consulted primary sources, *inter alia* South African as well as international legislation, public documents (such as commentary on legislation) as well as court orders and case laws. International statutes as well as international case laws were collected through internet sources and downloaded from governmental websites. Secondary sources, such as writings, journals and articles relating to the subject matter were gathered from the University of Zululand's library catalogue system. South African statutes and case laws were downloaded from governmental websites. In addition to primary sources, data obtained from secondary sources were collected from South African SAPSE accredited journals as well as text books.

In selecting the documents used during the study the following aspects had to be considered and verified:-

- Is the document a primary or secondary source?
- How recent was the document published and is the document still relevant?
- Is the document based on original research or anecdotal?
- What was the reasoning behind the drafting of the document?
- How does the document relate to this study?

⁹¹¹ Maree *First Steps in Research* 82.

⁹¹² *Ibid.*

- What methodology was applied in drafting the document?⁹¹³

Due to the volume of documents gathered for purposes of this study the researcher entered all the documents into a bibliographic database. In doing so the documentation was categorized according to their content. International legislation, case law and secondary sources were indexed separately from South African statutes and documents. The documents were indexed according to common themes. The indexing of documentation according to common themes assisted in corroborating the data from other sources.⁹¹⁴

6.4.1.2 Documentary Analysis

The data gathered for purposes of the first phase of this study was analysed with the aim of investigating how “the best interests of the child” principle had been applied in terms of family law and in particular matrimonial matters. In identifying possible indicators of how “the best interests of the child” principle was considered or dismissed during the research study the researcher applied content analysis. Content analysis refers to a systematic approach of approaching data from various angles in categorizing explanations that will assist in understanding the raw data, with the aim of identification.⁹¹⁵ In applying content analysis, communication and raw data are coded by selecting common themed words, and context.⁹¹⁶ The application of content analysis is particularly beneficial when analysing case law, legislation and reports.⁹¹⁷

The content of the documents were coded by way of latent coding which entails the interpretation of sections of legislation, case laws or texts, and making a subjective assessment based on the content of the specific section of the document.⁹¹⁸ Accordingly raw data is categorised through the process of coding.⁹¹⁹ In terms of the coding process key categories are identified and organized with the view of describing

⁹¹³ Maree *First Steps in Research* 83.

⁹¹⁴ Maree *First Steps in Research* 79.

⁹¹⁵ Maree *First Steps in Research* 101.

⁹¹⁶ Babbie *The Practice of social research* 112.

⁹¹⁷ Maree *First Steps in Research* 101.

⁹¹⁸ Babbie *The Practice of social research* 112.

⁹¹⁹ Babbie *The Practice of social research* 112.

the themes and investigating structural relationships.⁹²⁰ The assessment is accordingly an overall valuation of a specific section of a document.⁹²¹

6.4.2. Phase Two: Interviews

An interview can be defined as a “two-way conversation” whereby the researcher poses questions to the participants in view of collecting data in respect of the participants’ views, opinions and interpretations.⁹²² As interviews are interactive in nature, it supports the interpretive approach to research.⁹²³ The main purpose of qualitative interviews is therefore to obtain rich descriptive data and to allow the researcher to “see the world through the eyes of the participants”.⁹²⁴

In collecting rich descriptive data from the participants through their views and experiences, it is important to consider some important aspects when conducting an interview, namely:-

- To ensure that the participant/s are best qualified to provide valuable data;
- To, from the outset, inform the participant/s of the aim of the research study;
- To be mindful that the aim of the interview/s are to collect rich descriptive data;
- To construct the questions in such a way that the information you are trying to extract from the interview is clear;
- To be mindful of the manner in which the researcher conducts and structures her questions;
- To be attentive and listen to the responses of the participants without judging;
- To observe non-verbal communication and record the same in terms of field notes.⁹²⁵

6.4.2.1 Semi-Structured Interviews

⁹²⁰ *Ibid.*

⁹²¹ *Ibid.*

⁹²² Maree *First Steps in Research* 87.

⁹²³ Blanche, Durrheim and Painter *Research in Practice* 297.

⁹²⁴ Maree *First Steps in Research* 87.

⁹²⁵ Maree *First Steps in Research* 88.

The researcher conducted semi-structured interviews with ten family advocates that are regarded as experts in the field of family law and in particular the interpretation, assessment and application of “the best interests of the child” principle. In conducting semi-structured interviews, participants’ answered predetermined questions in order to validate developing data from other sources.⁹²⁶ Despite the fact that the questions for the interview/s are predetermined, semi-structured interviews do allow for the probing⁹²⁷ and clarification of data thereby enabling the researcher to pursue new aspects that may become apparent during the interview process.⁹²⁸ As a result of the inductive nature of the interview process, new theory is generated.⁹²⁹ Consequently the researcher is instrumental in the gathering of in-depth descriptions from the participants relating to the research study.⁹³⁰ Conducting semi-structured interviews accordingly allows for the adaption of questions during the interview process and accordingly is more flexible than structured interviews.⁹³¹ Therefore the researcher is in a position to obtain a more holistic understanding of the phenomenon being studied.⁹³²

6.4.2.2 The Semi-Structured Questions

The researcher designed the questions in such a manner that allowed for the obtaining of valuable insight into the professional views of the participants. The researcher prepared a brief introduction to the research study, followed by introductory questions relating to the participants’ experience and qualifications. The latter part of the interview dealt with the essence of the research study in relation to the child’s best interests in terms of family law as well as in relation to matrimonial issues. In structuring the interview questions, the researcher relied on a literature study that guided the process of developing appropriate questions for this study.

⁹²⁶ Maree *First Steps in Research* 87.

⁹²⁷ For a discussion on the three probing strategies, namely detail-orientated probes, elaboration probes and clarification probes generally, see Maree *First Steps in Research* 88-89.

⁹²⁸ Maree *First Steps in Research* 87.

⁹²⁹ Babbie and Mouton *The practice of social research* 212.

⁹³⁰ Maree *First Steps in Research* 87.

⁹³¹ Maree *First Steps in Research* 84-87.

⁹³² Maree *First Steps in Research* 87.

During the initial stages of the research study a list of preliminary questions were drafted by the researcher. The questions were adapted and some changed after the initial literary review. A list of questions were drafted and used to gather data during the interview process. A copy of the questions used during the interviews is attached as Appendix A.

The initial questions established the qualifications and experience of the participants and included questions such as:-

- What qualifications do you have and when and where did you obtain such qualification?
- How many years of experience do you have as a family advocate?
- What aspect of your career do you find most challenging?

After the initial questions, the researcher directed questions that were more related to the research study, including:-

- What is your perspective on the best interests of the child concept?
- Do you think that South African marriage law adequately encompasses the best interests of the child principle?
- To what extent do you think the personal circumstances and best interest of the child criteria is applied in determining the best interests of the child in terms of South African marriage law?
- Do you think that the best interests of the child test are adequately considered for administrative and judicial decisions involving minor children?
- Do you think that the best interest of the child standard is considered in terms of section 1 of the Civil Union Act?
- If not, why not?
- Do you think that excluding minors from entering into a civil union, whilst allowing minors to enter into a civil or customary marriage, constitutes equality?
- Do you think that when precluding minors from entering into a civil union (especially same-sex minors), material consideration is given to the well-being of the minor child?

- If not, do you think that restricting minors from entering into a civil union affects their perception of self-worth and dignity?
- Do you think that a generic marriage law system in South Africa, allowing for all minors to get married provided they have the necessary consent from their guardians, will be more reflective of the constitutional values of the South African Constitution?
- What do you understand by the concept “the best interests of the child”?
- How do you ensure that the best interests of the child are applied in your assessment?
- What do you regard as relevant factors to be considered when determining the best interests of the child?
- As far as matrimonial law is concerned, do you think that “the best interests of the child” principle is adequately applied when determining when a minor should enter into a marriage?
- What criteria can be used to determine the best interests of the child?

The questions were prepared in such a manner that the participants could not only share their personal experiences with the researcher, but also elaborate on issues related to the research study. Accordingly the researcher obtained in-depth information on the judicial perception of the best interest of the child and the application of the principle. All the questions were asked during the interviews, thereby ensuring the same basic line of inquiry, whilst in some cases elaborative questions were put to the participant.

6.4.2.3 Sampling and Selection of Participants

Due to the specific purpose of the study the population for this study is restricted to family advocates from the offices of the Family Advocate. In selecting a portion of the population for purposes of the study the researcher made use of purposive sampling.⁹³³ Purposive sampling refers to “the selection of participants as a result of a defining characteristic that makes them the holders of the data needed for the

⁹³³ For a discussion on purposive sampling in general see Maree *First Steps in Research* 79; 178.

study”.⁹³⁴ The use of purposive sampling therefore aims at gaining the richest source of data in answering the research study.⁹³⁵ The participants were restricted to the province of KwaZulu-Natal and more specifically to the offices of the Family Advocate in Durban, Pietermaritzburg and Ntuzuma.

For the purposes of the interview, the sample of participants had to comply with the following criteria:-

- The participants had to be resident citizens of the Republic of South Africa;
- The participants had to specialize and have extensive knowledge in the field of family law and the *Children’s Act*, 38 of 2005;
- The participants had to be appointed family advocates and had to belong to either the Bar association or the Law Society;
- The participants had to have had a minimum of five years’ experience as a family advocate.

The researcher accordingly identified individuals who had been appointed as family advocates in KwaZulu-Natal and that had at least five years’ experience in chairing enquiries regarding the determination and application of “the best interests of the child” principle. The researcher is of the view that the selected family advocates would be in the best position to provide the most useful information for purposes of the study and that such data, in conjunction with the documentary analysis, would allow for new rich data relating to the research study.

In determining the sample size of the participants, the researcher considered the type of analyses planned, the accuracy of results and the characteristics of the population.⁹³⁶ It is imperative that the sample should be representative of the population.⁹³⁷ Due to the homogenous nature and characteristics of the participants as well as that between the Durban, Pietermaritzburg and Ntuzuma offices, there were only thirteen appointed family advocates. The researcher restricted the sample size to

⁹³⁴ Maree *First Steps in Research* 79.

⁹³⁵ *Ibid.*

⁹³⁶ Maree *First Steps in Research* 178.

⁹³⁷ *Ibid.*

ten participants. At the same time the researcher was fortunate to conduct interviews with male and female family advocates from diverse backgrounds. Despite the sample size being restricted to ten participants, the researcher is confident that by using purposive sampling, the sample is representative of the population.⁹³⁸

6.4.2.4 Research Procedure

The research procedure encompasses the process of obtaining consent, setting up the interviews and using interviewing techniques to collect data.

6.4.2.4.1 Consent to Conduct Interviews

Consent was obtained from the National Office: Department of Justice and Constitutional Development to conduct interviews with members practicing as family advocates within the province of KwaZulu-Natal. The interviewers agreed to be interviewed for purposes of this research. For purposes of confidentiality the names of the participants are not used during the research study. The participants will accordingly be referred to in the order in which they were interviewed. The chief family advocates of the Durban, Pietermaritzburg and Ntuzuma offices were contacted in arranging for the interviews of their colleagues. A copy of the letter giving consent to be interviewed, the researcher's ethical clearance certificate as well a copy of the semi-structured questions were e-mailed to each chief family officer prior to the interviews.

6.4.2.4.2 Setting up the Interviews

To ensure that the family advocates were not unnecessarily inconvenienced, the researcher travelled to the offices of the family advocate and conducted the interviews at their offices as and when they had time. The fact that the interviews were conducted in the participants own environments ensured that the interviews were not perceived as threatening whilst at the same time making the participants feel comfortable. Due

⁹³⁸ Maree *First Steps in Research* 179-180.

to the nature of semi-structured interviews it is imperative that the participants trust the researcher.⁹³⁹

6.4.2.4.3 The Recording Method

At the outset of the interview, the recording process was explained to the participants on an individual basis. Each participant was asked permission to record the interview. Every participant consented to the recording of the interview.

Each interview was recorded on an audio recorder that was placed between the interviewer and the participant during the interview process. For ethical purposes each participant was asked, prior to the interview as well as during the interview to formally consent to the interview being audio recorded. In addition to consent being obtained to record the interview, each participant also consented to the data gathered during the interview being used for purposes of the research study. Whilst the recording of the interviews allowed the researcher to focus on the participant's contributions, the researcher also took her own field notes during and after an interview in respect of what the researcher experienced during the interview thereby ensuring the gathering of rich data whilst still fresh in the mind of the researcher.⁹⁴⁰ The recorded interviews accordingly assisted in delivering a more complete record of the interviews.

The recorded interviews were transcribed verbatim by a professional transcriber to ensure that all gestures during the interview were translated into words for purposes of authenticity.⁹⁴¹ The original recording is stored digitally.

6.4.2.4.4 Participant Engagement

The purpose of conducting interviews is to gather data.⁹⁴² In obtaining rich data it is important that the participants engage with the researcher during the interview process.⁹⁴³ The interview accordingly commenced with a brief explanation of the

⁹³⁹ Maree *First Steps in Research* 92-94.

⁹⁴⁰ Maree *First Steps in Research* 92.

⁹⁴¹ Maree *First Steps in Research* 104.

⁹⁴² Maree *First Steps in Research* 92-94.

⁹⁴³ *Ibid.*

research topic to ensure that the participants understood the nature of the questions asked during the interview.

6.4.2.5 Data Collection

In analysing the data obtained during the interviews the recording is professionally transcribed in the form of a record.

6.4.2.5.1 Description of the Participants

The first participant was an Indian female family advocate practicing as such at the Pietermaritzburg office. The participant obtained a B Proc degree from the University of South Africa. The participant first started working at the family advocate's offices on an *ad hoc* basis for five months prior to her fulltime appointment. She has nine and a half years of experience as a family advocate. She chose to follow the career path as a family advocate as she finds her profession "highly emotive".

The second participant is an African female family advocate practicing as a family advocate at the Pietermaritzburg office. She completed her LLB degree at the University of Zululand in 2002. The participant first worked at the Durban Magistrate's Court dealing mostly with family related matters. She has ten years of experience as a family advocate. She chose to become a family advocate because it provides her with an "emotional challenge".

The third participant is an African male family advocate practicing as such from the family advocate's offices in Durban. He obtained a LLB degree from the University of Zululand in 2011. The participant initially started working in the criminal court and became interested in family law related matters after being transferred to the civil court. The participant has ten years' experience as a family advocate. The participant pursued the career as a family advocate as he finds the job "challenging and very unique".

The fourth participant is an Indian female family advocate employed as such at the offices of the family advocate in Durban. The participant obtained a BA LLB in 1993 and a LLM degree in 2008 from the University of KwaZulu-Natal. The participant has twenty one years' experience as a family advocate. The participant indicated that "it was a dream for her ...something I wanted to do" in becoming a family advocate as she "can be a nice lawyer".

The fifth participant is a coloured female family advocate employed at the family advocate's office in Durban. The participant obtained a LLB degree in 1995 from the University of Natal. The participant has fourteen years' experience as a family advocate. The participant finds her job challenging considering that parents often "walk away from their child who is totally innocent".

The sixth participant is an African male family advocate employed by the family advocate's office in Durban. The participant obtained a LLB degree from the University of Natal in 1998 whereafter he practiced law as an advocate until he was appointed as a family advocate in 2007. The participant has ten years' experience. The participant finds his profession "enlightening and empowering".

The seventh participant is an African female family advocate employed by the family advocate's office in Durban. The participant obtained a BA social work degree as well as a LLB degree from the University of Zululand. The participant has ten years' experience as a family advocate. The participant chose to be a family advocate as "she loves working with children, promoting and safeguarding their rights".

The eighth participant is an African female family advocate employed as such by the family advocate's offices in Durban. The participant obtained her LLB degree from the University of Pietermaritzburg. The participant has twenty years' experience as a family advocate. The participant regards her job as rewarding stating that "when you mediate you get satisfaction".

The ninth participant is an African female family advocate employed by the family advocate's office in Ntuzuma. The participant obtained a LLB degree from the University of KwaZulu Natal in 2007. The participant has five years' experience as a

family advocate. The participant indicated that “I like educating people because that is where we get the platform to educate people of their rights...” Although the participant indicated that “everything has its challenges” she finds her profession rewarding.

The tenth participant is a white male family advocate employed by the offices of the family advocate in Durban. The participant completed his B Proc degree in 1992 and his LLB degree in 1994 at the RA University. The participant has eight years’ experience as a family advocate and decided to follow the career path of a family advocate as he “enjoys helping children”.

From the above-mentioned description of the participants is it evident that a diverse group of participants were interviewed and is accordingly a well-balanced sample of the family advocate offices.

6.4.2.5.2 Data Analysis and Coding

Qualitative data analysis is a continuous process whereby data gathering, analyses and reporting are interconnected.⁹⁴⁴ Consequently the process of qualitative data analysis consists of three important elements that are interlinked and cyclical namely noticing, collecting and reflecting.⁹⁴⁵ Consequently whilst a researcher is reflecting on data collected, gaps may be noticed that require the collection of further data.⁹⁴⁶ Qualitative research thus requires the summary of observations in terms of common themes and words to assist in making sense of the data.⁹⁴⁷

In terms of the interviews, the verbal recorded data was transcribed into written format. In analysing the transcribed data the researcher applied thematic analyses.⁹⁴⁸ The transcribed record is read and reread in identifying common themes by looking *inter alia* at the use of specific words or phrases, context and the frequent use of similar

⁹⁴⁴ Maree *First Steps in Research* 99-100.

⁹⁴⁵ Maree *First Steps in Research* 100.

⁹⁴⁶ Maree *First Steps in Research* 100. For a discussion on the data analysis model developed by Seidel generally, see Seidel *Qualitative Data Analysis* appendix E <http://www.qualisresearch.com/Downloads/qda.pdf> (Date of use: 15 November 2017).

⁹⁴⁷ Maree *First Steps in Research* 100.

⁹⁴⁸ Thematic analyses refers to a process whereby patterns in data is identified, examined and recorded. For a discussion on thematic analysis generally, see Braun and Clarke *Successful Qualitative Research: A practical guide for beginners* 12.

comments.⁹⁴⁹ Through the rereading of the transcribed record, the researcher is able to form a comprehensive thematic coding scheme.⁹⁵⁰ Themes (patterns across the data) are identified and linked to a particular research question.⁹⁵¹ Once the themes are identified, categories are analysed by way of coding.⁹⁵² The coding process consists of six phases to create established patterns.⁹⁵³ The coding process starts by the researcher familiarising herself with the data and creating initial codes.⁹⁵⁴ Once the initial codes are created common themes across the codes are identified whereafter the themes are reviewed.⁹⁵⁵ This process is followed by the defined naming of the themes and the production of the final report.⁹⁵⁶ Accordingly thematic analyses is an inductive process with the focus on the phenomenon as the human experience is analysed subjectively whilst also supporting the construction of theories that are grounded in the data themselves.⁹⁵⁷

Meaningful segments are coded by way of using descriptive words.⁹⁵⁸ The researcher applies inductive codes by developing the codes as they code the data.⁹⁵⁹ This process takes place by way of direct investigation of the data.⁹⁶⁰ The researcher made use of a three-column format in coding the transcribed record.⁹⁶¹ The transcription was in the center-column whilst the coding was recorded in the right-hand column. The researcher's reflective notes were recorded in the left-hand column.⁹⁶² The codes were manually captured and acted not only as collection points in respect of noteworthy data, but also as markers in respect of what the researcher thinks is happening and to assist in the discovery of deeper realities in the data.⁹⁶³ Paragraphs were coded by using different coloured highlighters for purposes of easy reference. Accordingly by

⁹⁴⁹ Maree *First Steps in Research* 104-105.

⁹⁵⁰ Maree *First Steps in Research* 105-107.

⁹⁵¹ Braun and Clarke *Successful Qualitative Research: A practical guide for beginners* 12.

⁹⁵² *Ibid.*

⁹⁵³ Braun and Clarke "Using thematic analysis in psychology" http://eprints.uwe.ac.uk/11735/2/thematic_analysis_revised (Date of use: 15 November 2017).

⁹⁵⁴ *Ibid.*

⁹⁵⁵ *Ibid.*

⁹⁵⁶ *Ibid.*

⁹⁵⁷ *Ibid.*

⁹⁵⁸ Maree *First Steps in Research* 105; Blanche, Durrheim and Painter *Research in Practice* 322-326.

⁹⁵⁹ *Ibid.*

⁹⁶⁰ *Ibid.*

⁹⁶¹ Maree *First Steps in Research* 106.

⁹⁶² Maree *First Steps in Research* 105-106.

⁹⁶³ Maree *First Steps in Research* 105.

employing open coding⁹⁶⁴ as a means to analyse data, the researcher can quickly retrieve and consider associated data together.⁹⁶⁵ It is therefore imperative that a master coding list (list of all the codes used in the research study) be kept.⁹⁶⁶ The same codes are thereafter applied to similar segments of data (*in vivo* coding).⁹⁶⁷

After the initial coding of the data the researcher summarized her data whilst revisiting the identified codes.⁹⁶⁸ By using axial coding the researcher identifies the connections between categories of the data.⁹⁶⁹ In establishing how many participants used certain words and expressions during their interviews an inventory was created for reporting purposes.⁹⁷⁰ At the end of the initial coding process of all the data, possible categories are identified.⁹⁷¹ The organisation of codes into categories entails labelling each category by way of a descriptive phrase from the text.⁹⁷² Categories accordingly emerge by identifying the themes that recur in the data.⁹⁷³

After the identification of the categories and labelling of the data the coded data is grouped into categories.⁹⁷⁴ Sections of the data are accordingly placed into suitable categories by way of an iterative process.⁹⁷⁵ This process continues until all the coded data has been placed into an appropriate category.⁹⁷⁶ Orphaned codes were kept separate from the categories.⁹⁷⁷ For consistency and thoroughness the researcher, at this stage, reread the transcribed record to ensure that all relevant data had been coded and categorized.

Once all the data had been categorized, the researcher identified a connection between the various categories based on mutual meanings amongst categories or

⁹⁶⁴ For a discussion on open coding generally, see Maree *First Steps in Research* 105.

⁹⁶⁵ Maree *First Steps in Research* 105; Blanche, Durrheim and Painter *Research in Practice* 324-325.

⁹⁶⁶ Maree *First Steps in Research* 105.

⁹⁶⁷ Maree *First Steps in Research* 106.

⁹⁶⁸ Maree *First Steps in Research* 106-107; Blanche, Durrheim and Painter *Research in Practice* 326.

⁹⁶⁹ Maree *First Steps in Research* 106-108.

⁹⁷⁰ Maree *First Steps in Research* 107; Blanche, Durrheim and Painter *Research in Practice* 326.

⁹⁷¹ Maree *First Steps in Research* 108; Blanche, Durrheim and Painter *Research in Practice* 326.

⁹⁷² *Ibid.*

⁹⁷³ Maree *First Steps in Research* 109.

⁹⁷⁴ *Ibid.*

⁹⁷⁵ *Ibid.*

⁹⁷⁶ *Ibid.*

⁹⁷⁷ *Ibid.*

supposed connections between categories.⁹⁷⁸ Although the coding and categorisation of the data collected in terms of the research study is in essence a summary of the participants' answers to the interview questions, they also signify a degree of interpretation.⁹⁷⁹ Such interpretation may be found in emerging patterns or descriptions in the data.⁹⁸⁰ For the study to contribute towards either a validation of existing knowledge or a new consideration of the body of knowledge, "the analysed data must be brought into context with existing theory".⁹⁸¹ This process requires an ongoing and iterative approach. In drawing a conclusion of the data analysis the conclusions must be based on verifiable data.⁹⁸²

6.5 Trustworthiness of the Study

The quality of the research conducted in this study was ensured through the application of the following criteria. Firstly, the researcher ensured thoroughness by collecting rich, in-depth data that was sufficient, appropriate and complex enough to make a contribution to the field of marriage law.

Secondly, the researcher's own involvement in matrimonial matters necessitated self-reflexivity about the biases and inclination of the research to ensure that the data was trustworthy. This implied that the researcher, who acted as the main instrument in this study, constantly reflected on psychological, sociocultural, academic, career-related or any other personal characteristics that might have influenced data collection and interpretation in order to minimise biased findings. The researcher shared her biases and assumptions about participants and the phenomenon with her supervisor to reduce researcher biases, while upholding self-reflectivity. Furthermore, the methods of data collection as well as the challenges faced in the process of obtaining the documents and identifying appropriate participants were described clearly.

⁹⁷⁸ Maree *First Steps in Research* 110.

⁹⁷⁹ Maree *First Steps in Research* 110-111.

⁹⁸⁰ Maree *First Steps in Research* 111.

⁹⁸¹ Maree *First Steps in Research* 111-113.

⁹⁸² Maree *First Steps in Research* 113.

Accordingly the following criteria were applied in ensuring the trustworthiness of the research:-

- The researcher ensured thoroughness by collecting rich, in-depth data that was sufficient, appropriate and complex enough to make a contribution to the field of marriage law;
- The researcher's own involvement in matrimonial matters necessitated self-reflexivity about the biases and inclination of the research to ensure that the data was trustworthy. This implied that the researcher, who acted as the main instrument in this study, constantly reflected on psychological, sociocultural, academic, career-related or any other personal characteristics that might have influenced data collection and interpretation in order to minimise biased findings.
- The researcher shared her biases and assumptions about participants and the phenomenon with her supervisor to reduce researcher biases, while upholding self-reflectivity.
- The methods of data collection as well as the challenges faced in the process of obtaining the documents and identifying appropriate participants were described clearly.
- Credibility that refers to trustworthiness and plausibility of the findings was ensured through the application of the principles of crystallisation in each of the phases of the study. Thick descriptions were presented to show the data to the readers *without telling them what to think*.⁹⁸³ In this study, the following principles of crystallisation were applied either across or in specific phases as indicated below:

Across phases: The use of multiple data sources including documents relating to matrimonial legislation and the experiences of professionals engaged in family law, as well as various methods of data collection, which in this case included document analysis and semi-structured interviews with professionals.

Crystallisation in each phase of the study included the following:

⁹⁸³ Ellingson *Engaging Crystallization in Qualitative Research* 843.

Phase 1: (Document analysis): Using a coder who was able to provide a different lens and allow for a more complex understanding of the documents.

Phase 2: (Interviews): Including participants who were involved in a variety of contexts to ensure multi-vocality as their different viewpoints would be clearly heard without being influenced in any way.

Member reflection was applied as a way to obtain correspondence between the findings and the participants' understanding of acting in "the best interests of the child." Through this process a rich deeper analysis of the research findings emerged that enhanced the trustworthiness of the set guidelines.

6.6 Ethical Considerations

The framework for the proposed research was the Civil Union Act. This study furthermore focused on the blanket exclusion of minors from entering into a civil union. The emphasis of the research focused on section 1 of the Civil Union Act as well as certain provisions of the Constitution, and specifically section 28 (2) which states that *"A child's best interests are of paramount importance in every matter concerning the child"*. The ethics of the study was typically associated with morality as it dealt with matters of right and wrong with associated emphasis on human rights.

The following ethical principles were adhered to in this research: -

- The fundamental ethical rule is that the research should not bring harm to the participants. In the first phase of the study secondary data, including case laws were used.
- The identities of the persons referred to in these documents were protected to ensure that no harm is inflicted. In the second phase of this study the participants were professionals, thus harm may have been limited as they are familiar with the challenge associated with issues relating to matrimonial legislation.

- The researcher paid particular attention to gauge whether any distressing issues for the participants had been aroused by the interview, and participants were given the opportunity to deal with any stressful issues that were evoked.
- The researcher clearly and openly stated the research procedures to the participants and the aim of the study to the participants.
- No physical harm was caused to the participants, as they were merely required to relate incidents from their own experience.
- After the interviews, the researcher provided the participants with an opportunity to reflect upon issues and to discuss matters that may have been evoked during the interviews.
- To ensure informed consent from the participants, the researcher informed them about the duration of the process, how they would be engaged in the process, what procedures would be followed, possible advantages as well as the credibility of the researcher.
- The researcher did not deceive the participants in any way and maintained participants' right to refuse to be interviewed, to answer any questions or fill in any forms, and also respected their time.
- The protection of the participants' interests and identities were paramount in this study and the researcher ensured confidentiality at all times by protecting their anonymity.

As far as the interviews are concerned the researcher ensured that the following measures were taken:-

- Explained to the participants the purpose of the research study;
- Explained to the participants that the interview/s is voluntarily and that they can withdraw their participation at any stage during the interview;
- Advised the participants that they may refuse to answer a question if they so wish;
- Informed the participants that the interview would last fifteen to thirty minutes;
- Explained the anonymity of their participation;
- Requested their consent to recording the interview as well as to use the data for purposes of the study;
- Provided the participants with the questions prior to the interviews;

- Provided the participants with a copy of the study's ethical clearance certificate as well as the letter of the head of the offices of the family advocate offices consenting to the interviews.

The researcher endeavored to maintain integrity in the data analysis and reporting, which also included ethical practices. A professional code of ethics was adhered to at all times. The data collected was stored at the University of Zululand and will be destroyed after 7 years.

6.7 Summary and Conclusion

In this chapter, the research paradigm, research design and method was discussed as well as the ethics and trustworthiness of the study. Fundamental terminology such as the interpretative paradigm as well as the interpretive and descriptive design was discussed. Methods of data collection and data analysis that were applied in this study were explained in order to establish themes.

The interviews consisted of questions and themes that are relevant to the research study. Semi-structured interviews were conducted with ten professionals. The professionals were selected by applying purposive sampling.

The interviews ranged from quarter of an hour to half an hour, depending upon the amount of information participants had to share. During the interviews the researcher actively engaged with the participants, asked them questions, listened to them and gained access to their accounts and articulations in order to obtain descriptions of their lives regarding the interpretations of the meaning of the described phenomena. All the interviews were recorded on an audio device and later transcribed. Participants were informed about the use of the recording in the consent form, and again when the interview commenced. The use of the recording device increased the accuracy of the research information and at the same time allowed the researcher to focus on the interviewee with full attention. The recorded data was transcribed verbatim for

purposes of analysis. In the next chapter the theories that emerged from the documentary analysis are compared to the results of the study.

CHAPTER 7

RESEARCH RESULTS

7.1 Introduction

The research results in respect of the first phase of the study (documentary analysis) as well as in respect of the second phase of the study (interviews) are reported in this chapter. The results in respect of the first phase of the study are obtained by way of a non-interactive mode of inquiry and comprises of a systematic analysis of primary and secondary documentary evidence. The aim of the first phase of the research study is to obtain a better understanding of the current marriage law framework of South Africa, as well as the differences created by and as a consequence of the application of dual but separate Acts. In addition to the aforesaid, the first phase of the study also assists in developing a deeper appreciation of “the best interests of the child” principle and the application thereof by considering the provisions of the current South African marriage legislation.

In the second phase of the study, namely the interviews, the researcher applied thematic analysis in identifying the common themes derived from the participants’ experiences during the interviews. This data was collected by conducting ten semi-structured interviews with purposively selected participants who have extensive experience in the field of family law with particular reference to the assessment and application of “the best interests of the child” principle within a South African context. In this chapter the common themes that emerged from the interviews are identified, similarities across the participants’ experiences correlated and the findings discussed.

In assessing the research results, the conclusions drawn from the second phase of the study are integrated into the results acquired from the first phase of the study in establishing the degree to which the results correspond or differ from prevailing research in this field of study.

7.2 Aims and Objectives of the Study

From the outset, the study aimed at accomplishing the following outcomes:-

- To establish a deeper understanding of what constitutes “the best interests of the child”;
- To evaluate the approach adopted by the judicial system and more specifically the family advocate’s office when assessing and applying the “the best interests of the child” principle;
- To ascertain whether such approach adequately caters for a child-centred determination in the context of marriage;
- To investigate the juxtaposition of current South African matrimonial legislation in determining whether the outright prohibition of minors’ wishing to enter into a civil union violates such minors’ fundamental rights to equality and dignity;
- To determine whether the blanket ban on minors from entering into a civil union as stipulated in section 1 of the Civil Union Act is in conflict with the constitutional provision that “[a] child’s best interest are of paramount importance in every matter concerning the child”;
- To establish whether the current South African law system requires law reform, and if so, what approach is to be adopted.

To following outcomes were achieved:-

- The study outlined the basic tenets of what constitutes the “best interests of the child” through a comprehensive literature review restricted to marriage law and legal historical origins;
- It outlined the national and international viewpoint of “the best interests

of the child” principle;

- It outlined and discussed the general principles guiding the implementation of a child-centred approach by the offices of the family advocate when determining the “best interests of the child”;
- It identified the common approach applied by the offices of the family advocate, when determining “the best interests of the child”;
- It critically analysed the current South African matrimonial legislation in so far as it relates to marriageable age and established that the blanket ban on minors from entering into civil unions, do not underpin “the best interests of a child” principle;
- It outlined the differentiation in marriageable age within the current South African marriage law framework and established that minors’ constitutionally protected rights are unjustifiably violated by such differentiation;
- It extracted lessons from the practice of Canadian and Dutch marriage law; and proposed solutions and recommendations for the development of a generic marriage law in South Africa that is gender-neutral and reflective of fundamental human rights.

7.3 Results: Documentary Analysis (Phase 1 of the Study)

7.3.1 “Best Interests of the Child” Principle: Understanding and Application

The following documents, listed in Table 7.3.1 below were of particular significance in establishing what constitutes “the best interests of the child” and how the principle is applied:-

Table 7.3.1

Number	Document Description	Nature of the Document	Impact and or Contribution to Analysis
1.	The Declaration of the Rights of the Child, 1924.	An initial international instrument protecting children's rights.	<ul style="list-style-type: none"> - First instrument to incorporate the "the best interests of the child" concept; - Principle 1 stated that "[E]very child shall enjoy all the rights set forth in the declaration and will not be discriminated against on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family"; - Principle 2 stated that "[T]he child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration".
2.	United Nations Convention on the	International treaty.	- Article 2(2) states that "[S]tate parties shall take all appropriate

	Rights of Children, 1989.		<p>measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members”;</p> <p>- Article 3(1) provides that “[I]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”;</p> <p>- Article 12.1 states that “[S]tate parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”.</p>
3.	The African Charter on the Rights and Welfare of the Child, 1990.	National treaty.	<p>- Article 1 stipulates that “[M]ember States of the Organization of African Unity, Parties to the present Charter shall recognize the rights, freedoms and duties enshrined</p>

			in this Charter and shall undertake the necessary steps, in accordance with their Constitutional processes and within the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.”
4.	Children’s Charter of South Africa, 1992.	National charter.	<p>- Article 1 states that “[A]ll children have the right to protection and guarantees of all the rights of the Charter and should not be discriminated against because of his / her or his / her parents or family's colour, race, sex, language, religion, personal or political opinion, nationality, disability or for any other reason” (which may include sexual orientation);</p> <p>-Article 3 furthermore mandates that “[A]ll children have the right to express their own opinions and the right to be heard in all matters that affect his / her rights and protection and welfare. All children have the right to be heard in courtrooms and hearings affecting their future rights and protection and</p>

			welfare and to be treated with the special care and consideration within those courtrooms and hearings which their age and maturity demands”.
5.	Interim Constitution of the Republic of South Africa 200 of 1993.	Interim Constitution.	Section 30(3) provided that “[F]or the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.”
6.	The Constitution of the Republic of South Africa, 1996.	Constitution.	<ul style="list-style-type: none"> - Section 28(1)(h) provides children the specific right “[t]o have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result”; - Section 28(2) provides that “[A] child’s best interests are of paramount importance in every matter concerning the child.”
7.	Matrimonial Affairs Act 37 of 1953.	Legislation	Section 5(1) (b) states that “ on the application of either parent of a minor whose parents are divorced or are living apart, if it is proved that it would be in the interests of the minor to do so, grant to either parent sole

			guardianship...or sole custody of the minor.”
8.	Marriage Act 25 of 1961.	Legislation.	<p>-Section 24(1) provides that “[N]o marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing”;</p> <p>-Section 25(1) provides that in certain circumstances where the consent of the parent/s or guardian/s cannot be obtained, the presiding officer of a children’s court can consent to the marriage”;</p> <p>-Section 25(4) states that where “[T]he parent, guardian or commissioner of child welfare in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the Supreme Court of South Africa: Provided that such a judge shall not grant such consent unless he is of the opinion that such refusal of consent by the parent, guardian or commissioner of child</p>

			<p>welfare is without adequate reason and contrary to the interests of such minor”;</p> <p>-Section 26(1) provides that a boy below the age of 18 years and a girl below the age of 15 years may not marry without the consent of the Minister of Home Affairs.”</p>
9.	Recognition of Customary Marriages Act 120 of 1998.	Legislation.	<p>- Section 3(3)(b) provides that section 25 of the Marriage Act 25 of 1961 applies in cases where the consent of the parent or legal guardian cannot be obtained in terms of customary marriages”;</p> <p>-Section 3(4)(a) provides that “[t]he Minister or any authorised officer in the public service may grant written permission to a minor who wishes to enter into a customary marriage, provided such intended marriage is desirable and in the interest of the parties”.</p>
10.	Children’s Act 38 of 2005.	Legislation.	<p>-Section 6(1) establishes a child-centered approach in relation to all matters concerning the child;</p> <p>-Section 6(2)(a) provides that “[s]ubject to any lawful limitation, all proceedings,</p>

			<p>actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and all other rights and principles as set out in terms of the Children's Act";</p> <p>-Section 9 mandates that in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied;</p> <p>-Section 7(1) provides a set of criteria/factors to be considered in establishing the best interests of the child;</p> <p>-Section 10 of the Act provides that "[e]ach child that is of such an age and maturity and stage of development as to be able to participate in proceedings, actions or decisions concerning him/her, participate in such process and that such views should be considered in determining the best interests of that child";</p> <p>-Section 14 states that "[E]very child has the right to bring, and</p>
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			to be assisted in bringing, a matter to a court, provided that that matter falls within the jurisdiction of that court.
11.	<i>Cronje v Cronje</i> 1907 TS 871.	Case law.	Signified a shift in family law by recognising the importance of applying a child-centered approach as opposed to that of a father's preferential right in custody matters.
12.	<i>Fletcher v Fletcher</i> 1948 (1) SA 130 (A).	Case law.	Established that in custody matters the children's interests must undoubtedly be the main consideration.
13.	<i>B v B and Another</i> 1983 (1) SA 496 (N).	Case Law.	Court emphasised that the two considerations, namely whether the parents' refusal was without "adequate reason" as well as whether it is contrary to the interest of the minor to refuse consent, should be considered in conjunction with each other before deriving at a conclusion.
14.	<i>Martens v Martens</i> 1991 (4) SA 287 (T).	Case Law.	Instrumental case in drafting section 7(1) of the Children's Act.
15.	<i>McCall v McCall</i> 1994 3 SA 201 (C) 204J-205G.	Case Law.	One of the first cases in which a list of factors were provided to determine the best interests of the child. This case was instrumental in drafting section 7(1) of the Children's Act.

16.	<i>Minister of Welfare and Population Development v Fitzpatrick and Others</i> 2000(3) SA 422 (C).	Case Law.	Concluded that section 28(2) of the Constitution creates a right independent of the rights listed in section 28(1) of the Constitution.
17.	<i>Kotze v Kotze</i> 2003(3) SA 628 T.	Case Law.	Court held that the High Court sits as upper guardian in matters involving the best interests of the child (be it in custody matters or otherwise), and it has extremely wide powers in establishing what such best interests are.
18.	<i>De Reuck v Director of Public Prosecutions</i> 2004 1 SA 406 (CC).	Case Law.	Court determined that section 28(2) of the Constitution is interrelated and interdependent and accordingly form a single constitutional value system that cannot veto other fundamental rights contained in the Bill of Rights.
19.	<i>B v M</i> 2006 (9) BCLR 1034 (W).	Case Law.	Court held that the complexity of the “best interests” principle required courts to consider all factors which contributed towards ascertaining children’s “best interests.
20.	<i>M v S (Centre for Child Law as Amicus Curiae)</i> 2008 (3) SA (CC).	Case Law.	-Court concluded that “the paramountcy principle should be applied in a meaningful manner without unduly

			<p>obliterating other valuable and constitutionally protected interests.”</p> <p>- Court found that by applying a wholly individualised approach to determine a child’s best interest it is imperative that the child’s viewpoints be considered.</p> <p>- Court held that to apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.</p>
21.	<p><i>Cunningham v Pretorius</i> 31187/08 2008</p> <p><i>ZAGPHC</i> 258 (unreported case).</p>	Case Law (unreported).	<p>The court held that an overall impression is required when determining the best interests of the child. In addition the relevant facts, opinions and circumstances must be assessed in a balanced fashion and the court must render a finding of mixed fact and opinion. In the final analysis a structured value judgment, about what it considers will be in the best interests of the child.</p>

7.3.2 Differentiation of Current Marriage Law System

The following documents listed in Table 7.3.2 below were analysed in establishing the differentiation within the current marriage law framework:-

Table 7.3.2

Number	Document Description	Nature of the Document	Impact and or Contribution to Analysis
1.	The Constitution of the Republic of South Africa, 1996	Constitution	<p>-Section 9(1) provides that “[E]veryone is equal before the law and has the right to equal protection and benefit of the law”;</p> <p>-Section 9(3) provides that “[T]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”;</p> <p>-Section 9(5) provides that “[D]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”;</p>

			<p>-Section 10 states that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”;</p> <p>-Section 28(2) provides that “[A] child’s best interests are of paramount importance in every matter concerning the child”;</p> <p>-Section 28(1)(h) provides children the specific right “[t]o have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.”</p> <p>-Section 36 provides that “[T]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors...”.</p>
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2.	Marriage Act 25 of 1961.	Legislation.	<p>-In terms of section 24(1) of the Marriage Act requires that parties of whom one or both are minors must obtain consent to enter into the marriage;</p> <p>-Section 25(1) provides that in certain circumstances where the parent/s or guardian/s consent cannot be obtained, the presiding officer of a children's court can consent to the marriage;</p> <p>- Section 25(4) furthermore provides that if a parent, guardian or commissioner of child welfare in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the Supreme Court of South Africa (Provided that such a judge shall not grant such consent unless he is of the opinion that such refusal of consent by the parent, guardian or commissioner of child welfare is without</p>
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			adequate reason and contrary to the interests of such minor); -Section 26(1) provides that a boy below the age of 18 years and a girl below the age of 15 years may not marry without the consent of the Minister of Home Affairs.”
3.	Recognition of Customary Marriages Act 120 of 1998.	Legislation.	- Section 3(3)(b) provides that a minor may enter into a customary marriage provided he/she obtains the required consent as per section 25 of the Marriage Act 25 of 1961; -Section 3(4) (a) provides that in the event of consent to a customary marriage not being obtained, “[t]he Minister or any authorised officer in the public service may grant written permission to a minor (provided such intended marriage is desirable and in the interest of the parties).
4.	Civil Union Act 17 of 2006.	Legislation.	Section 1 of the Civil Union Act clearly prescribes that the partners to a civil union

			must be 18 years of age or older
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7.3.3 Proposed Law Reform

The following documents listed in Table 7.3.3 below were significant in considering law reform:-

Table 7.3.3

Number	Document Description	Nature of the Document	Impact and or Contribution to Analysis
1.	Marriage Act 25 of 1961.	South African Legislation.	Section 30(1) providing for a gender specific marriage formula.
2.	Recognition of Customary Marriages Act 120 of 1998.	South African Legislation.	- Section 3(3)(b) provides that section 25 of the Marriage Act 25 of 1961 applies in cases where the consent of the parent or legal guardian cannot be obtained in terms of customary marriages”; -Section 3(4)(a) provides that “[t]he Minister or any authorised officer in the public service may grant written permission to a minor who wishes to enter into a customary marriage, provided such intended marriage is desirable and

			in the interest of the parties”.
3.	Civil Union Act 17 of 2006.	South African Legislation.	Section 1 of the Civil Union Act clearly prescribes that the partners to a civil union must be 18 years of age or older
4.	The Constitution of the Kingdom of the Netherlands 2008.	Dutch Constitution.	Article 1 of the Dutch Constitution provides that “[a]ll persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted”.
5.	First Kortmann Commission Report, 1991.	Report.	The Commission recommended that a registration system for same-sex and heterosexual couples be established outside of marriage.
6.	The Act on Registered Partnerships Act of 5 July 1997.	Dutch Legislation.	Resulted in the creation of a new institution akin to marriage applicable to both same-sex and heterosexual couples. Despite registered

			partnerships having similar consequences to those of a Dutch marriage, marriages were reserved for heterosexual couples.
7.	Second Kortmann Committee, 1997.	Committee Report.	Recommended that in addition to marriage, provision should be made for same-sex couples to marry either by way of a registered partnership or an institution akin to that of a marriage.
8.	The Act Opening Marriage to Same-Sex Couples of 21 December 2000.	Dutch Legislation.	Retention of one marital institution that is gender-neutral.
9.	Dutch Civil Code, as amended, 1992.	Dutch Legislation.	Article 1:30 of Book 1 of the Dutch Civil Code allows for two people of the same or opposite sex to conclude a marriage.
10.	The Canadian Constitution includes the Canada Act 1982 which includes the Constitutional Act, 1982 as well as all acts referred to in the schedule which includes the Constitutional Act of 1867 and the British	Canadian Constitution.	Section 52(1) of the Charter provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect;

	North America Act of 1867 and Canadian Charter of Human Rights and Freedom.		- Section 15 of the Charter provides that “[E]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”
11.	Modernisation of Benefits and Obligations Act of 2000.	Canadian Legislation.	Enactment of this Act did not only acknowledge same-sex or heterosexual “common-law partners” ⁹⁸⁴ in terms of sixty-eight federal statutes ⁹⁸⁵ but also confirmed a distinction between the common law definition of marriage and a partnership.
12.	Civil Marriage Act, 2005.	Federal Canadian Legislation.	The definition of marriage was codified thereby expanding the traditional common law definition as applied in <i>Hyde</i> case to

⁹⁸⁴ A “common-law partner” was defined as a person that cohabitates with another in a conjugal relationship for at least one year.

⁹⁸⁵ A list of the federal statutes acknowledging common-law partners can be accessed from Modernisation of Benefits and Obligations Act <http://laws-lois.justice.gc.ca/PDF/M-8.6.pdf> (Date of use: 15 October 2017).

			include same-sex marriages.
13.	<i>Andrews v Law Society of British Columbia</i> 1989 1 S.C.R.	Canadian Case Law.	Court found that “sexual orientation” and “marital status” could be prohibited grounds of discrimination as they are analogous to those grounds listed in section 15 of the Charter.
14.	<i>Law v Canada</i> 1999 1 S.C.R.	Canadian Case Law.	Court held that in addition to a distinction being based on a listed ground of discrimination, such discrimination should also impair human dignity.
15.	<i>Egan v Canada</i> [1995] 2 S.C.R. 513	Canadian Case Law.	Sexual orientation was recognised as an analogous ground of discrimination in terms of section 15(1) of the Charter
16.	<i>M v H</i> [1999] 2 S.C.R. 3	Canadian Case Law.	The case recognised the need for acceptance of same-sex parents by ruling that the term “spouse” in terms of section 29 of the Ontario’s Family Law Act R.S.O.1990 was in violation of section 15(1) of the Charter thereby affording same-sex spousal support.

17.	<i>Halpern et al v Canada (Attorney General)</i> 2001 B.C.S.C. 1365	Canadian Case Law.	The common law definition of marriage was challenged in Ontario when the Supreme Court of Justice found the definition to be unconstitutional as it violated section 15(1) of the Charter.
18.	<i>Barbeau v British Columbia (Attorney General)</i> 2003 BCCA.	Canadian Case Law.	The court held that the exclusion of same-sex marriages was in violation of same-sex couples right to equality.
19.	<i>Re Same-Sex Marriage</i> [2004] 3 S.C.R. 698	Canadian Case Law.	-The definition of "marriage" was not contained in the Constitution and that Parliament therefore had the authority to redefine marriage. -In addition the court held that such proposed legislative amendments would be in line with section 15(1) of the Charter.

7.4 Findings from Interview Process (Phase 2 of the Study)

7.4.1 Common Themes

The research results from the interviews with the participants are reported with reference to eight themes that are summarised in table 7.4.1 below. The themes emanated from the participants' experiences, perceptions and opinions in consequence of their application of "the best interests of the child" principle in their practice as family advocates.

For purposes of convenience, the participants are reflected by the letter P and with a numerical denomination that reflects the order in which the interview was conducted. The themes divided by the total number of participants reflects the percentage arrived at in the analysis.

Table 7.4.1

Theme	P1	P2	P3	P4	P5	P6	P7	P8	P9	P10	Total
1. Perspective of "the best interests of the child" ⁹⁸⁶	x	x	x	x	x	x	x	x	x	x	10
2. Criteria and Relevant Factors of the BIOC	x	x			x			x	x	x	6
3. Voice of the Child	x	x		x	x	x		x	x		7
4. Applying the BIOC in terms of Assessments	x	x	x	x	x	x		x	x		8
5. Civil Union Act			x	x	x	x	x	x	x	x	8

⁹⁸⁶ "The best interests of the child" (hereinafter referred to as the BIOC for purposes of the table).

6. Exclusion of Minors	x	x	x	x	x	x		x	x	x	9
7.Differentiation within Marriage Law	x	x	x	x	x	x		x	x		8
8.Required Law Reform	X	x	x	x	x	x		x	x	x	9

7.4.1.1 Theme 1: Perspective of the BIOC

All the participants in the study (100%) acknowledged the importance of applying “the best interests of the child” principle in every matter concerning the child. Participant 6 commented that:

“The best interest principle in definition would be in all situations that involve the child – in that whatever is decided must be decided in line with what’s best for the child, in any situation”.

During the interview process, various participants interpreted “the best interests of the child” as a guiding principle whilst others viewed it as a fundamental right. In this regard participant 2 stated:

“In fact it is a human right issue now in terms of our bill of rights, it’s no longer a principle as we all normally refer to in terms of the common law. Every child has the right to have his/her best interests considered whenever the issues concerning the child are at stake”.

This sentiment was shared by participant 4:

“Whatever decision is made in a matter, whatever evaluations are made, need to point to the rights of the child being protected in regard to people who have responsibilities towards this child that those responsibilities are being properly met. All in all that the child is protected and put on positive ground with the decision that is made in respect of the child”.

It became apparent during the interviews that the basic premise for determining “the best interests of the child” principle was based on the individual circumstances of the minor child. In this regard the basic needs and well-being of the child, as well as the need to protect minors’ rights were regarded as the most significant determinations associated with the best interest of the child.

In addition to the aforesaid interpretation of “the best interests of the child” principle, participant 1 remarked that “the best interests of the child” principle is very subjective by noting that:

“I know as much as it’s defined in the Act as what the best interest of the child is but it goes beyond and it’s a very subjective viewpoint. Best interests of a child can mean so many things when being a child. We think about the basic needs of the child that (inaudible) comforts having a guardian or caregiver taking care of their emotional needs, their intellectual needs, their daily care and ensuring that at all given times that a child is well loved and comforted making sure that whatever is there in the best interest of the child that must be adhered to. When it comes to matters of divorce where children are part of the divorce process I find that the voice of the child is the most critical aspect and without the voice of the child because sometimes we get different viewpoints from the parents and when we interview the children we hear something completely different which was not even addressed by the parent”.

Accordingly the application and or interpretation of the best interest of the child cannot only be through the lens of an adult but must be reflective of the child’s views and opinions.

The majority of the participants emphasised the importance of the offices of the family advocate in ensuring that “the best interests of the child” principle is correctly applied and in such a manner that it protects the rights of the minor child. Participant 10 summarised the role as the family advocate as:

“In a nutshell we are there to ensure that the child is protected and (inaudible) and common law and has enough precedence of recent statute has given us certain guidelines of aspects that we can look at in ascertaining what would be in the best interests of the child”.

In analysing the documents listed in table 7.3.1, secondary sources and the experiences of the participants it became evident that children’s rights and in particular the application of “the best interests of the child” principle has evolved over time.

Initially the *paterfamilias*, the head of a tribal community or the father of a child, used to determine what is in “the best interests of a minor child”.⁹⁸⁷

As a result of *inter alia* international and national treaties, widespread recognition of children’s individual rights rather than that of their parents’ parental authority became the focus.⁹⁸⁸ The African Charter on the Rights and Welfare of the Child and in particular the CRC resulted in the recognition of children’s rights and the need to promulgate legislation to defend and promote such rights.⁹⁸⁹ These treaties not only identified specific children’s rights but also mandated all parties to the treaties to promote, protect and enforce such rights by using “the best interests of the child” principle as a guide and yardstick.⁹⁹⁰

With the adoption of our Constitution, children were given specific fundamental rights. Section 28(2) of the Constitution provides every child with a guarantee that all courts must give consideration to the best interests of the child. Accordingly, the application of “the best interests of the child” were no longer restricted to divorce matters but extended to “every matter concerning the child”. This provision is in line with the unanimous interpretation of the participants’ perceptions in respect of the application of “the best interests of the child” principle.

Although section 28(2) of the Constitution specifically provides that the best interest of the child must be of paramount importance,⁹⁹¹ such right does not constitute an absolute right, as it is subject to lawful limitation. Accordingly case law and statutory changes resulted in South African law developing the initial Roman-Dutch approach of paternal preference into a more child-centred approach by adopting “the best interests of the child” principle.⁹⁹² Consequently what was once a common law

⁹⁸⁷ See paragraph 4.2.

⁹⁸⁸ Preamble to the United Nations Convention on the Rights of the Child, 1959.

⁹⁸⁹ Article 2.2 of the Declaration of the Rights of the Child, 1959; article 1 of the African Charter on the Rights and Welfare of the Child, 1992.

⁹⁹⁰ *Ibid.*

⁹⁹¹ Heaton *South African Family Law* 276-277.

⁹⁹² Section 5(1) (b) of the Matrimonial Affairs Act 37 of 1953 states that “on the application of either parent of a minor whose parents are divorced or are living apart, if it is proved that it would be in the interests of the minor to do so, grant to either parent sole guardianship...or sole custody of the minor....”

principle, applicable only in custody matters, has now become the yardstick that is to be applied in every matter concerning the child.⁹⁹³

7.4.1.2 Theme 2: Criteria and Relevant Factors of the BIOC

All the participants of the study (100%) indicated that “the best interests of the child” must be applied in all matters concerning the child, which includes matrimonial law.

At least 60% of the participants indicated that a child’s emotional and intellectual needs, their age, stage of maturity, his/her relationship with a parent or other person as well as the well-being of the child are the most important factors to consider in determining the best interest of the child.

There was a general feeling amongst the participants that in determining the best interest of the child, each matter should be dealt with on its own merits considering the individual needs of the child. From the interviews it was evident that in determining the needs of a minor, as well as what constitutes “the best interests of the child,” a child-centred approach should be adopted. In this regard participant 1 commented that a child’s age:

“is something that is very subjective because a child at 12 may not be as mature as a child at 10. So we cannot really say we can put age to that, that’s actually not correct. We have had kids in our offices when the child spoke and I looked again and I said am I confused, because this child looked as if she were more than 10, 12 years of age but when I looked to see she was only 10. The way she articulated herself you know it brought out everything so clearly what her needs were to come out of this divorce with her parents, what she wanted and how she felt the situation at home was affecting her and that child just spoke and I was like really amazed. Then I told the family counsellor we cannot know for sure that the child is going to be mature at 12 or 14 – it all depends on the stage of development some children mature earlier than others”.

This sentiment was shared by participant 2:

“Yes you have to apply specific circumstances. Each and every matter... I’m just now thinking of the word...each matter is dealt with on its own merits”.

⁹⁹³ Section 28(2) of the Constitution. In considering the expansion of the application of “the best interests of the child” principle to a wider field of application, see *Lovell v Lovell* 1980(4) SA 90 (T) where “the best interests of the child was considered and resulted in the removal of the father from the matrimonial home during the divorce process. In *S v F* 1989 1 SA 460(Z) the best interests of a young offender was considered prior to sentencing.

From the documents listed in table 7.3.1, secondary sources as well as by interpreting the participants' experiences and opinions it can be concluded that although "the best interests of the child" is not defined, the criteria for determining what constitutes "the best interests of the child" is encompassed in terms of section 7(1) of the Children's Act. Section 7(1) of the Children's Act provides for a list of fourteen factors that the judiciary should consider in determining "the best interests of the child". Although section 7(1) of the Children's Act is a closed list of factors, the decision makers should not only apply the listed factors of the best interest standard but also any other relevant factor.⁹⁹⁴ The data gathered from the participants during the interview process confirms that section 7(1) of the Children's Act is only a guide as to what criteria should be considered in determining the best interests of the child. In this regard the participants emphasised the following sections as being most important when determining the best interest of the child:-

- sections 7(1)(a) listing the nature of the relationship of the child;
- section 7(1)(f) listing the needs of the child;
- section 7(1)(g) listing the age and level of maturity of the child;
- section 7(1)(h) listing the child's physical and emotional security; and
- section 7(1)(l) listing the need to protect the minor from harm.

It can also be concluded that due to a lack of objective standards for determining the best interests of a child, different approaches applied by the judiciary and other role players as well as different interpretations of relevant factors that are deemed relevant based on each child's individualised circumstances, contribute towards making the application of "the best interests of the child" subjective in nature.⁹⁹⁵ In fully comprehending the unique circumstances of a matter, an individualised examination of the precise real-life situation of the particular child (child-centred approach) is

⁹⁹⁴ Heaton *South African Family Law* 163-164. See also *Cunningham v Pretorius* 31187/08 2008 ZAGPHC 258 (unreported case) para 9 noting that "[W]hat is required is that the court acquires an overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the court must render a finding of mixed fact and opinion, in the final analysis a structured value judgment, about what it considers will be in the best interests of the child".

⁹⁹⁵ The extents of the judicial discretion granted in terms of section 25(4) of the Marriage Act will be discussed in para 4.5. See also *B v M* 2006 (9) BCLR 1034 (W) page 1036 where the court noted that "as a result of the inherently subjective nature of the principle, the interpretation of the principle had inevitably be left to the judgment of the person, institution or organisation applying the standard".

advocated as opposed to a general one-size-fits-all approach.⁹⁹⁶ Decision makers accordingly have to firstly determine the needs of the child by way of an assessment of the relevant factors set out in section 7(1) of the Children's Act.⁹⁹⁷ During the interviews, it was apparent that the majority of participants were in favour of a child-centred approach to ensure that each matter is dealt with on its own unique merits. In addition to the aforementioned, different weightings need to be attached to each factor. This process is also susceptible to different interpretations as different courts may apply different weightings to different factors.⁹⁹⁸ The relevant factors may also appear to be conflicting especially considering that some courts may interpret the paramount consideration of the child to mean that the child's interest should take priority.⁹⁹⁹ The relevant factors should then be balanced against competing interests whilst giving due consideration to the rights of the child and the obligations of public authorities, service providers and caregivers towards the child.¹⁰⁰⁰ Lastly a proportionality assessment must be applied in determining what constitutes the best interest of the child.¹⁰⁰¹ The objective of determining the best interest of the child is consequently to find a long lasting solution by balancing an individual child's circumstances in such a manner so as to make a decision that would safeguard the rights of the child concerned and promote his/her well-being.¹⁰⁰²

Accordingly, as a result of the subjective nature of applying "the best interests of the child" principle, the determination of what constitutes the best interest of the child is

⁹⁹⁶ For a discussion on the application of a child centred approach in determining the best interest of the child generally, see Reyneke *PELJ* 2016 4; Heaton 2009 *Journal for Judicial Science* 5-6.

⁹⁹⁷ For a discussion on the subjective nature of determining the best interest of the child generally, see Salter 2012 *Theoretical Medicine and Bioethics* 186-196.

⁹⁹⁸ Lapsatis 2012 *St John's Law Review* 675. For a discussion on the six versions of the best interest standard as well as the individualistic and relational models for decision making generally, see Salter 2012 *Theoretical Medicine and Bioethics* 179- 187.

⁹⁹⁹ Lapsatis 2012 *St John's Law Review* 675-678.

¹⁰⁰⁰ See *B v M* 2006 (9) BCLR 1034 (W) page 1036 in which the court held that "best" amongst a selection of "interests" created a discretion in the power who or which made that selection and that one factor could therefore not be given pre-eminence in all cases involving children". The court furthermore noted that "[T]he complexity of the "best interests" principle required courts to consider all factors which contributed towards ascertaining children's "best interests". The court accordingly held that it was necessary to avoid a unidimensional focus which failed to attempt a careful balancing of the different ingredients hence that each case had to be decided on its own facts".

¹⁰⁰¹ Heaton *South African family Law* 166. See also *S v Makwanyana* 1995 (6) BCLR 665 (CC) and *Hay v B* 2003 (3) SA 492 (W).

¹⁰⁰² Separated Children in Europe Programme, Statement of Good Practice, 4th Revised Edition, Save the Children, UNHCR, UNICEF, 2009, p. 15.

often unpredictable. In this regard, the participant specifically made mention of the subjectivity of the application and assessment process in determining the best interest of the child. At the same time it may be argued that the unpredictability in determining the best interest of the child is not necessarily undesirable by applying a predetermined formula for the sake of certainty or predictability may be contrary to the best interests of the individual child.¹⁰⁰³ Accordingly the application of “the best interests of the child” is a subjective conclusion best reached by professionals.

7.4.1.3 Theme 3: The Voice of the Child

At least 60% of the participants indicated that one cannot consider the best interests of the child if consideration is not given to the voice of the child. Participant 1 expressed the following view:

“... for me the child’s voice in every aspect would matter pertaining to how and the child’s voice should have taken recognition. I mean you get our Article 12 on the United Nations Convention on the rights of the child, our very own African Charter and rights on the welfare of children, Article 10, if I’m not sure that speaks so critically of the rights of the child and I endorse it very strongly”.

Participant 9 furthermore remarked that:

“...because of section 6 and sub-section 5 and 10 of the children’s act where child participation is encouraged, I think and also where we have to let the children express their views, so they must be given a chance and also be heard.

Because the children must be given a chance, everyone has the right to express his/her feelings in the way that they want to, a child is also a person a South African who is covered by the constitution so if they feel that they want to get married they do have people who are their guardians up until they reach the age of majority. So I feel that they should be given a chance”.

These sentiments were also expressed by participant 5:

“Well let me go to the voice of the child...Marriage is such a large step even for an adult so personally I don’t think the child is capable of making that decision. However, if a child does wish to enter, surely the voice of that child ought to be taken into consideration”.

¹⁰⁰³ The *M v S* case para 24.

It became apparent that the participants regarded child participation as an integral part of determining the best interests of the child.

From the documentary analysis as well as the participants; viewpoints obtained during the interview process, it is especially noteworthy that in applying a child-centred approach it is imperative that the child's viewpoints be considered.¹⁰⁰⁴ A child should therefore be given an opportunity to participate in any decision affecting him/her. Accordingly, the views of the child have to be considered where a child is of an age and level of maturity to make an informed decision.¹⁰⁰⁵ Section 10 of the Children's Act makes specific provision that "a child of such an age, maturity and stage of development to understand the nature of the process and the consequences thereof must be given an opportunity to express his/her view."¹⁰⁰⁶ Section 28(1) (h) of the Constitution also provides children the specific right "[t]o have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result". The right for a child to have access to court and to participate in matters concerning him/her is accordingly constitutionally protected.

7.4.1.4 Theme 4: Applying the BIOC in terms of Assessments

All the participants of the study (100%) expressed that "the best interests of the child" should be applied in terms of marriage law. The majority of the participants (80%) however indicated that currently the best interests of the child cannot be adequately applied in terms of marriage law as the Civil Union Act bans all minors from entering into civil unions and hence precludes the application of the principle. In this regard participant 2 commented that she does not think that the best interest of the child principle is adequately applied in terms of matrimonial law as:

¹⁰⁰⁴ The *M v S* case *para* 24-25. See also *French v French* 1971 4 SA 298 (W); *Manning v Manning* 1975 4 SA 659 (T) and *McCall v McCall* 1994 3 SA 201(C) in which the courts held that a child's wishes are one of the factors that need to be considered when determining the best interest of the child.

¹⁰⁰⁵ *HG v CG* 2010 (3) SA 352 (ECP) *para* 6.

¹⁰⁰⁶ Section 10 of the Children's Act states that "[E]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration". In *Lubbe v du Plessis* 2001 (4) SA 57 (C) the court held that if a child has sufficient maturity, intellectual and emotional functioning should the court give serious consideration to the child's preference.

"I think that specific legislations are a little discriminatory. Like if you say the child who is, you know, a child who is of the same-sex party is treated differently from, you know, the child of a heterosexual party you know, I think it's discriminatory in this way".

Some participants were of the view that:

"...because we have conflicting legislations... at some stage that could be challenged in the (inaudible) court because it takes away the principle best interests of a child".

The general views of the participants were therefore that by precluding all minors from entering into a civil union without considering their personal circumstances or affording them an opportunity to voice their opinions, the best interests of the child principle cannot be adequately applied in terms of matrimonial law. Accordingly there is a need to address the inequality resulting from section 1 of the Civil Union Act.

7.4.1.5 Theme 5: Civil Union Act

The majority of the participants (80%) were aware of the provisions of section 1 of the Civil Union Act that excludes minors from entering into a civil union.

The majority of the participants furthermore indicated that "the best interests of the child" is not considered in terms of the Civil Union Act. In this regard participant 1 expressed that precluding minors from entering into a civil union:

"...contradicts the absolute essence of the voice of the child. Why should the child that wants to enter into a civil union be precluded from entering into that kind of relationship. Whereas under our normal situations in terms of the marriages Act whereby if a child is under 18 they can either get permission from their guardian failing which they can approach the Minister of Home Affairs if they are quite young or the Commissioner of the Children's Court. I don't think there should be a disparity because there is no fairness in that".

Participant 4 furthermore expressed that a blanket ban on all minors from entering into a civil union is not in the best interests of the child. She commented that:

"No if it's a blanket that a child is precluded then not because it doesn't give the child a voice at all. We do have children aged 17 who maybe in terms of their daily lives be very emancipated and may be able to enter into a civil union. They may have children and may need to perform as adults and as parents and by

virtue of not being able to be married, not to give their children a union to live in, may not be in the child's best interests and obviously not".

It furthermore became apparent during the interviews that some participants were of the view that section 1 of the Civil Union Act, was not in line with the Constitution and current South African legislation and International trends.

In interpreting and analysing the documents listed in table 7.3.2 as well as additional secondary sources, it became apparent that the nature of marriage evolved over time from a social institution, during the early Roman times, to a sacred institution as a result of the influence of the Roman Catholic Church. It is from this basic concept of marriage that the South African civil marriage law under the Marriage Act is derived.

In terms of the common law definition, a marriage is "the legally recognised life-long voluntary union between one man and one woman to the exclusion of all others".¹⁰⁰⁷ The Marriage Act accordingly only provides for the solemnisation of monogamous heterosexual couples. Section 24(1) of the Marriage Act states that a marriage officer may only solemnise a marriage between parties, where one or both are minors, if the required consent is obtained. Section 25 of the Marriage Act however provides that if the consent of the parent or guardian cannot be obtained, then the test that should be applied when considering whether or not to grant a minor permission to enter into a civil marriage is in the best interest of that minor. Accordingly the Marriage Act does provide for minors to enter into a civil marriage. Section 3(3)(b) of the Recognition of Customary Marriages Act provides that section 25 of the Marriage Act is also applicable to the Recognition of Customary Marriages Act as far as a marriage of a minor is concerned.

With the adoption of the Constitution as well as the provision for judicial review of legislation, judicial rulings extended certain spousal benefits previously restricted to monogamous heterosexual married couples, to other forms of interpersonal relationships on the basis of non-discrimination and equality. As a result of the *Fourie* case ruling (declaring the traditional definition of marriage and section 30(1) of the Marriage Act unconstitutional) the Civil Union Act was promulgated. Despite the

¹⁰⁰⁷ *Seedat's Executors v The Master (Natal)* 1917 AD 302.

Constitutional Court declaring certain aspects of the Marriage Act unconstitutional, the legislator enacted a separate Act, the Civil Union Act, which bestows the same legal consequences on a civil union than that of a civil marriage. South Africa's marriage law system consequently provides that civil marriages and civil unions are regulated by two separate Acts that have identical consequences.

7.4.1.6 Theme 6 and 7: Exclusion of Minors and Differentiation within Marriage Law

There was a general feeling by 90% of the participants that the exclusion of minors from entering into a civil union is not only inconsistent with other South African marriage laws but also results in inequality. In addition 80% of the participants were of the view that the differentiation caused by the application of dual Acts resulted in inequality.

The majority expressed that the disparity caused by the application of section 1 of the Civil Union Act, by excluding minors from entering into a civil union, is prejudicial to minors and not justifiable in terms of the Constitution. They were of the view that the same principle should be applied in terms of the Marriage Act, Recognition of Customary Marriages Act and the Civil Union Act.

Some participants were of the view that section 1 of the Civil Union Act, precluding minors from entering into a civil union, is contrary to the values of a democratic country.

Participant 3 expressed that:

"I will not understand what the intention of the legislature was at that stage. Safe to assume it could be the fact that same-sex marriages are generally disapproved in our society".

Participant 5 also shared the viewpoint of the majority of participants by stating that:

"If a child is allowed to enter, whether they consent etc., then it should be applicable to the other because if not we go against our constitution. What makes one child; because you are hetero, you know...more entitled to more rights just because of sexual preferences now needs to be deprived. That's just unacceptable!"

From the documentary analysis it can be concluded that in terms of section 1 of the Civil Union Act, a civil union is defined as "the voluntary union of two persons who are

both eighteen years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, whilst it lasts, of all others".¹⁰⁰⁸ Accordingly the Civil Union Act provides for monogamous heterosexual or same-sex marriages. Unlike the Marriage Act and the Recognition of Customary Marriage Act, the Civil Union Act however precludes a minor from entering into a civil union irrespective of whether the minor's guardian consents to the civil union.

By automatically excluding all minors from entering into a civil union, the age, maturity, and stage of development and any other relevant characteristics of the child¹⁰⁰⁹ are not considered in terms of section 1 of the Civil Union Act. From the aforementioned it is evident that the Civil Union Act does not consider "the best interests of the child" as required in terms of section 28(2) of the Constitution. Section 28(2) of the Constitution stipulates that "[a] child's best interests are of paramount importance in every matter concerning the child".¹⁰¹⁰ In addition to violating section 28(2) of the Constitution, section 1 of the Civil Union Act also violates sections 6(2) and 9 of the Children's Act as well as article 3(1) of the CRC and article 4 of the African Charter on the Rights and Welfare of the Child by categorically excluding minors from civil unions, thereby not giving consideration to "the best interests of the child". These sentiments were also expressed by the participants during the interview process.

In addition to the aforesaid, prohibiting a minor from entering into a civil union whilst other legislation (Marriage Act and the Recognition of Customary Marriages Act) provides for a minor to enter into a civil or a customary marriage, amounts to differentiation that bears no rational connection between the limitation of fundamental rights and a legitimate governmental purpose.¹⁰¹¹ A minor wishing to enter into a civil union is therefore not treated equally before the law and does not receive equal protection and benefit of the law. Section 1 of the Civil Union Act accordingly violates section 9(1) of the Constitution that provides that "[e]veryone is equal before the law and has the right to equal protection by and benefit of the law".

¹⁰⁰⁸ Section 1 of the Civil Union Act.

¹⁰⁰⁹ Section 7(1) (g) (i) and (iv) of the Children's Act.

¹⁰¹⁰ Section 28(2) of the Constitution.

¹⁰¹¹ Currie and De Waal *The Bill of Rights Handbook* para 7.2.

Section 1 of the Civil Union Act furthermore differentiates on the grounds of age, marital status, and sexual orientation (in the case of same-sex minors). The aforesaid grounds constitute illegitimate grounds of differentiation which are presumed to be unfair in terms of Section 9(5) of the Constitution.¹⁰¹² The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.¹⁰¹³ Accordingly, the mere fact that same-sex minors have no legal means of entering into a legally recognised relationship, whilst heterosexual minors can, infer that same-sex minors cannot have their family life recognised and protected by law. Prohibiting same-sex minors from entering into a civil union or marriage (for that matter) violates minors' right to "*inherent dignity and the right to have their dignity respected and protected.*" The violation of minors' rights to equality and dignity could furthermore not be justified.

7.4.1.7 Theme 8: Required Law Reform

In considering the data gathered from the interviews it is evident that 90% of the participants were in favour of law reform. The majority of the participants expressed that as a result of conflicting legislation there is a clear need for law reform. In this regard participant 1 expressed that law reform is absolutely required as:

"...you can bring everything on the same level and there should be no disparity with that. In any situation the voice of the child is critical so why should there be any disparities, I totally don't agree with that".

Some participants were furthermore of the view that if section 1 of the Civil Union Act was constitutionally challenged, the court would find the provision to be unconstitutional as it unjustifiably violates section 28(2) of the Constitution.

Participants also expressed the need for uniformity in terms of South African marriage law. In this regard participant 8 made the following statement:

¹⁰¹² Currie and De Waal *The Bill of Rights Handbook* paras 9.3 and 9.4.

¹⁰¹³ The *Harksen* case para 53. See also Currie and De Waal *The Bill of Rights Handbook* para 9.2(b).

“That is why I said in all legislations, even in the 3 marriages, children must be treated the same as you know. Everything in those 3 separate legislations, when it comes to children, it must be the same to protect the children”.

These sentiments were also expressed by participant 10 that stated that:

“obviously a contradiction in as far as the 2 piece legislation is concerned so therefore that would require some kind of addressing in the future”.

During the comparative analysis, the South African marriage law system was compared to the Dutch and Canadian marriage systems respectively. The Netherlands, as in the case of Canada, has a Constitution. One significant difference between the aforesaid systems is that the Dutch legal system does not allow for judicial review of legislation and, accordingly Parliament is obliged to address the issues of inequality by way of legislation.¹⁰¹⁴ Consequently Dutch marriage law reform took place by way of judicial process. It is noteworthy that the Dutch, with the enactment of the Act on Registered Partnerships, attempted to encompass same-sex marriages by providing for an alternative institution to marriage that is applicable to heterosexual and same-sex couples. The promulgation of the Act on Registered Partnerships however emphasised the fact that same-sex couples were not worthy of marriage. This position is similar to the current South African marriage law framework in terms whereof a civil union provides for a separate institution to marriage to accommodate same-sex marriages. It is noteworthy that as a result of differentiation between a civil marriage and a registered partnership, the Dutch promulgated the Act Opening Marriage to Same-Sex Couples and the amendment of Article 1:30 of Book 1 of the Dutch Civil Code, thereby providing that same-sex couples achieve full equality.

In terms of Canada, allowing for judicial review of legislation, marriage law reform took place (as in the case of South African marriage law) by way of specific judicial review declaring the exclusion of same-sex couples from marriage as unconstitutional. As a result of legislative power being shared by federal and provincial governments, same-sex marriages were legally recognised in certain provinces of Canada. However with the promulgation of the Civil Marriages Act, same-sex marriage was legally recognised

¹⁰¹⁴ Article 120 of the Constitution of the Kingdom of the Netherlands 2008 provides that “[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts”. In contrast section 172(1) of the Constitution allows for judicial review to determine the constitutionality of legislation.

across Canada. Canadian marriage law reform accordingly took place by way of the enactment of a single institution of marriage that was gender-neutral.

Accordingly, the Dutch and Canadian marriage law systems have a single institution of marriage that is gender-neutral. Couples (including a couple where one or both parties is a minor) are accordingly treated the same. By adopting this approach to law reform, Canada and the Netherlands have ensured that all couples (regardless of their sexual orientation) are treated equally. The majority of the participants (90%) were of the view that South African marriage law is in need of law reform. As per the documentary analysis, the participants expressed their concerns that applying two separate Acts that have different provisions relating to minor children, result in inequality. They were furthermore of the view that such inequality is unconstitutional and not reflective of a democratic society. The majority of the participants were accordingly supportive of marriage law reform to ensure that all minors, regardless of their sexual orientation are treated equally.

7.5 Evaluation of Study

In evaluating the research study it is important to identify the strengths and weaknesses of the study as well as consider recommendations in respect of future research in this field of law.

7.5.1 Strengths

The research study applied qualitative research methods in gathering data. In this regard the initial phase of the research study comprised of a historical and comparative analysis of the current marriage law framework as well as the application of the best interest of the child principle as far as it relates to matrimonial legislation. By conducting a historical analysis it became apparent that in terms of the Constitution, as well as national legislation and treaties (national and international), “the best interests of the child” principle has to be applied in all matters concerning the child. The application of a comparative analysis provided the researcher with a deeper

understanding of the different approaches adopted by countries, such as the Netherlands and Canada, in encompassing gender-neutral matrimonial legislation.

The application of an interpretative paradigm as well as the interpretive and descriptive design allowed the researcher to gain a more comprehensive understanding of the experiences of the purposively selected participants, as the researcher was privy to their interpretations and insights as far as determining the best interest of the child is concerned. The recording of the interviews, the use of field notes as well as the verbatim transcription of the interview recordings allowed for trustworthy data. The participant sample is reflective of male and female family advocates from diverse backgrounds. The researcher was accordingly able to collect data by way of semi-structured interviews to provide that the true experiences of the participants emerge during the interview process.

Most of the aims and objectives that were set at the inception of the study were achieved. From the research study it is evident that section 1 of the Civil Union Act does not consider “the best interests of the child” and is accordingly in violation of the Constitution. In addition it emerged that the differentiation caused by the application of dual but separate Acts cannot be justified. The documentary analysis, as well as the interviews, corroborate the need for marriage law reform.

7.5.2 Limitations

The study’s scope was limited to civil marriages. Accordingly the comparative analysis of the South African, Canadian and Dutch marriage law systems was restricted to civil marriages and specifically excluded indigenous or customary marriages.

As far as the sampling process is concerned, purposive sampling was applied in selecting the participants for purposes of the interview process. The sample pool was restricted as only eleven family advocates are assigned to the Durban and Pietermaritzburg family advocate offices. Consequently the findings of the ten participants that were interviewed may be generalised. In addition to the aforementioned, consideration should also be given to the possible subjective influence that may have emanated from the researcher’s experiences as a legal practitioner as well as from the researcher contributions during the interview process.

In this regard the researcher made use of different methods of collecting data as well as analysing the data. Thematic analysis as well as peer examination was applied to verify the research results.

7.6 Future Research

The aim of the study was to recommend and propose marriage law reform. The documentary analyses, as well as the participants, support marriage law reform. The findings furthermore suggest that there is scope for future research in this field of study which in turn can add value to this study by:

- Investigating the perceptions of judicial officers presiding over applications made by minors to enter into a civil or customary marriage;
- Consulting a larger sample of participants to identify variables across the board.

The researcher recommends ongoing research on the principle of the best interests of the child, especially in relation to matrimonial law. The researcher further recommends in-depth and extensive research in respect of the promulgation of a single Act that regulates not only gender-neutral civil marriages, but also other forms of interpersonal relationships (such as domestic relationships). The applicability of a single Act should also be investigated in research.

CHAPTER 8

DIVERGING PERSPECTIVES ON THE WAY FORWARD AND GUIDELINES ON FACILITATING MARRIAGE LAW REFORM WITHIN SOUTH AFRICA

8.1 Introduction

The purpose of the study is threefold. Firstly to determine whether the categorical ban of minors from entering into a civil union undermines “the best interests of the child” principle. The aim of the study is accordingly to examine what constitutes “the best interests of the child” by analysing relevant judicial and legislative authority as well as the approach adopted by the judicial system and specifically the family advocate’s office when applying “the best interests of the child” principle. The study furthermore aims to ascertain whether the exclusion of minors from a civil union adequately accommodates for a child-centred determination within the context of marriage law.

The second purpose of the study is to determine whether the prohibition of minors from entering into a civil union, whilst both the Marriage Act and the Recognition of Marriages Act afford minors (provided they obtain the required consent) the right to enter into a marriage, results in disparity and whether such disparity violates minors’ right to equality before the law as well as their right to have their dignity respected and protected. The study therefore ultimately has to consider whether the categorical exclusion of minors from entering into a civil union, without considering their personal circumstances as well as their viewpoints, is in “the best interests of the child” or whether such exclusion perpetuates the marginalisation of minors’ (and in particular same-sex minors’) constitutionally protected rights.¹⁰¹⁵ In achieving same, the study aimed at examining South African matrimonial legislation regulating civil and customary marriages so as to determine the implications and possible anomalies

¹⁰¹⁵ For a general discussion of the constitutional arguments regarding the position of same-sex minors, see Van Schalkwyk 2007 *De Jure* 168.

resulting from the application of dual but separate Acts to regulate civil marriages and civil unions.

The study lastly set out to determine whether section 1 of the Civil Union Act unjustifiably violates the Constitution and thereby accentuates the need for South African marriage law reform. In accomplishing same, the study aimed at conducting a juxtaposed comparison of the South African with the Dutch and Canadian marriage law systems so as to gain insightful knowledge on marriage law legislation and best practice. The results of the comparative analysis should identify and provide South Africa with possible alternative workable strategies in matrimonial law reform.

8.2 A Collective Overview of the Study

The study commenced with a comprehensive historical and comparative analysis of the development of the South African marriage law system for the purposes of gaining a deeper understanding of the reasoning behind the promulgation of a separate Act to encompass same-sex marriages. The legal context of matrimonial law in the South African context was accordingly described by using a theoretical framework to ensure that the research reflects on current South African and international matrimonial legislation, as well as both the provisions of the Constitution and international treaties.

The study is conducted by applying a qualitative research approach¹⁰¹⁶ whilst the framework of the study is founded on the interpretivist paradigm. For purposes of this study data was collected during two sequential phases, firstly the documentary analysis of primary and secondary sources and secondly data obtained by way of semi-structured interviews. In this regard ten family advocates within the area of KwaZulu-Natal were interviewed to collect rich descriptive data from the participants' experiences. The participants were selected by way of a purposive

¹⁰¹⁶ Qualitative research comprise of the collection of data that is mostly in written or spoken language or observed and transcribed into language. Data analysis is mostly conducted by identifying and categorizing themes. Quantitative research methods comprise of the collection of Data in the form of numbers and the analysis thereof by way of statistics. Blanche, Durrheim and Painter *Research in Practice* 46-47.

selection process.¹⁰¹⁷ The data collected from the interviews was analysed by way of an interpretive analysis approach¹⁰¹⁸ and by applying a thematic analysis method. Eight common themes emerged from the interviews with the participants. The findings concluded from the data analysis, combined with the findings of the literature studied in terms of the initial phase of the study, provided valuable and insightful information relating to the research study.

8.3 Conclusions based on the Outcomes of the Study

South African matrimonial legislation is regulated by three pieces of legislation namely the Marriage Act providing for monogamous heterosexual civil marriages, the Recognition of Customary Marriages Act regulating polygynous heterosexual customary marriages and the Civil Union Act that regulates civil unions in respect of monogamous heterosexual and or same-sex couples. In terms of both the Marriage Act and the Recognition of Customary Marriages Act a minor may enter into a civil or customary marriage provided the required consent is obtained. In determining whether consent should be granted for a minor to enter into civil or customary marriages, “the best interests of the child” principle is applied. This principle is regulated in terms of section 28(2) of the Constitution that provides that “[A] child’s best interests are of paramount importance in every matter concerning the child.” The best interest of the child is also included in terms of the Children’s Act as well as national and international treaties. From the documentary analysis the researcher concluded that the best interest standard as provided for in terms of section 7 of the Children’s Act must be applied in all matters concerning a child. In applying “the best interests of the child” principle various factors need to be considered based on the individual circumstances of the child, in a child-centred approach. In this regard the voice of the child was identified as an important consideration during the interview process.

¹⁰¹⁷ Purposive selection is based on careful selection of cases that are reflective of the population under study. Blanche, Durrheim and Painter *Research in Practice* 563.

¹⁰¹⁸ Interpretive analysis refers to interpretation of intended meaning. Blanche, Durrheim and Painter *Research in Practice* 560.

Section 1 of the Civil Union Act however categorically excludes all minors from entering into a civil union without considering “the best interests of the child” principle or standard.

The results of the research study confirm that the blanket ban on minors from entering into a civil union, whilst other comparable legislation provides for minors to enter into a civil or customary marriage, results in differentiation within the current South African marriage law framework. The excluding of minors from entering into civil unions thus violates section 28(2) of the Constitution as well as minors’ rights to equality and dignity. These findings were concluded by way of the documentary analysis and reinforced by the interpretations and experiences of the participants during the interviews.

Based on the research data collected during the 2nd phase of the study it emerged that the participants’ interpretations in respect of the criteria, the application and assessment of “the best interests of the child” is in line with the results derived from the documentary analysis. The participants unanimously regarded the exclusion of minors from entering into a civil union, without applying the best interests of the child principle as discriminatory and firmly expressed their views that the South Africa’s current marriage law system requires law reform to ensure that all minors are treated equally.

8.4 Conclusion

Currently the South African marriage law system is fragmented in the sense that it has three statutes regulating three different forms of marriage. The application of different statutes to regulate civil marriages and civil unions are particularly anomalous. From the research study it is evident that the current South African matrimonial legislation not only results in inequality but also differentiation. The implication of the differentiation that results from the application of dual but separate Acts is predominantly prejudicial to minors who are precluded from entering into civil unions.

As far as minors are concerned, the application of two separate Acts, each dictating different requirements (especially in relation to the age of marriage or age of entering into a civil union) is found to be in violation of minors' right to be treated equally and with dignity. The blatant and categorical exclusion of "the best interests of the child" principle in terms of section 1 of the Civil Union Act, as well as the disregard of the minor child's right to express his/her viewpoint in determining his/her best interest, is found to be a violation of section 28(2) of the Constitution and not in accordance with South African and international best practices as encompassed in law and treaties.

8.5 Recommendation

The current predicament we find ourselves in of applying two separate Acts to regulate a civil marriage or an institution akin to a marriage, namely a civil union, was previously experienced in the Netherlands with the enactment of the Act on Registered Partnerships. The experience of the Netherlands is nearly identical to the current status of matrimonial legislation in South Africa and may therefore be beneficial in terms of marriage law reform.

With the enactment of the Act on Registered Partnerships, the Dutch created a new institution akin to marriage, applicable to both same-sex and heterosexual couples,¹⁰¹⁹ that had similar consequences to those of a Dutch marriage.¹⁰²⁰ Marriages were however reserved for heterosexual couples. The fact that Dutch heterosexual couples could choose between a marriage and an institution akin to a marriage was indicative of the institutions having different social status.¹⁰²¹ Consequently a dual system that permitted heterosexual couples a choice between either entering into a Dutch marriage or a registered partnership was created, whilst same-sex couples were not afforded such a choice.¹⁰²² The Dutch ultimately acknowledged that the only manner

¹⁰¹⁹ For a discussion on the arguments that led to heterosexual couples being included in the Act on Registered Partnerships, see Waaldijk 2004 *NELR* 572. See *Kamerstukken II* 1994-1995, 22, 700 no. 5 in respect of the controversial memorandum that led to the amendment of the Partnership Bill to include heterosexual couples and to be aligned with the formalities and consequences of a Dutch marriage.

¹⁰²⁰ For a general discussion on the differences between a registered partnership and a marriage, see Sumner 2002 *Maastricht Journal of European and Comparative Law* 35-36.

¹⁰²¹ Sumner 2002 *Maastricht Journal of European and Comparative Law* 35-38.

¹⁰²² Boele Woelki *Registered partnership* 45.

in which full equality was going to be achieved was by amending their marriage law to enable same-sex couples the right to enter into a marriage. Accordingly a single gender-neutral marital system was adopted.

South African matrimonial law can accordingly relate to the Dutch experience. With the promulgation of the Civil Union Act heterosexual couples have a choice to either enter into a civil marriage or a civil union, whilst same-sex couples are restricted to civil unions by virtue of a civil marriage still being restricted to heterosexual couples.

In considering the research results as well as the experiences of the Dutch and Canadian matrimonial legal system in terms of marriage law reform it seems unavertable that the South African marriage law system will at same stage have to be amended. In recommending law reform it is suggested that South Africa either amend current legislation (as in the case of the Dutch marriage law system) or promulgate a new single Act (as in the case of Canadian marriage law reform) to ultimately provide for a single institution of marriage that is gender-neutral. By adopting the recommended law reform all people (including minors wishing to enter into a marriage) will be treated equally before the law and have equal protection and benefit of the law.

8.6 Contribution of the Study

The study was ultimately motivated by the anomaly resulting from the application of dual but separate Acts within the current South African marriage law framework. It is envisaged that the findings of this research will contribute towards the development of a gender-neutral marriage law system that accommodates all people in line with the constitutional values of a democratic society despite any cultural, religious or sexual orientation differences.

Annexure A

Informed Consent Form Research Participants

Title of Research Study:

An analysis of Section 1 of the Civil Union Act 17 of 2006: underpinning the “best interests of the child” in light of the South African Constitution?

Purpose of the study:

My name is Lizelle Ramaccio Calvino and I am presently registered for my LLD at the University of Zululand. As part of the requirements for the LLD at the University of Zululand, I have to carry out a research study. I am conducting my research in respect of matrimonial law, focussing on the best interests of the child.

What will the study involve?

While the Marriage Act 25 of 1961 and the Recognition of Customary Marriages Act 120 of 1998 provide that a minor may enter into a civil or customary marriage, the Civil Union Act 17 of 2006 precludes civil unions by minors. The study will involve questions addressed to family advocates and social workers in establishing whether they are of the view that Section 1 of the Civil Union Act 17 of 2006 that categorically prohibits minors from entering into a civil union comply with the “best interests of the child” in terms of the Constitution of the Republic of South Africa. The research study will only include family advocates and social workers from the Durban family advocate office. The interview process should take about 25 minutes and will be conducted in English. The interviews will be conducted during August-September 2016.

Why have you been asked to take part?

You have been asked because you are a key role player in that family advocates are unbiased family law specialists that are assisted by social workers in conducting inquiries as to what is in the best interest of the child.

Do you have to take part?

You do not have to take part in the research. Your participation is totally voluntary. You will be asked to sign a consent form and you will get to keep the information sheet and a copy of the consent form. You may at any stage of the interview ask to refrain from answering certain questions or stop with the interview process. Where data are identifiable (e.g. from interviews yielding qualitative data) you have the option to withdraw your contribution within two weeks of participation and you may ask to have the data destroyed.

Your privacy:

Your participation in this study will be kept confidential. Any reference to you will be by pseudonym, including any direct quotes from your responses. This document and any notes or recordings that might personally identify you as a participant in this study will be kept in a locked place that only I will have access to. The study will be used for research purposes only. To protect your confidentiality, I will only use information and results from the interview, without including your name. The interview will not be shared with anyone other than myself, Lizelle Ramaccio Calvino (researcher) and my supervisor, Professor Desan Iyer at the University of Zululand. The data will be kept confidential for the duration of the study. On completion of the thesis, they will be retained for a limited period and then destroyed.

What will happen to the results?

The results will be presented in the thesis. They will be seen by the supervisor, a second marker and the external examiners. The thesis may be read by future students on the course. The study may be published in a research journal.

What are the possible disadvantages of taking part?

I don't envisage any negative consequences for you in taking part. It is possible that talking about your experience in this way may cause some distress. If you experience a negative reaction, you may choose to skip the question, to withdraw from the study, or you may contact my supervisor, especially if your discomfort continues after the study.

You might experience social, economic, or legal implications if you share your responses or your participation in this study with others. If you choose to participate in this study, you are encouraged to keep your participation in this study and your responses confidential. I will maintain your confidentiality throughout the study.

Benefits to You:

There are not foreseen direct benefits to you regarding participation in this study beyond the general knowledge that you are assisting in furthering the knowledge related to this research topic, and assisting me in harvesting rich data to enable me to complete my LLD degree requirements. There is no compensation associated with participation in this study.

What if there is a problem?

At the end of the interview, I will discuss with you how you found the experience and how you are feeling and if at that point you wish to withdraw your submissions then you may do so.

Who has reviewed this study?

The Faculty Ethics Committee and the University Research Ethics Committee have reviewed this study.

Concerns:

If you have any questions or if you would like to receive a final copy of this research study after completion, please feel free to contact me at 035-9026335 or CalvinoL@unizulu.ac.za. In addition you may contact my supervisor, Professor Desan Iyer at 035-9026379 or IyerD@unizulu.ac.za.

Consent Form to Participate in an Interview

I.....agree to participate in Lizelle Ramaccio
Calvino's (Student Number 201551089), research study.

- The purpose and nature of the study has been explained to me in writing.
- I am participating voluntarily.
- I give permission for my interview with Lizelle Ramaccio Calvino to be recorded with the use of an electronic device.
- I understand that I can withdraw from the study, without repercussions, at any time, whether before it starts or while I am participating.
- I understand that I can withdraw permission to use the data within two weeks of the interview, in which case the material will be deleted.
- I understand that anonymity will be ensured in the write-up by disguising my identity.
- I understand that disguised extracts from my interview may be quoted in the thesis and any subsequent publications if I give permission below:

(Please tick one box :)

I agree to quotation/publication of extracts from my interview ☐

I do not agree to quotation/publication of extracts from my interview ☐

Signed: _____

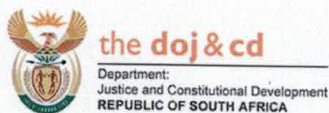
Date: _____

Contact Details: _____

Tel: _____

E-Mail: _____

Annexure B



NATIONAL OFFICE

PRIVATE BAG X81, PRETORIA, 0001. Momentum Centre, 329 Pretorius Street
PRETORIA Tel (012) 315 4840,

Ref: HRD/09/17

Enq: (012) 315 4840

E-mail: MLEbaka@justice.gov.za

TO WHOM IT MAY CONCERN

This serve to confirm that the Department of Justice and Constitutional Development has given Ms L.R Calvino permission to conduct Academic Research in the Department.

Ms Calvino's research topic is "**A determination of whether Section 1 of the Civil Union Act 17 of 2006 underpins "the best interests of the child" principle or whether it underscores the need for marriage law reform**".

Ms Calvino's approval is on condition that:

- (a) She only collects information that is relevant to her academic research.
- (b) She share the information obtained from the Department for academic purpose only.
- (c) She maintains, uphold and stick to strict confidentiality on all information obtained from the Department.
- (d) She should not publicly publish the findings and recommendations of the research without prior approval of the Department. The publishing should only be limited to the Academic Institution's requirements.
- (e) She shares her findings and recommendations of her research with the Department.

Best regards,

Dr Moses Lebaka

Director: Human Resource Development

18/09/2017

Date

Annexure C

PERMISSION TO USE MY RESPONSE FOR ACADEMIC RESEARCH

Please complete this section to show that an actual person participated in this interview. The information that you provide during the interview is **strictly confidential**. Your personal identity will not be revealed to your colleagues, members of the legal profession or anyone else in a position of authority.

I hereby give permission that my responses may be used for research purposes provided that my identity is not revealed in the published records of the research.

Initials and surname: _____

Signature: _____

Date: _____

Annexure D

Transcribers Report

This report serves to verify that I, **Deshnee Chetty-Sherief**, MD of Mi-PA (Pty) Ltd – The Professional Office Assistant, Company Registration Number: **2013/223784/07**, have scripted the 10 transcriptions derived from the 10 interviews that Ms Calvino had conducted.

I assure you that they were written with accuracy and attention to detail.

I can be contacted for further information or clarity.

Regards

Deshnee Chetty-Sherief

Date: 06th November 2017

Interview Number 1:

Recording 1003

Interview Verbatim

Duration 23:14

Total Pages: 12

INTERVIEWER:

Good day Advocate, thank you for accommodating me today. Today is the 6th of October 2017 and this is my first interview. I am an admitted attorney and I was practising in family law, for more than ten years, in the province or area of Zululand. I am currently a Senior Lecturer at the University of Zululand in the Private Law Department and I am currently completing my doctorate.

The title of my research topic, just to familiarise you with it is: **The determination of whether Section 1 of the Civil Union Act 17 of 2006 underpins “the best interests of the child” principle or whether it underscores the need for marriage law reform. Section 1 of the Civil Union categorically excludes all minors from entering into a civil union.**

Just before we proceed I just quickly to want to reiterate what Section 1 of the Civil Union Act actually states, it is defined as, in terms of Section 1 as:

“the voluntary union of two persons who are both eighteen years of age or older which are solemnised and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in this act to the exclusion while it lasts of all others.”

The reason why I decided to interview the Family Advocates offices is that I thought as part of my doctorate it would be imperative to find the input and also to take into consideration the views of the Family Advocate offices who would also then be the people who are responsible to safeguard minor children’s rights on a daily basis. As part of my research relating to the present South African marriage law reform or framework and in particular the effect that Section 1 of the Civil Human Act has on the rights of minor children wishing to enter into a civil union.

I just would like to put you at ease with regards to the privacy aspect of this interview. The aim of this interview is just to obtain your ideas and your opinions regarding the effect the Civil Union Act, in particular Section 1 of the Act, has on the best interest principle and other rights

of minors wishing to enter into a civil union and whether this position is in line with our current marriage law statutes that make provision for minors to enter into marriages.

I also want to reiterate that I hope the results of my research will advance the current legislative structure pertaining to South African marriage law framework.

With regards to the information relating to the interview I would just like to indicate that the interview would probably take 10-15 minutes. I would like to ask you your first question:

Are you available to respond to these questions at this time?

PARTICIPANT 1:

Yes

INTERVIEWER:

May I audio record the interview as it would help me to listen to it at a later stage?

PARTICIPANT 1:

Yes

INTERVIEWER:

You have no objections.

Can you please sign the letter of informed consent so I can use your response for official research?

And then I am going to start with some general questions if you don't mind.

First and foremost where did you complete your tertiary qualification?

PARTICIPANT 1:

UNISA

INTERVIEWER:

What qualification do you have?

PARTICIPANT 1:

B Proc

INTERVIEWER:

B Proc – same as myself

PARTICIPANT 1:

Is it? Ok...

INTERVIEWER:

Why did you choose to become a family advocate as a career path?

PARTICIPANT 1:

Because I am a mom and a grand mom I just love working with family issues and in fact when I started my articles it was straight into family law and that's when I thought that I should continue specialising in family law.

INTERVIEWER:

Ok...how many years of experience do you have as a family advocate?

PARTICIPANT 1:

Its 9 and a half years now but I started five months prior to that as an ad hoc.

INTERVIEWER:

As a...

BOTH SIMULTANEOUSLY:

Ad hoc family advocate

PARTICIPANT 1:

Yes

INTERVIEWER:

What are the aspects that you like most of your profession?

PARTICIPANT 1:

I love the challenge because it is not an easy sort of work that we handle. It's very highly emotive and I am up for the challenges and I enjoy working with kids.

INTERVIEWER:

Do you find your profession challenging? Because you just said it's challenging...

PARTICIPANT 1:

Absolutely...as you can't be all things to all people comes with the terrain.

INTERVIEWER:

What aspects of your profession do you find most challenging?

PARTICIPANT 1:

When we are dealing with difficult recalcitrant clients who don't fully understand and cooperate they don't fully understand the law or how the law works in terms of the child having a voice and it becomes problematic when we are recommending and it doesn't work in their favour. Often times we find that we are blasphemed for that, we are, we have different complaints where we have to respond and I find that quite challenging and at the same time I feel despondent because I know we do the best we can at the enquiry. When you get complaints of this nature it just makes you feel a bit despondent, I am only human that is why I feel it.

INTERVIEWER:

Understandably...if you don't mind I would like to move onto the essence of my research.

What is your understanding of the "best interest of the child" principle?

PARTICIPANT 1:

This I know as much as it's defined in the Act as what the best interests of the child is but it goes beyond and it's a very subjective viewpoint. Best interests of a child can mean so many things when being a child. We think about the basic needs of the child that (*inaudible*) comforts having a guardian or caregiver taking care of their emotional needs, their intellectual needs, their daily care and ensuring that at all given times that a child is well loved and comforted making sure that whatever is there in the best interest of the child that must be adhered to. When it comes to matters of divorce where children are part of the divorce process I find that the voice of the child is the most critical aspect and without the voice of the child because sometimes we get different viewpoints from the parents and when we interview the children we hear something completely different which was not even addressed by the parent.

And we find when we start to calm the child down or just make the child more comfortable we tell them if they are not feeling comfortable to talk that's fine we give them time. But then you find immediately when you set the tone for the interviews and you tell them what you are there for introducing yourself as being their lawyer for the day, they just light up.

You can see the immediate difference and then they want to disclose what their feelings are and how upset and upsetting it is and they cannot concentrate on their schoolwork because mommy and daddy are fighting so much and all we want is for the fighting to stop.

And then I ask the question: when you are in your classroom do you find that all the issues that are taking place at home does it detract you from concentrating from the lesson that's being given by your teacher?

That is their first point we get and I always tell parents that is the first indication that you will have when your child is not coping with all that is going on in the marriage. When there are cracks in that marriage the children are those that feel the first effects and that is why it so vitally important to hear their voice.

Like often times what we would not hear initially from the child they will actually request that they want to see the family advocate so that they can explain themselves because they were too shy to talk, they didn't know what it was all about *"but now that I am feeling more prepared I can rather talk to the family advocate"*.

Most often we find that is what happens here the child goes back and then tells either parent *“oh I didn’t say this and I so much wanted to say this but I didn’t”*

When the parent finds that that is the most critical aspect of the child not disclosing that critical issue they will say can you see my child again I think it’s important for you to hear him/her. And we actually accommodate for that sometimes on a Friday or in-between our enquiries. We bring them in and allow the family counsellor speak with them again.

That is what I find fulfilling in the job because once you reach to the child and you get their assurance or you get their trust then they just spill it all out. And that’s what’s so amazing.

Often times its tears, most often, all they want is mommy and daddy to come back together again. I always explain to them, in the manner I do from my practice, I always say:

“rather than living in a home where mommy and daddy is constantly fighting which is not good for any of the children in the home; don’t you think it’s better that you stay separately so that you have a happy home with mommy and a happy home with daddy and you don’t have to listen to the constant fights and don’t you think that’s better. When you on your own with daddy you can enjoy him without having the kind of issues that’s going to be there if mommy was there. Because then an argument comes up and you find that you are caught up in the middle. So at least now you enjoy time with daddy and you enjoy time with mommy. And I think that’s the best gift you can have right now with all that’s happening in your home”

INTERVIEWER:

So is it your viewpoint then that the best interests of a child can only be served if the child is afforded the opportunity to be heard?

PARTICIPANT 1:

Absolutely...absolutely

INTERVIEWER:

Do you feel that the “best interests of the child” principle should be applied within the framework of South African marriage law, where minors enter into a marriage relationship?

PARTICIPANT 1:

Yes, I think all round the best interests of a child should be the *(inaudible)* factor in any matters affecting a child. Their voice needs to be heard.

INTERVIEWER:

Do you think that the principle is adequately applied within the national framework currently within South Africa?

PARTICIPANT 1:

Well I think with the implementation of the children’s Act they have made quite good advances where with the children’s Act you are compelled to hear the voice of the child and I think that is a great thing. The introduction of the children’s Act has brought about lots of changes even with the implementation of the mediation processes in our offices which was never here before the children’s Act was implemented.

Whereby now even if the parties are not married in terms of Section 21 applicable to underrate fathers or Section 33 pertaining to married separated parents or married and divorced parents.

You also give that opportunity to children born of those relationships to have a voice and that was never before. It was a great thing to have the children's Act implemented.

INTERVIEWER:

Ok...**Are you familiar with the Civil Union Act and in particular Section 1?**

PARTICIPANT 1:

I have not really familiarised myself with that.

INTERVIEWER:

Ok...**are you aware that Section 1 of the Civil Union Act precludes all minors from entering into a civil union regardless of their sexual orientation?**

PARTICIPANT 1:

Yeah that comes as a big surprise and absolute big surprise because for me the child's voice in every aspect would matters pertaining to how and the child's voice should have taken recognition.

I mean you get our Article 12 on the United Nations Convention on the rights of the child, our very own African Charter and rights on the welfare of children, Article 10, if I'm not sure that speaks so critically of the rights of the child and I endorse it very strongly.

INTERVIEWER:

Do you think the best interests of the child standard is considered in terms of Section 1 of the Civil Union Act?

PARTICIPANT 1:

Sorry...

INTERVIEWER:

Do you think that the best interest of the child standard is at all considered in terms of Section 1 of the Civil Union Act?

PARTICIPANT 1:

I wouldn't think so.

INTERVIEWER:

I would like to reiterate Section 1 of the Act which specifically states: *"the voluntary union of two persons who are both eighteen years of age or older"*

In other words the Civil Union Act precludes minors from entering into the marriage. So in view of that I would like to understand your viewpoint whether you feel that the best interests of the child is at all considered taking into consideration Section 1 of the Act?

PARTICIPANT 1:

Yeah I think it contradicts the absolute essence of the voice of the child. Why should the child that wants to enter into a civil union be precluded from entering into that kind of relationship.

Whereas under our normal situations in terms of the marriages Act whereby if a child is under 18 they can either get permission from their guardian failing which they can approach the Minister of Home Affairs if they are quite young or the Commissioner of the Children's Court.

I don't think there should be a disparity because there is no fairness in that.

INTERVIEWER:

What are your views on the exclusion of same-sex minors from entering into a civil union?

PARTICIPANT 1:

Well as I said there is disparity and that's not fair. I think the same principle should apply to the same civil union.

INTERVIEWER:

Do you think, in view of our conversation, that there is a need to change the current marriage law system of South Africa specifically in respect of minors?

PARTICIPANT 1:

Absolutely because then you can bring everything on the same level and there should be no disparity with that.

In any situation the voice of the child is critical so why should there be any disparities, I totally don't agree with that.

INTERVIEWER:

A question that I want to ask you as well from a family advocate's perspective from what age do you attach weight to the child's viewpoint?

PARTICIPANT 1:

That is something that is very subjective because a child at 12 may not be as mature as a child at 10. So we cannot really say we can put age to that, that's actually not correct.

We have had kids in our offices when the child spoke and I looked again and I said am I confused, because this child looked as if she were more than 10, 12 years of age but when I looked to see she was only 10.

The way she articulated herself you know it brought out everything so clearly what her needs were to come out of this divorce with her parents, what she wanted and how she felt the situation at home was affecting her and that child just spoke and I was like really amazed.

Then I told the family counsellor we cannot for sure that the child is going to be mature at 12 or 14 – it all depends on the stage of development some children mature earlier than others.

INTERVIEWER:

From your experience as a Family Advocate children at the age of 16 because as you know in terms of the marriage act, recognition of customary marriages act, children as of the age from 16, which is the age of puberty, can enter into a marriage provided they get the necessary consent, do you feel that they are mature enough to express their viewpoints?

PARTICIPANT 1:

Things I always tell parents you know hopefully when I cover that section and I said in terms of the guardianship aspect do you know your children if they want to be married before 18 and I always say, hopefully not, but if the parents out of concern are saying you are saying no, are you aware that your child can approach the Minister of Home Affairs if he/she is quite young or the Commissioner of the Children's Court.

They look with very confused looks on their face with their eyebrows raised but then I tell them then your parental responsibilities or rights, more especially your rights, are displaced for that very purpose and the authority's steps in to give that permission,

They are quite amazed, *can that happen, can my rights be displaced in terms of that?* Then I said being a child of 16 that child is so much in love and really wants to be married. Sixteen I would assume the child is old enough to say *I want to be married* and I think the child's voice should be heard.

As much as we can say, overall does a child at 16, does the child have that level of maturity to enter into a marriage at that stage? So that can be debatable. Like I said children mature differently at different levels.

We had a 16 year old... sorry... a child that was about to become 18 and then I said why are we interviewing this child, the child has her own voice. But when you looked at the circumstances of the one parent who wanted primary care and we felt you know what we cannot possibly because of the *(inaudible)* the mother alleges that the man is drunk from Friday to Sunday, he brings in different characters into the house and here's a young girl living with him and he brings in prostitutes into the house and you want a 17 and half year old girl being exposed to that?!

That is where we said it all depends on the circumstances that surround that situation. Are we saying now, must we send that 17 and a half year old, although she said she wants to be with her father because she doesn't get on with her mother but that's when we had to say you know what, I think in all fairness to you, from what advice we want to give you, you are better off with mom, you can just visit your dad but tell him when you are visiting you want to be alone with him.

So these are the kind of scenarios that we are faced with.

INTERVIEWER:

So just to understand you, do you feel that the voice of a child is probably one of the most crucial aspects in determining the best interests of the child?

PARTICIPANT 1:

Absolutely...as I said there are exceptions like the one point I mentioned now...so...

INTERVIEWER:

And just one other aspect do you feel one can have a general approach towards the best interests of a child or do you think it should be dealt with on each matters individual circumstances?

PARTICIPANT 1:

It should, like I said we can't use a blanket approach and say at this age we are specifically going to do this or recommend this.

Each situation that we experience at the table is so different from the other. So like I said we have curve balls thrown at us at each time. But I think you have to apply your mind maturely and you got to do the necessary things.

Although a child might tell you I want to be with dad because mom doesn't allow me this and that and we often find that children maybe they are influenced by the Father Christmas syndrome where they feel: *"Oh I can stay with dad because dad will allow me to watch TV till late"* and that often times we get these complaints from the mothers.

When the child has returned from a trip they are being endowed with expensive PlayStation games and things and yet that father will not ensure that the homework for the child is done for that weekend.

And when the child is returned on a Sunday evening, then I have face the drama of sitting with them up till late and trying to oversee their homework.

So the child's voice I think in every aspect is so critical and what the parents tell you here is so different from when a child walks in. And we know exactly because I think we are so attuned to talking to children over the time of 9 and half years that I have been here is that often time become probed like you can see they like little robots. Often times they come in and say *"daddy said I must say I want to stay with mommy"* or *"I don't like mommy's house there are too many dogs there and I am scared they will bite me"* without asking the question.

So we know the situations where the children can be probed to answer these questions.

INTERVIEWER:

Ok...is there anything else you would like to add to our conversation or interview? Specifically relating to my topic?

PARTICIPANT 1:

Ok...now what happens is this could be somehow related to what you are actually saying like I mentioned earlier I always wanted an in-house psychologist to be appointed within the precincts of the Family Advocate because what we find more often when children are being probed and when the child is being taken to a specific psychologist appointed by that particular parent often times we are not really guided by that actual report we get because what the children are being probed to say forms part of that very report and then you hear the other parent complaining I didn't give permission for the child to be seen or assessed by that psychologist how could that have been.

So we've got to be so careful as to how we view the reports that we receive because from my understanding and from what our office rules or disciplines or policies is that if, like I said, we are not reliant on psychologists reports.

Under very exceptional circumstances where it really warrants the need for us to be guided by that report then we will consider it, that's important for us

Other than that when the mother will say "*oh no sorry I don't think you should write your report until we get the psychologists report*" so then you will know exactly what's been happening.

So we have to be so mindful of what the contents of the report is and take it in a kind of holistic fashion of what we got from the enquiries, what the parents had each told us and what they subsequently would have conveyed to us in the form of an email to us and then looking at the child's voice and then taking everything then looking at the psychologists report then determine do you think we should have supervised contact or does it warrant supervised contact or not.

So our work entails a lot more than what we hear at the very table, we have got to look beyond. Ultimately the mandate is to look at the very best interests of that child.

Obviously what also assists with that is collateral information which the Family Counsellors who are trained social workers within the Family Advocate's office, they have to obtain collateral information to make sure that we are making sure that we look at the best interests of the child.

How is he being taken care of when he comes back from school? Is it a grandparent or a neighbour, who sees to that child especially when there is a dispute with primary residence?

So we got to look beyond and obtain collateral information in order to do that. To make sure that when we are compiling our recommendation ultimately it's going to be in the child's best interests.

INTERVIEWER:

Ok., alright that concludes my questionnaire (*inaudible*).

I would like to thank you for your participation in this interview process and if there is no other comment which you'd like to make then we would then conclude our interview for today.

Thank you very much...

PARTICIPANT 1:

But I must thank you because I have actually learnt a lot from you as well today in terms of your research and the general topics we were having earlier.

And I wish we could have gone on for the day...

End of Transcription

Interview Number 2:

Recording 1004

Interview Verbatim

Duration 14:01

Total Pages: 8

INTERVIEWER:

Good day Advocate, thank you for accommodating me today. Today is the 06th of October 2017 and this is my second interview. I am an admitted attorney and I was practising in family law, for more than ten years, in the province or area of Zululand. I am currently a Senior Lecturer at the University of Zululand in the Private Law Department and I am currently completing my doctorate.

The title of my research topic, just to familiarise you with it is: **The determination of whether Section 1 of the Civil Union Act 17 of 2006 underpins “the best interests of the child” principle or whether it underscores the need for marriage law reform. Section 1 of the Civil Union categorically excludes all minors from entering into a civil union.**

Just before we proceed I just quickly to want to reiterate what Section 1 of the Civil Union Act actually states, it is defined as, in terms of Section 1 as:

“the voluntary union of two persons who are both eighteen years of age or older which are solemnised and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in this act to the exclusion while it lasts of all others.”

The reason why I decided to interview the Family Advocates offices is that I thought of as part of my doctorate it would be imperative to find the input and also to take into consideration the views of the Family Advocate offices who would also then be the people who are responsible to safeguard minor children’s rights on a daily basis. As part of my research relating to the present South African marriage law reform or framework and in particular the effect that Section 1 of the Civil Human Act has on the rights of minor children wishing to enter into a civil union.

I just would like to put you at ease with regards to the privacy aspect of this interview. The aim of this interview is just to obtain your ideas and your opinions regarding the effect the Civil Union Act in particular Section 1 of the Act has on the best interest principle and other rights of minors wishing to enter into a civil union and whether this position is in line with our current marriage law statutes that make provision for minors to enter into marriages.

I also want to reiterate that I hope the results of my research will advance the current legislative structure pertaining to South African marriage law framework.

With regards to the information relating to the interview I would just like to indicate that the

interview would probably take 10-15 minutes. I would like to ask you your first question:

Are you available to respond to these questions at this time?

PARTICIPANT 2:

Yes I am

INTERVIEWER:

May I audio record the interview as it would help me to listen to it at a later stage?

PARTICIPANT 2:

Yes it's ok

INTERVIEWER:

Can you please sign the letter of informed consent so I can use your response for official research?

PARTICIPANT 2:

Ok

INTERVIEWER:

And then I am going to start with some general questions if you don't mind.

First and foremost where did you complete your tertiary qualification?

PARTICIPANT 2:

I completed my LLB Degree at the University of Zululand

INTERVIEWER:

Oh so you are from the University of Zululand?

PARTICIPANT 2:

Yes...

INTERVIEWER:

Which year did you finish?

PARTICIPANT 2:

Finished in I think 2002, graduated in 2003 in June

INTERVIEWER:

Why did you choose to become a family advocate as a career path?

PARTICIPANT 2:

You know before I used to work in court, Durban Magistrates court. So I think I spent most of my years you know...there working there in family court section. I was just dealing with family related matters.

So that is the reason why...you know...I became interested...you know...in becoming a Family Advocate.

INTERVIEWER:

Ok...**how many years of experience do you have as a family advocate?**

PARTICIPANT 2:

Its 10 years now

INTERVIEWER:

What are the aspects that you like most of your profession?

PARTICIPANT 2:

The aspects of my profession...you know...what I can say is that yes I like doing enquiries with the (*inaudible*) but also I would like - but here we don't do that.

I have been...you know... to the Northern Cape...you know...for almost 9 years – so there my work entails even going to court and motion court.

I also like to go to court, because you know court is where I grew up. When I joined this office in 2015 so it was like we have to be in that office, we have to conduct enquiries. I do like to conduct enquires but I also like to go to court and attend motion court.

But it doesn't matter now (laughs)...

INTERVIEWER:

So you like the thrill of court?

PARTICIPANT 2:

Yes...

INTERVIEWER:

Do you find your profession challenging?

PARTICIPANT 2:

It is very much challenging.

INTERVIEWER:

What aspects of your profession do you find most challenging?

PARTICIPANT 2:

It is challenging because we deal with emotions. People are emotional, they are going through this divorce. The relationship between them tends to be acrimonious. The children tend to get caught up in middle of this acrimonious relationship.

So it's very much challenging.

INTERVIEWER:

An emotional challenge...

PARTICIPANT 2:

Yes...yes

INTERVIEWER:

If you don't mind I would like to move onto the essence of my research:

What is your understanding of the "best interests of the child" principle?

PARTICIPANT 2:

The best interests of the child principle in my understanding is, even though I would not be exact in my definition, but I would like to explain it in a way that you can understand.

You know we are dealing with matters that involve minor children, when the parents are getting divorced, it is - the children get affected negatively by the fact that their parents are getting divorced.

So their best interests, their well-being, now needs to be taken into consideration. Like you know our office it serves, it is there to see to it that their best interests are served. Their well-being needs to be considered when their parents are getting divorced.

INTERVIEWER:

And what factors do you take into consideration when you determine the best interests of the child?

PARTICIPANT 2:

The factors that I take into consideration when I consider the best interests of the child?

You know the factors...like for instance, their ages you know, like it happens that you know that you find that the children are still very very young you know.

I understand when children who are above 4, age 10, 12, those children who are below the ages of 10 it's you have to treat the matter with absolute care when you deal with such matters.

INTERVIEWER:

Can you apply a "one size fit all" approach? In other words can you deal with all the matters in the same manner or is it required that you consider specific circumstances of a specific matter?

PARTICIPANT 2:

Yes you have to apply specific circumstances. Each and every matter... I'm just now thinking of the word...each matter is dealt within its own (*inaudible*).

INTERVIEWER:

Do you feel that the “best interests of the child” principle should be applied within the framework of South African marriage law, where minors enter into a marriage relationship?

PARTICIPANT 2:

Yes, I think that the best interests of the child has to be considered.

INTERVIEWER:

Do you think that the principle is adequately applied within the national framework currently within South Africa?

PARTICIPANT 2:

No I don't think so...

INTERVIEWER:

Why not?

PARTICIPANT 2:

I don't think so because now if, like for instance, if there, I think that specific legislations are little discriminatory.

Like if you say the child who is you know a child who is of the same-sex party is treated differently from you know the child of a heterosexual party you know, I think it's discriminatory in this way.

INTERVIEWER:

Are you familiar with the Civil Union Act and in particular Section 1? Or where you familiar with it before I read it to you?

PARTICIPANT 2:

No I wasn't familiar with it...

INTERVIEWER:

Are you aware that Section 1 of the Civil Union Act precludes all minors from entering into a civil union regardless of their sexual orientation?

PARTICIPANT 2:

No

INTERVIEWER:

Do you think that the best interests of the child is served by having a Section 1 of the Civil Union Act precluding all minors from entering into a Civil Union?

PARTICIPANT 2:

Would you please rephrase the question?

INTERVIEWER:

Sure...Do you think that the best interests of the child is served by having a Section 1 of the Civil Union Act precluding all minors from entering into a Civil Union?

PARTICIPANT 2:

No...I don't think it is served.

INTERVIEWER:

Can you elaborate why you think that?

PARTICIPANT 2:

I don't think it is served because it's important that the best interests of the child is served.

Like for instance if the child wants to get married you know and there is this piece of legislation that doesn't allow the child to...I think it's ...

INTERVIEWER:

So do you feel that the viewpoint of the child is important?

PARTICIPANT 2:

It has to be given due consideration...

INTERVIEWER:

What are your views on the exclusion of same-sex minors from entering into a civil union? In other words if I can rephrase the question a little bit: in terms of the marriage act and the recognition of customary marriages act, it makes a provision that a heterosexual minor can get married provided that they get the required consent. In terms of the Civil Union Act, no minor can get married. So same-sex minors therefore do not have, in terms of our South African current situation, the provision to enter into a marriage. What are your views on the excluding same-sex minors based on their orientation in getting married?

PARTICIPANT 2:

It's not right you know because we live in a democratic country. By right they are supposed to be, they are supposed to be allowed to be...

INTERVIEWER:

Treated equally...

PARTICIPANT 2:

Treated equally that's the word I was looking for...

INTERVIEWER:

Ok...do you think, in view of our conversation, that there is a need to change the current marriage law system of South Africa specifically in respect of minors?

PARTICIPANT 2:

Yes...yes

INTERVIEWER:

Is there anything else you would like to add to our conversation or interview? Specifically relating to my topic?

PARTICIPANT 2:

Nah...I think we covered everything.

INTERVIEWER:

I would like to thank you for your participation in this interview process and if there is no other comment which you'd like to make then we would then conclude our interview for today, concluding interview number 2.

Thank you very much...

PARTICIPANT 2:

You are most welcome.

*****End of Transcription*****

Interview Number 3:

Recording 1006

Interview Verbatim

Duration 8:09

Total Pages: 6

INTERVIEWER:

Good day Advocate, thank you for accommodating me today. Today is the 12th of October 2017 and this is my third interview. I am an admitted attorney and I was practising in family law, for more than ten years, in the province or area of Zululand. I am currently a Senior

Lecturer at the University of Zululand in the Private Law Department and I am currently completing my doctorate.

The title of my research topic, just to familiarise you with it is: **The determination of whether Section 1 of the Civil Union Act 17 of 2006 underpins “the best interests of the child” principle or whether it underscores the need for marriage law reform. Section 1 of the Civil Union categorically excludes all minors from entering into a civil union.**

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I just would like to put you at ease with regards to the privacy aspect of this interview. The aim of this interview is just to obtain your ideas and your opinions regarding the effect the Civil Union Act in particular Section 1 of the Act has on the best interest principle and other rights of minors wishing to enter into a civil union and whether this position is in line with our current marriage law statutes that make provision for minors to enter into marriages.

I also want to reiterate that I hope the results of my research will advance the current legislative structure pertaining to South African marriage law framework.

With regards to the information relating to the interview I would just like to indicate that the interview would probably take 10-15 minutes.

I would like to ask you your first question:

Are you available to respond to these questions at this time?

PARTICIPANT 3:

Yes I am available

INTERVIEWER:

May I audio record the interview as it would help me to listen to it at a later stage?

PARTICIPANT 3:

You are welcome mam you may proceed

INTERVIEWER:

Can you please sign the letter of informed consent so I can use your response for official research?

PARTICIPANT 3:

I can sign

INTERVIEWER:

And then I am going to start with some general questions if you don't mind.

First and foremost where did you complete your tertiary qualification?

PARTICIPANT 3:

I completed my LLB in 2001 at the University of Zululand

INTERVIEWER:

Why did you choose to become a family advocate as a career path?

PARTICIPANT 3:

I have a long path in the field of Family Law. Initially when I was introduced in this legal field I worked in General Court, it was called Criminal Court at that time. I was so much interested in the field.

In my career at that point I got promoted to Civil Section where I worked mainly on Family law matters, it could be divorce matters or any family law related matters.

Well the opportunity came for me to apply here I grabbed that opportunity with both hands and I was successful, I was hired to work here since 2008 and I have been here since then.

INTERVIEWER:

Ok that answers my next question...**how many years of experience do you have as a family advocate?**

I think that was adequately answered.

What are the aspects of your profession that you find most challenging?

PARTICIPANT 3:

There are a number of aspects, especially I would say (*inaudible*) parental (*inaudible*) – one parent against another, that really affects our work a lot.

Because we have to intervene in the matter, we have to have some measures to make sure that the mind-set of the child is properly adapted to have equal relationships with both parents. And at some point we have experienced when children end up completely resentful against one of the parents. It affects children emotionally and psychologically.

INTERVIEWER:

Thank you...**What are the aspects of your profession that you like most?**

PARTICIPANT 3:

(*Inaudible*) matters – they are very challenging and they are very unique you know. When you deal with (*Inaudible*) matters you actually you go out of the daily routine that you normally do.

I'd say I'm very interested on those matters. And it is when you realise how the principle best interests of the child matters. Because in those matters you really have to stick to the best interests of the child and also take into account the international laws that are in place.

We have to do away with our current legislations and focus on what international instrument (*Inaudible*).

INTERVIEWER:

Thank you...If you don't mind I would like to move onto the essence of my research:

What is your understanding of the “best interests of the child” principle?

PARTICIPANT 3:

That is a guiding principle. In fact it is a human right issue now in terms of our bill of rights, it's no longer a principle as we all normally refer to in terms of the common law.

Every child has the right to have his/her best interests considered whenever the issues concerning the child are at stake.

INTERVIEWER:

Do you feel that the “best interests of the child” principle should be applied within the framework of South African marriage law, where minors enter into a marriage relationship?

PARTICIPANT 3:

It should be applied across whether be Criminal Law, Civil Law, anyhow whenever the issues of the child are involved.

INTERVIEWER:

Do you think that the principle is adequately applied within the national framework currently within South Africa?

PARTICIPANT 3:

I really don't think so and I feel at some stage that could be challenged in the (*inaudible*) court because it takes away the principle best interests of a child.

INTERVIEWER:

Are you familiar with the Civil Union Act and in particular Section 1?

PARTICIPANT 3:

Yes I am aware of it, in fact it, that Section excludes consent from the child's guardian in case the child wish to enter into a civil marriage act which is opposed to all other pieces of legislation where consents are required.

INTERVIEWER:

Are you aware that Section 1 of the Civil Union Act precludes all minors from entering into a civil union regardless of their sexual orientation?

PARTICIPANT 3:

I'm definitely aware

INTERVIEWER:

Do you think that the best interests of the child's standard is considered then in terms of Section 1 of the Civil Union Act?

PARTICIPANT 3:

Not at all

INTERVIEWER:

What are your views on the exclusion of same-sex minors from entering into a civil union?

PARTICIPANT 3:

I will refer to my statement which I already mentioned, the best interests of the children are not considered in that aspect.

I will not understand what the intention of the legislature was at that stage. Safe to assume it could be the fact that same-sex marriages are generally disapproved in our society.

INTERVIEWER:

Ok...do you think that there is a need to change the current marriage law system of South Africa specifically in respect of minors?

PARTICIPANT 3:

Yes...I feel it could be successfully challenged in the (*inaudible*) court because it takes away the full (*inaudible*) right of the child which is the best interests of a child.

INTERVIEWER:

Is there anything else you would like to add to our conversation or interview?
Specifically relating to my topic?

PARTICIPANT 3:

None that I can think of...

INTERVIEWER:

I would like to thank you for your participation in this interview process and if there is no other comment which you'd like to make then we would then conclude our interview for today, concluding interview number 3.

Thank you very much...

PARTICIPANT 3:

You are welcome.

*****End of Transcription*****

Interview Number 4:

Recording 1007

Interview Verbatim

Duration 12:09

Total Pages: 7

Good day Advocate, thank you for accommodating me today. Today is the 12th of October 2017 and this is my fourth interview. I am an admitted attorney and I was practising in family law, for more than ten years, in the province or area of Zululand. I am currently a Senior Lecturer at the University of Zululand in the Private Law Department and I am currently completing my doctorate.

The title of my research topic, just to familiarise you with it is: **The determination of whether Section 1 of the Civil Union Act 17 of 2006 underpins “the best interests of the child” principle or whether it underscores the need for marriage law reform. Section 1 of the Civil Union categorically excludes all minors from entering into a civil union.**

Just before we proceed I just quickly to want to reiterate what Section 1 of the Civil Union Act actually states, it is defined as, in terms of Section 1 as:

“the voluntary union of two persons who are both eighteen years of age or older which are solemnised and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in this act to the exclusion while it lasts of all others.”

The reason why I decided to interview the Family Advocates offices is that I thought of as part of my doctorate it would be imperative to find the input and also to take into consideration the views of the Family Advocate offices who would also then be the people who are responsible to safeguard minor children's rights on a daily basis. As part of my research relating to the present South African marriage law reform or framework and in particular the effect that Section 1 of the Civil Human Act has on the rights of minor children wishing to enter into a civil union.

I just would like to put you at ease with regards to the privacy aspect of this interview. The aim of this interview is just to obtain your ideas and your opinions regarding the effect the Civil Union Act in particular Section 1 of the Act has on the best interest principle and other rights of minors wishing to enter into a civil union and whether this position is in line with our current marriage law statutes that make provision for minors to enter into marriages.

I also want to reiterate that I hope the results of my research will advance the current legislative structure pertaining to South African marriage law framework.

With regards to the information relating to the interview I would just like to indicate that the interview would probably take 10-15 minutes. I would like to ask you your first question:

Are you available to respond to these questions at this time?

PARTICIPANT 4:

Yes I am

INTERVIEWER:

May I audio record the interview as it would help me to listen to it at a later stage?

PARTICIPANT 4:

Yes you may

INTERVIEWER:

Can you please sign the letter of informed consent so I can use your response for official research?

PARTICIPANT 4:

I will do that

INTERVIEWER:

And then I am going to start with some general questions if you don't mind.

First and foremost where did you complete your tertiary qualification?

PARTICIPANT 4:

UKZN

INTERVIEWER:

What qualification did you obtain?

PARTICIPANT 4:

BA Law LLB and LLM

INTERVIEWER:

Which year did you finish?

PARTICIPANT 4:

Ah...you got me there...it was 1993 that was the LLB and 2008 LLM

INTERVIEWER:

Why did you choose to become a family advocate as a career path?

PARTICIPANT 4:

It was a dream it was what I wanted to do. At the stage when I became a Family Advocate the Family Advocate's office was about 4 years old. Beside it being an avenue to have a job after you qualified it dealt with family law which was an area that always interested me.

I also studied psychology as a Major in my Law Degree with the option to branch off into furthering studies in Psychology.

Yes, it was a crossroad when I had to make that choice. The only reason why I chose Law was because I heard horror stories about furthering studies in Psychology in terms of a quota system.

But I learnt then that the position of a Family Advocate would allow me to satisfy both these career paths.

That is why it was a dream position and when I applied I was fortunate enough to having obtained it.

INTERVIEWER:

How many years of experience do you have as a family advocate?

PARTICIPANT 4:

21

INTERVIEWER:

What are the aspects that you like most of your profession?

PARTICIPANT 4:

The fact that I can be a nice lawyer. Yes...Law was the passion and I loved practising Law and I loved studying Law but at the same time in being a Family Advocate I am not a ruthless lawyer.

I am making my decisions and my evaluations within the bounds of humanity.

I am dealing with children which is a very pleasant aspect of a family to deal with despite all the challenges it may come with.

Ya...

INTERVIEWER:

Do you find your profession challenging?

PARTICIPANT 4:

Yes it can be.

But the challenges are not problems to me in my everyday practice.

Challenges are, I would say are, the bounds set by the legislation, the red tape of the profession.

INTERVIEWER:

If you don't mind I would like to move onto the essence of my research:

What is your understanding of the "best interests of the child" principle?

PARTICIPANT 4:

Whatever decision is made in a matter, whatever evaluations are made, need to point to the rights of the child being protected in regard to people who have responsibilities towards this child that those responsibilities are being properly met.

All in all that the child is protected and put on positive ground with the decision that is made in respect of the child.

INTERVIEWER:

Do you feel that the “best interests of the child” principle should be applied within the framework of South African marriage law, where minors enter into a marriage relationship?

PARTICIPANT 4:

Yes, the reason that the Family Advocate’s office came into being was specifically to protect the interest of children in a marriage and that was because with research initially done it was found that in divorces the focus was too much on the couple rather than children.

And yes we know that in divorce children are affected. They are being divorced from their parents and in as much as we say not, we try to lessen the effect of that and it is the fact of the matter.

INTERVIEWER:

Do you think that the principle is adequately applied within the national framework currently within South Africa?

PARTICIPANT 4:

Yes but I believe it can be improved it can always be improved.

But for where we are today the developments of that the Law has in terms of the best interests, we certainly move everyday closer toward protecting the best interests of a child.

I think with further research into that issue much more can be done. But for where we are at the moment we are doing our best in terms of legislation governing the role of the Family Advocate. There are specific sections in the Children’s Act dedicated to the best interests of the child.

We have our international legislations, the African Charters, our Bill of Rights, the Constitution all have a little portion to protect the best interests of the child.

So we have the idea, I don’t think we on the crown of it, we can develop further.

INTERVIEWER:

Are you familiar with the Civil Union Act and in particular Section 1?

PARTICIPANT 4:

Not to the extent that I work with it regularly. I am familiar with it as it being a piece of legislation but not having worked with it on a regular basis.

INTERVIEWER:

Are you aware that Section 1 of the Civil Union Act precludes all minors from entering into a civil union regardless of their sexual orientation?

PARTICIPANT 4:

Well yes...as we see it to be now... *(laughs)*

INTERVIEWER:

Do you think that the best interests of the child standard is considered in terms of Section 1 of the Civil Union Act precluding all minors from entering into a Civil Union?

PARTICIPANT 4:

No if it's a blanker that a child is precluded then not because it doesn't give the child a voice at all.

We do have children aged 17 who maybe in terms of their daily lives be very emancipated and may be able to enter into a civil union.

They may have children and may need to perform as adults and as parents and by virtue of not being able to be married, not to give their children a union to live in, may not be in the child's best interests and obviously not.

INTERVIEWER:

You are aware that the Civil Union Act is applicable to heterosexual as well as same-sex marriages?

PARTICIPANT 4:

Yes

INTERVIEWER:

What are your view of same-sex minors from entering into a Civil Union?

PARTICIPANT 4:

Doesn't make sense does it... *(laughs)*

INTERVIEWER:

Would you like to elaborate?

PARTICIPANT 4:

Well then are we not prejudicing...I would say it is so

INTERVIEWER:

Do you think that there is a need to change the current marriage law system of South Africa specifically in respect of minors?

PARTICIPANT 4:

I could spend an entire day speaking to you about that. I always believe that there is room for change and further development.

We have come a long way with where we are today especially with the role of the Family Advocate, the Children's Act, the mediation and certain divorce matters Act but there are many grey areas and yes I think we can change further and improve further.

INTERVIEWER:

Is there anything else you would like to add to our conversation or interview?
Specifically relating to my topic?

PARTICIPANT 4:

I feel under pressure with only 10-15 minutes to chat to you (*laughs*)...

INTERVIEWER:

You are more than welcome to continue with your chat, it's always insightful to hear the views of the Family Advocate. We don't interact regularly enough in my opinion.

PARTICIPANT 4:

Yes that is true. In terms from where I practice we do our best to give regard to the best interests of the child to give the child a voice.

But yes in terms of our own practices and procedures more can be done more can be done to give the child more space and time in what we do.

I think with pressure from the legal system time limits imposed on us, staff shortages, workload, we tend to deal with our own matters to accommodate all those limitations and that is what prevents, I think, the ultimate seat of the best interests of the child.

But if there could be the improvements in those sectors then we will be going a further way.

INTERVIEWER:

Advocate I would like to thank you for your time and your insightful opinions. I want to thank you for making time to see me and your valued contributions. This then concludes our interview for today, concluding interview number 4.

Thank you very much...

PARTICIPANT 4:

You are most welcome and good luck.

*****End of Transcription*****

Interview Number 4:

Recording 1005

Interview Verbatim

Duration 8:38

Total Pages: 7

INTERVIEWER:

Good day Advocate, thank you for accommodating me today. Today is the 12th of October 2017 and this is my fifth interview. I am an admitted attorney and I was practising in family law, for more than ten years, in the province or area of Zululand. I am currently a Senior Lecturer at the University of Zululand in the Private Law Department and I am currently completing my doctorate.

The title of my research topic, just to familiarise you with it is: **The determination of whether Section 1 of the Civil Union Act 17 of 2006 underpins “the best interests of the child” principle or whether it underscores the need for marriage law reform. Section 1 of the Civil Union categorically excludes all minors from entering into a civil union.**

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The reason why I decided to interview the Family Advocates offices is that I thought of as part of my doctorate it would be imperative to find the input and also to take into consideration the views of the Family Advocate offices who would also then be the people who are responsible to safeguard minor children’s rights on a daily basis. As part of my research relating to the present South African marriage law reform or framework and in particular the effect that Section 1 of the Civil Human Act has on the rights of minor children wishing to enter into a civil union.

I just would like to put you at ease with regards to the privacy aspect of this interview. The aim of this interview is just to obtain your ideas and your opinions regarding the effect the Civil Union Act in particular Section 1 of the Act has on the best interest principle and other rights of minors wishing to enter into a civil union and whether this position is in line with our current marriage law statutes that make provision for minors to enter into marriages.

I also want to reiterate that I hope the results of my research will advance the current legislative structure pertaining to South African marriage law framework.

With regards to the information relating to the interview I would just like to indicate that the interview would probably take 10-15 minutes. I would like to ask you your first question:

Are you available to respond to these questions at this time?

PARTICIPANT 5:

Yes

INTERVIEWER:

May I audio record the interview as it would help me to listen to it at a later stage?

PARTICIPANT 5:

Yes

INTERVIEWER:

Can you please sign the letter of informed consent so I can use your response for official research?

INTERVIEWER:

And then I am going to start with some general questions if you don't mind.

First and foremost where did you complete your tertiary qualification?

PARTICIPANT 5:

University of Natal

INTERVIEWER:

What qualification did you obtain?

PARTICIPANT 5:

B Proc - LLB

INTERVIEWER:

Which year did you finish?

PARTICIPANT 5:

Oops...1995 then I took a year off, I went to Law Practical School. I was in Cape Town for a year, then I came back in 1998. I did my LLB for a year and then went to the *(inaudible)*.

INTERVIEWER:

Why did you choose to become a family advocate as a career path?

PARTICIPANT 5:

Children.

I studied Psychology of Children while I was at University as well.

I find it very fulfilling.

INTERVIEWER:

How many years of experience do you have as a family advocate?

PARTICIPANT 5:

As a Family Advocate almost 8 and as an Advocate almost 18

INTERVIEWER:

What are the aspects that you like most of your profession?

PARTICIPANT 5:

My enquiries and interaction with children.

INTERVIEWER:

Do you find your profession challenging?

PARTICIPANT 5:

Yes every day is a challenge in my office

Well sometimes you get very emotionally challenging.

I would say because you get matters that are emotionally very heavy. You will get issues between people because generally they are in conflict with one another hence they come into the office of the Family Advocate.

What I find very challenging though to deal with is cases of sexual abuse and especially when you are in a position whereby you can't really help the child because you have to refer them to ChildLine etc.

It really breaks your heart!

Apart from sexual abuse even general abuse.

And the most challenging is when you get a parent who now wants to give up his or her parental rights and walk away from this child who is totally innocent!

INTERVIEWER:

If you don't mind I would like to move onto the essence of my research:

What is your understanding of the "best interests of the child" principle?

PARTICIPANT 5:

Well the best interests of the child principle is encapsulated in Section 7 of the children's act, where basically, where from our perspective we have to look at the needs of the child, the relationship the child has with both parents and then determine what is in that child's best interests.

Other facts that are taken into account are like litigations should not be protracted where a child is concerned.

INTERVIEWER:

Do you feel that the “best interests of the child” principle should be applied within the framework of South African marriage law, where minors enter into a marriage relationship?

PARTICIPANT 5:

Definitely...

INTERVIEWER:

Would you like to elaborate?

PARTICIPANT 5:

Well let me go to the voice of the child...

Marriage is such a large step even for an adult so personally I don't think the child is capable of making that decision.

However, if a child does wish to enter, surely the voice of that child ought to be taken into consideration.

Because as much as...when we look at children I can get a 5 year old walk in through the door who is ready for overnight contact with mom or dad and then I can get another 5 year old who has been through so much of trauma and is probably clinging to the one party, suffering with a sense of inferiority, etc.

My point is that we all develop at different stages in our lives.

So even though a child may be a child and under 18 they may still have the mental capacity to make that decision but that is very far in-between.

INTERVIEWER:

Do you think that the principle is adequately applied within the national framework currently within South Africa?

PARTICIPANT 5:

No because we have conflicting legislations... *(laughs)*

INTERVIEWER:

Would you like to elaborate?

PARTICIPANT 5:

Oh yeah...in terms of our common law a girl of 12, boy of 14, I think it is, can give consent to get married whereas our civil union act says 18...so

INTERVIEWER:

Are you familiar with the Civil Union Act and in particular Section 1?

PARTICIPANT 5:

Yes

INTERVIEWER:

Are you aware that Section 1 of the Civil Union Act precludes all minors from entering into a civil union regardless of their sexual orientation?

PARTICIPANT 5:

Yes

INTERVIEWER:

You are aware that the Civil Union Act is applicable to heterosexual as well as same-sex marriages?

PARTICIPANT 5:

Yes

INTERVIEWER:

Do you think that the best interests of the child standard is considered in terms of Section 1 of the Civil Union Act precluding all minors from entering into a Civil Union?

PARTICIPANT 5:

No, clearly the voice of the child has not been taken into account in respect of that section...

INTERVIEWER:

What are your views of the exclusion of same-sex minors from entering into a Civil Union?

PARTICIPANT 5:

As I said, quite frankly I don't think minors are capable to make that decision.

But maturity levels vary, some are.

If a child is allowed to enter, whether they consent etc., then it should be applicable to the other because if not we go against our constitution.

What makes one child, because you are hetero, you know...more entitled to more rights just because of sexual preferences now needs to be deprived.

That's just unacceptable!

INTERVIEWER:

Do you think that there is a need to change the current marriage law system of South Africa specifically in respect of minors?

PARTICIPANT 5:

Yes because you can have conflicting legislations.

Children need to know exactly where they stand as well.

INTERVIEWER:

Is there anything else you would like to add to our conversation or interview? Specifically relating to my topic?

PARTICIPANT 5:

No...

INTERVIEWER:

Advocate I would like to thank you for your time and your insightful opinions. I want to thank you for making time to see me and for your valued contributions. This then concludes our interview for today, concluding interview number 5.

Thank you very much...

PARTICIPANT 5:

Pleasure...

*****End of Transcription*****

Interview Number 6:

Recording 1005

Interview Verbatim

Duration 7:00

Total Pages: 6

INTERVIEWER:

Good day Advocate, thank you for accommodating me today. Today is the 12th of October 2017 and this is my sixth interview. I am an admitted attorney and I was practising in family law, for more than ten years, in the province or area of Zululand. I am currently a Senior Lecturer at the University of Zululand in the Private Law Department and I am currently completing my doctorate.

The title of my research topic, just to familiarise you with it is: **The determination of whether Section 1 of the Civil Union Act 17 of 2006 underpins “the best interests of the child” principle or whether it underscores the need for marriage law reform. Section 1 of the Civil Union categorically excludes all minors from entering into a civil union.**

Just before we proceed I just quickly to want to reiterate what Section 1 of the Civil Union Act actually states, it is defined as, in terms of Section 1 as:

“the voluntary union of two persons who are both eighteen years of age or older which are solemnised and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in this act to the exclusion while it lasts of all others.”

The reason why I decided to interview the Family Advocates offices is that I thought of as part of my doctorate it would be imperative to find the input and also to take into consideration the views of the Family Advocate offices who would also then be the people who are responsible to safeguard minor children's rights on a daily basis. As part of my research relating to the present South African marriage law reform or framework and in particular the effect that Section 1 of the Civil Human Act has on the rights of minor children wishing to enter into a civil union.

I just would like to put you at ease with regards to the privacy aspect of this interview. The aim of this interview is just to obtain your ideas and your opinions regarding the effect the Civil Union Act in particular Section 1 of the Act has on the best interest principle and other rights of minors wishing to enter into a civil union and whether this position is in line with our current marriage law statutes that make provision for minors to enter into marriages.

I also want to reiterate that I hope the results of my research will advance the current legislative structure pertaining to South African marriage law framework.

With regards to the information relating to the interview I would just like to indicate that the interview would probably take 10-15 minutes. I would like to ask you your first question:

Are you available to respond to these questions at this time?

PARTICIPANT 6:

Yes I am available

INTERVIEWER:

May I audio record the interview as it would help me to listen to it at a later stage?

PARTICIPANT 6:

Go ahead...

INTERVIEWER:

Can you please sign the letter of informed consent so I can use your response for official research?

PARTICIPANT 6:

Have signed

INTERVIEWER:

And then I am going to start with some general questions if you don't mind.

First and foremost where did you complete your tertiary qualification?

PARTICIPANT 6:

I completed my tertiary in 1998 – yes when I finished my Post Grad at the University of Natal - Pietermaritzburg

INTERVIEWER:

What qualification did you obtain?

PARTICIPANT 6:

B Proc – LLB Degree

INTERVIEWER:

Why did you choose to become a family advocate as a career path?

PARTICIPANT 6:

I took an interest in family law because of what I was going through at that time. And I took interest in it...studied it, got solutions from it and decided to give back to my community.

INTERVIEWER:

How many years of experience do you have as a family advocate?

PARTICIPANT 6:

Now about 10 years

INTERVIEWER:

What are the aspects that you like most of your profession?

PARTICIPANT 6:

Reaching out, enlightening, empowering my people, it's also seeing the best interests of a child being upheld at all times.

INTERVIEWER:

Do you find your profession challenging?

PARTICIPANT 6:

A lot...a lot mainly on the ignorance of people in so many aspects that affect the children.

Mainly on culture traits that stands against upholding the best interests of the children.

On the stigmas that surrounds you know children undergoing so many things that at out times when we were young you would think the child is not supposed to, like taking precautions, preventing abortion, preventing pregnancies like abortion and this and that.

In today's times there are things that people who are still stuck in the old...old ideologies that are failing to conform to current laws that respect adult and children as well.

INTERVIEWER:

If you don't mind I would like to move onto the essence of my research:

What is your understanding of the "best interests of the child" principle?

PARTICIPANT 6:

Best interests principle in definition would be in all situations that involve the child – in that whatever is decided must be decided in line with what's best for the child, in any situation.

INTERVIEWER:

Do you feel that the "best interests of the child" principle should be applied within the framework of South African marriage law, where minors enter into a marriage relationship?

PARTICIPANT 6:

Unfortunately I would say they are not taken into consideration for the mere fact that there's no ways when the laws were decided that children were discussed or thought about.

So I wouldn't say best interests I would say children not considered.

INTERVIEWER:

Do you think that the principle is adequately applied within the national framework currently within South Africa?

PARTICIPANT 6:

Best interests of the child principle...it was never applied.

INTERVIEWER:

Are you familiar with the Civil Union Act and in particular Section 1?

PARTICIPANT 6:

I would say I am...

INTERVIEWER:

Are you aware that Section 1 of the Civil Union Act precludes all minors from entering into a civil union regardless of their sexual orientation?

PARTICIPANT 6:

Most definitely I am aware of that...

INTERVIEWER:

What is your viewpoint on this?

PARTICIPANT 6:

To be honest understanding that when it comes to kids it depends on facts and circumstances.

I believe there are circumstances that might be in the best interests of the child that the child get married even before 28. As rare as it can be but there are circumstances.

INTERVIEWER:

Do you think that the best interests of the child standard is considered in terms of Section 1 of the Civil Union Act precluding all minors from entering into a Civil Union?

PARTICIPANT 6:

And I repeat I believe it was not even thought of...

INTERVIEWER:

What are your views of the exclusion of same-sex minors from entering into a Civil Union?

PARTICIPANT 6:

Same-sex minors involved in a civil union...well if you are talking about my views or my legal views, my personal or my legal?

INTERVIEWER:

Your legal views as a Family Advocate... *(laughs)*

PARTICIPANT 6:

Ok...repeat your question again

INTERVIEWER:

What are your views of the exclusion of same-sex minors from entering into a Civil Union?

PARTICIPANT 6:

Legally speaking it takes away the children's rights to decide on their own one.

It also takes away children's rights to be heard.

Thirdly it doesn't consider the best interests of the child because it might be best based on the situation at that time.

We might not know what is best but it might be best for children of same-sex to be married.

INTERVIEWER:

Do you think that there is a need to change the current marriage law system of South Africa specifically in respect of minors?

PARTICIPANT 6:

If you apply democracy then it has to be...

INTERVIEWER:

Is there anything else you would like to add to our conversation or interview? Specifically relating to my topic?

PARTICIPANT 6:

No

INTERVIEWER:

Advocate I would like to thank you for your time and your insightful opinions. I want to thank you for making time to see me and for your valued contributions. This then concludes our interview for today, concluding interview number 6.

Thank you very much...

PARTICIPANT 6:

Thank you very much mam...

*****End of Transcription*****

Interview Number 7:

Recording 1010

Interview Verbatim

Duration 6:42

Total Pages: 6

INTERVIEWER:

Good day Advocate, thank you for accommodating me today. Today is the 12th of October 2017 and this is my seventh interview. I am an admitted attorney and I was practising in family law, for more than ten years, in the province or area of Zululand. I am currently a Senior Lecturer at the University of Zululand in the Private Law Department and I am currently completing my doctorate.

The title of my research topic, just to familiarise you with it is: **The determination of whether Section 1 of the Civil Union Act 17 of 2006 underpins “the best interests of the child” principle or whether it underscores the need for marriage law reform. Section 1 of the Civil Union categorically excludes all minors from entering into a civil union.**

Just before we proceed I just quickly to want to reiterate what Section 1 of the Civil Union Act actually states, it is defined as, in terms of Section 1 as:

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The reason why I decided to interview the Family Advocates offices is that I thought of as part of my doctorate it would be imperative to find the input and also to take into consideration the views of the Family Advocate offices who would also then be the people who are responsible to safeguard minor children’s rights on a daily basis. As part of my research relating to the present South African marriage law reform or framework and in particular the effect that Section 1 of the Civil Human Act has on the rights of minor children wishing to enter into a civil union.

I just would like to put you at ease with regards to the privacy aspect of this interview. The aim of this interview is just to obtain your ideas and your opinions regarding the effect the Civil Union Act in particular Section 1 of the Act has on the best interest principle and other rights of minors wishing to enter into a civil union and whether this position is in line with our current marriage law statutes that make provision for minors to enter into marriages.

I also want to reiterate that I hope the results of my research will advance the current legislative structure pertaining to South African marriage law framework.

With regards to the information relating to the interview I would just like to indicate that the interview would probably take 10-15 minutes.

I would like to ask you your first question:

Are you available to respond to these questions at this time?

PARTICIPANT 7:

Yes

INTERVIEWER:

May I audio record the interview as it would help me to listen to it at a later stage?

PARTICIPANT 7:

Ok that's fine

INTERVIEWER:

Can you please sign the letter of informed consent so I can use your response for official research?

INTERVIEWER:

Thank you mam...

And then I am going to start with some general questions if you don't mind.

First and foremost where did you complete your tertiary qualification?

PARTICIPANT 7:

At the University of Zululand

INTERVIEWER:

Which year did you obtain your degree?

PARTICIPANT 7:

I have 2 degree's actually, I have a BA in social work and then I have a LLB

INTERVIEWER:

Ok...how many years of experience do you have as a family advocate?

PARTICIPANT 7:

Since 2007

INTERVIEWER:

Since 2007 and you have been stationed at this office?

PARTICIPANT 7:

Yes

INTERVIEWER:

Why did you choose to become a family advocate as a career path?

PARTICIPANT 7:

Actually I love working with children, promoting and safeguarding their rights yes I think that's all.

It all started with my social work background and when I decided to study Law I said I would venture into Family Law then I'm a Family Advocate.

It's all about the children.

INTERVIEWER:

What are the aspects that you like most of your profession?

PARTICIPANT 7:

Its mediation...

INTERVIEWER:

Do you find some aspects of your profession challenging?

PARTICIPANT 7:

It is very very challenging because now that we have a new children's act we've got lots of matters coming from the children's courts, yet we have limited staff and we find out we do not have enough time to deal with these matters of mediation because we have lots of cases to cover.

So usually it takes long it's not just a simple matter that you can take 1 hour or 2 hours sometimes it will take more than 2 hours to 3 hours, so lack of human resources, lack of advocates, ya...becomes a problem.

INTERVIEWER:

So the aspects of your profession that you find most challenging is lack of resources?

PARTICIPANT 7:

Yes

INTERVIEWER:

If you don't mind I would like to move onto the essence of my research:

What is your understanding of the “best interests of the child” principle?

PARTICIPANT 7:

For me my understanding is that it's all about the protection of the children.

Protecting the children, promoting their rights and ensuring that their interests is best served.

INTERVIEWER:

Do you feel that the “best interests of the child” principle should be applied within the framework of South African marriage law, where minors enter into a marriage relationship?

PARTICIPANT 7:

I don't think I am comfortable to respond to that...

INTERVIEWER:

Do you think that the principle is adequately applied within the national framework currently within South Africa?

PARTICIPANT 7:

I think it will emanate from the first question I don't think it would be proper for me to comment on that...

INTERVIEWER:

Are you familiar with the Civil Union Act and in particular Section 1?

PARTICIPANT 7:

Yes I am familiar with the Civil Union Act...

INTERVIEWER:

Are you aware that Section 1 of the Civil Union Act precludes all minors from entering into a civil union regardless of their sexual orientation?

PARTICIPANT 7:

Yes I am...

INTERVIEWER:

Do you think that the best interests of the child standard is considered in terms of Section 1 of the Civil Union Act?

PARTICIPANT 7:

I don't wish to comment on that...

INTERVIEWER:

What are your views on the exclusion of same-sex minors entering into a Civil Union?

PARTICIPANT 7:

No comment...

INTERVIEWER:

Do you think there is a need to change the current marriage law system of South Africa specifically in respect of minors?

PARTICIPANT 7:

No...

INTERVIEWER:

Is there anything else you would like to add to our conversation or interview specifically relating to my topic?

PARTICIPANT 7:

Unfortunately I haven't been much help for you because of my personal beliefs regarding the civil union marriages...I am sorry about that...

INTERVIEWER:

It's not a problem...your objection is based on the fact that you don't believe in same-sex marriages?

PARTICIPANT 7:

Yes...

INTERVIEWER:

I respect that mam...

I want to thank you for your time and for allowing me to interview you, that there then concludes our interview for today.

PARTICIPANT 7:

Ok thank you...

INTERVIEWER:

Thank you mam...

End of Transcription

Interview Number 8:

Recording 1011

Interview Verbatim

Duration 9:37

Total Pages: 7

INTERVIEWER:

Good day Advocate, thank you for accommodating me today. Today is the 13th of October 2017 and this is my eighth interview. I am an admitted attorney and I was practising in family law, for more than ten years, in the province or area of Zululand. I am currently a Senior Lecturer at the University of Zululand in the Private Law Department and I am currently completing my doctorate.

The title of my research topic, just to familiarise you with it is: **The determination of whether Section 1 of the Civil Union Act 17 of 2006 underpins “the best interests of the child” principle or whether it underscores the need for marriage law reform. Section 1 of the Civil Union categorically excludes all minors from entering into a civil union.**

Just before we proceed I just quickly to want to reiterate what Section 1 of the Civil Union Act actually states, it is defined as, in terms of Section 1 as:

“the voluntary union of two persons who are both eighteen years of age or older which are solemnised and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in this act to the exclusion while it lasts of all others.”

The reason why I decided to interview the Family Advocates offices is that I thought of as part of my doctorate it would be imperative to find the input and also to take into consideration the views of the Family Advocate offices who would also then be the people who are responsible to safeguard minor children’s rights on a daily basis. As part of my research relating to the present South African marriage law reform or framework and in particular the effect that Section 1 of the Civil Human Act has on the rights of minor children wishing to enter into a civil union.

I just would like to put you at ease with regards to the privacy aspect of this interview. The aim of this interview is just to obtain your ideas and your opinions regarding the effect the Civil Union Act in particular Section 1 of the Act has on the best interest principle and other rights

of minors wishing to enter into a civil union and whether this position is in line with our current marriage law statutes that make provision for minors to enter into marriages.

I also want to reiterate that I hope the results of my research will advance the current legislative structure pertaining to South African marriage law framework.

With regards to the information relating to the interview I would just like to indicate that the interview would probably take 10-15 minutes.

I would like to ask you your first question:

Are you available to respond to these questions at this time?

PARTICIPANT 8:

Yes I am...

INTERVIEWER:

May I audio record the interview as it would help me to listen to it at a later stage?

PARTICIPANT 8:

Ok

INTERVIEWER:

Can you please sign the letter of informed consent so I can use your response for official research?

PARTICIPANT 8:

Mmhmm...

INTERVIEWER:

And then I am going to start with some general questions if you don't mind.

First and foremost where did you complete your tertiary qualification?

PARTICIPANT 8:

At the University of Durban Westville

INTERVIEWER:

What degree did you obtain?

PARTICIPANT 8:

It was B Proc and later LLB

INTERVIEWER:

That's fine...**how many years of experience do you have as a family advocate?**

PARTICIPANT 8:

20

INTERVIEWER:

20 Years ...why did you choose to become a family advocate as a career path?

PARTICIPANT 8:

You know I am from (*inaudible*) you know that's when you get exposed to all different kinds of law.

I told myself this one I is what I like...I just like that...

INTERVIEWER:

What are the aspects of your profession that you like most?

PARTICIPANT 8:

Mmm – let me see...we deal with children, we deal with most of the time the nicest thing is when you have mediated something. You started disputing and when you mediate you get satisfaction too.

INTERVIEWER:

Do you find some aspects of your profession challenging and if so which aspects?

PARTICIPANT 8:

(*Laughs*)...I am afraid to say that...the problem with family advocates they too little in the country.

It seems to me that nobody takes cognizance of how family law is important to a society.

When they talk about criminal law, criminal things, criminal lawyers everybody is there but when it comes to family law everybody is shying away from that one, even the posts people that will have to deal with this it's too little.

It's as if our society forgets that everything starts from home.

INTERVIEWER:

If you don't mind I would like to move onto the essence of my research:

What is your understanding of the “best interests of the child” principle?

PARTICIPANT 8:

Must I state it ...what do I do (*laughs*)?

I think it's paramount to anything that deals with minor children.

You know you have to look at it in everything not only in divorces in every spectrum.

INTERVIEWER:

Do you feel that the “best interests of the child” principle should be applied within the framework of South African marriage law, where minors enter into a marriage relationship?

PARTICIPANT 8:

Yes I do...

INTERVIEWER:

Do you think that the principle is adequately applied within the national framework currently within South Africa?

PARTICIPANT 8:

No I don't...

INTERVIEWER:

Would you like to elaborate?

PARTICIPANT 8:

As I said before we started here...to me it's as if there are some other things where children are you know not that protected.

If you saying every child is 18 and below everything, every principle, every act, everything that deals with children will have to be from 18 downwards so that's how I feel.

So in other things, you know we are talking about the best interests' principle, if you are not looking for it in other things why are we using it?

We need to use it across the board in everything that concerns the children even the civil union's act it needs to be there also.

INTERVIEWER:

Are you familiar with the Civil Union Act and in particular Section 1?

PARTICIPANT 8:

I know it...I know it yes...

INTERVIEWER:

Are you aware that Section 1 of the Civil Union Act precludes all minors from entering into a civil union regardless of their sexual orientation?

PARTICIPANT 8:

Yes...

INTERVIEWER:

And you aware that the Civil Union Act is applicable to heterosexual as well as same-sex marriages?

PARTICIPANT 8:

Yes...

INTERVIEWER:

Do you think that the best interests of the child's standard is considered in terms of Section 1 of the Civil Union Act?

PARTICIPANT 8:

No its not...it's not at all...

INTERVIEWER:

Would you like to elaborate?

PARTICIPANT 8:

Not at all...you know I think it's because when you talk about the best interests principle there is so many things that are involved but in this Act there is nothing that is done you know protecting the children, getting the voice of the child, you know.

There is so many things you look at when you look at the best interests' principle, the stage of maturity, you don't look at those things, that is why I feel it is not taken into cognizance of.

INTERVIEWER:

What are your views on the exclusion of same-sex minors entering into a Civil Union?

PARTICIPANT 8:

Are they excluded?

INTERVIEWER:

Yes all minors are...

PARTICIPANT 8:

I don't know with me I feel that everything that concerns children needs to be standardised needs to be similar across the board. Whether it's a civil union or a marriage act, whatever it is, it needs to be similar because we are talking about children.

INTERVIEWER:

Do you think there is a need to change the current marriage law system of South Africa specifically in respect of minors?

PARTICIPANT 8:

Yes I think so...

INTERVIEWER:

Are you aware that we have 3 pieces of legislation that regulates marriages in South Africa presently?

PARTICIPANT 8:

Yes...

INTERVIEWER:

Do you realise that there is a differentiation between the marriages act, recognition of customary marriages act and that of the Civil Union Act?

PARTICIPANT 8:

Yes

INTERVIEWER:

Do you have a viewpoint on that differentiation?

PARTICIPANT 8:

That is why I said in all legislations, even in the 3 marriages, children must be treated the same as you know.

Everything in those 3 separate legislations, when it comes to children, it must be the same to protect the children.

INTERVIEWER:

With regards to minors wishing to enter into a marriage do you feel it's important that their best interests be considered and that they be given an opportunity to voice their opinion?

PARTICIPANT 8:

Yes I do...

INTERVIEWER:

Is there anything else you would like to add to our conversation or interview specifically relating to my topic?

PARTICIPANT 8:

I don't know if I think of something I will give you a shout or I will email you.

INTERVIEWER:

Advocate thank you very much for your time I really appreciate it, that will then conclude our interview. Thank you very much.

PARTICIPANT 8:

Ok...thank you

End of Transcription

Interview Number 9:

Recording 1012

Interview Verbatim

Duration 11:33

Total Pages: 7

INTERVIEWER:

Good day Advocate, thank you for accommodating me today. Today is the 13th of October 2017 and this is my ninth interview. I am an admitted attorney and I was practising in family law, for more than ten years, in the province or area of Zululand. I am currently a Senior Lecturer at the University of Zululand in the Private Law Department and I am currently completing my doctorate.

The title of my research topic, just to familiarise you with it is: **The determination of whether Section 1 of the Civil Union Act 17 of 2006 underpins “the best interests of the child” principle or whether it underscores the need for marriage law reform. Section 1 of the Civil Union categorically excludes all minors from entering into a civil union.**

Just before we proceed I just quickly to want to reiterate what Section 1 of the Civil Union Act actually states, it is defined as, in terms of Section 1 as:

“the voluntary union of two persons who are both eighteen years of age or older which are solemnised and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in this act to the exclusion while it lasts of all others.”

The reason why I decided to interview the Family Advocates offices is that I thought of as part of my doctorate it would be imperative to find the input and also to take into consideration the views of the Family Advocate offices who would also then be the people who are responsible to safeguard minor children’s rights on a daily basis. As part of my research relating to the present South African marriage law reform or framework and in particular the effect that Section 1 of the Civil Human Act has on the rights of minor children wishing to enter into a civil union.

I just would like to put you at ease with regards to the privacy aspect of this interview. The aim of this interview is just to obtain your ideas and your opinions regarding the effect the Civil Union Act in particular Section 1 of the Act has on the best interest principle and other rights of minors wishing to enter into a civil union and whether this position is in line with our current marriage law statutes that make provision for minors to enter into marriages.

I also want to reiterate that I hope the results of my research will advance the current legislative structure pertaining to South African marriage law framework.

With regards to the information relating to the interview I would just like to indicate that the interview would probably take 10-15 minutes. I would like to ask you your first question:

Are you available to respond to these questions at this time?

PARTICIPANT 9:

I am...

INTERVIEWER:

May I audio record the interview as it would help me to listen to it at a later stage?

PARTICIPANT 9:

Yes you can

INTERVIEWER:

Can you please sign the letter of informed consent so I can use your response for official research?

INTERVIEWER:

And then I am going to start with some general questions if you don't mind.

PARTICIPANT 9:

Yes...

INTERVIEWER:

First and foremost where did you complete your tertiary qualification?

PARTICIPANT 9:

I completed my tertiary education at the University of KZN, Westville Campus

INTERVIEWER:

What degree did you obtain?

PARTICIPANT 9:

LLB

INTERVIEWER:

Do you recall the year you obtained this degree?

PARTICIPANT 9:

2007

INTERVIEWER:

Why did you choose to become a Family Advocate as your career path?

PARTICIPANT 9:

I'm interested in family law that is where my interest is.

INTERVIEWER:

How many years of experience do you have as a family advocate?

PARTICIPANT 9:

5

INTERVIEWER:

5 Years...what are the aspects of your profession that you like most?

PARTICIPANT 9:

I like educating people because that is where we get a platform to educate people of their rights especially Section 18 of the children's act which talks about parental responsibilities and rights.

Because that is where the misunderstanding is, some people think that they have more rights than other then others so that is my interest in our work.

INTERVIEWER:

Do you find some aspects of your profession challenging and if so which aspects?

PARTICIPANT 9:

Everything has it challenges.

So what is more challenging with us is to talk to people who are traditional to tell them about the law who have their own understanding of how things should happen. Then you come and tell them that the law does not say that.

Especially being a black person, a Zulu person who also has cultural Zulu cultural background, so to make them understand the law and to differentiate between our culture and the law.

That is what is challenging mostly.

INTERVIEWER:

If you don't mind I would like to move onto the essence of my research:

What is your understanding of the “best interests of the child” principle?

PARTICIPANT 9:

My understanding of the best interests of the child principle is that in whatever issues that involves the children their best interests are paramount.

Be it the primary residence, the visitation to their parents, they need to have guardians everything, children have to be well taken care of.

INTERVIEWER:

Do you feel that the “best interests of the child” principle should be applied within the framework of South African marriage law, where minors enter into a marriage relationship?

PARTICIPANT 9:

I do...

INTERVIEWER:

Do you wish to elaborate?

PARTICIPANT 9:

Yes I can elaborate...because of Section 6 and sub-section 5 and 10 of the children's act where child participation is encouraged, I think and also where we have to let the children express their views, so they must be given a chance and also be heard.

If they feel that they want to be married since they are minors they do have guardians who can give their consent. Since the guardian is an older person who understands better than the child does and that person will be able to guide that child.

INTERVIEWER:

Do you think that the principle is adequately applied within the national framework currently within South Africa?

PARTICIPANT 9:

Taking into consideration the Civil Union Act, I think it doesn't.

INTERVIEWER:

Are you familiar with the Civil Union Act and in particular Section 1?

PARTICIPANT 9:

I am not very familiar with the Act but I do have an understanding of it.

INTERVIEWER:

And you aware that the Civil Union Act is applicable to heterosexual as well as same-sex marriages?

PARTICIPANT 9:

Yes...

INTERVIEWER:

Are you aware that Section 1 of the Civil Union Act precludes all minors from entering into a civil union regardless of their sexual orientation?

PARTICIPANT 9:

Yes...

INTERVIEWER:

What is your viewpoint in that regard?

PARTICIPANT 9:

My viewpoint is that that Act is not consistent with our constitution firstly.

Because the children must be given a chance, everyone has the right to express his/her feelings in the way that they want to, a child is also a person a South African who is covered by the constitution so if they feel that they want to get married they do have people who are their guardians up until they reach the age of majority.

So I feel that they should be given a chance.

INTERVIEWER:

Do you think that the best interests of the child's standard is considered in terms of Section 1 of the Civil Union Act?

PARTICIPANT 9:

I do not think so...I do not think so because this Act actually it sounds like it is a very very old Act (*laughs*) because it is not consistent with the children's Act it is not consistent with the constitution and other international declarations.

INTERVIEWER:

What are your views on the exclusion of same-sex minors from entering into a Civil Union?

PARTICIPANT 9:

I still think that they have guardians, they have guardians and they allowed to express their views, they are allowed to express their feelings and then their guardians are there to help them.

I still think that children should get a chance.

INTERVIEWER:

So you think that the exclusion of minors from entering into a civil union is unacceptable?

PARTICIPANT 9:

Yes unconstitutional as well...

INTERVIEWER:

Do you think there is a need to change the current marriage law system of South Africa specifically in respect of minors entering into a marriage?

PARTICIPANT 9:

I do...

INTERVIEWER:

Do you wish to elaborate?

PARTICIPANT 9:

In all the aspects of life children should be given a fair chance to be role-players and to be able to express their views and feelings.

And their parents and their guardians are there to help them. So I feel that the minors are not covered well in terms of the civil union.

INTERVIEWER:

Is there anything else you would like to add to our conversation or interview specifically relating to my topic?

PARTICIPANT 9:

No unless you have any other question for me or from what I have explained if you need more clarification...

INTERVIEWER:

No...maybe just one question: when you say that the children should be allowed to express their views, are you saying that children under 18, regardless of their sexual orientation, should be given an opportunity to be heard?

PARTICIPANT 9:

Exactly what I am saying...

INTERVIEWER:

And by having them heard the court will be in a position to make an informed decision relating to their best interests?

PARTICIPANT 9:

Yes...because also the children's Act talks about the stage of maturity you know...things like that...depending on how old the child is because now we are not talking about a 9 year old who is going to be getting married.

I am sure we are talking about an older child but who is not yet 18. So that person whatever they say that's the person who understands what they are talking about, it's just that they lack the capacity in terms of the age because they are still minors.

But those people must still be given a chance to express their feelings and their views, they have the right to be heard.

INTERVIEWER:

Advocate thank you very much for your time. I would like to express my sincere gratitude to the offices of Family Advocate to allow me to interview you here and not at your stationed office, which I will not try and pronounce again. That then concludes our interview number 9.

*****End of Transcription*****

Interview Number 10:

Recording 1015/1016

Interview Verbatim

Duration 8:47

Total Pages: 6

INTERVIEWER:

Good day Advocate, thank you for accommodating me today. Today is the 18th of October 2017 and this is my tenth interview. I am an admitted attorney and I was practising in family law, for more than ten years, in the province or area of Zululand. I am currently a Senior Lecturer at the University of Zululand in the Private Law Department and I am currently completing my doctorate.

The title of my research topic, just to familiarise you with it is: **The determination of whether Section 1 of the Civil Union Act 17 of 2006 underpins “the best interests of the child” principle or whether it underscores the need for marriage law reform. Section 1 of the Civil Union categorically excludes all minors from entering into a civil union.**

Just before we proceed I just quickly to want to reiterate what Section 1 of the Civil Union Act actually states, it is defined as, in terms of Section 1 as:

“the voluntary union of two persons who are both eighteen years of age or older which are solemnised and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in this act to the exclusion while it lasts of all others.”

The reason why I decided to interview the Family Advocates offices is that I thought of as part of my doctorate it would be imperative to find the input and also to take into consideration the views of the Family Advocate offices who would also then be the people who are responsible to safeguard minor children’s rights on a daily basis. As part of my research relating to the present South African marriage law reform or framework and in particular the effect that Section 1 of the Civil Human Act has on the rights of minor children wishing to enter into a civil union.

I just would like to put you at ease with regards to the privacy aspect of this interview. The aim of this interview is just to obtain your ideas and your opinions regarding the effect the Civil Union Act in particular Section 1 of the Act has on the best interest principle and other rights of minors wishing to enter into a civil union and whether this position is in line with our current marriage law statutes that make provision for minors to enter into marriages.

I also want to reiterate that I hope the results of my research will advance the current legislative structure pertaining to South African marriage law framework.

With regards to the information relating to the interview I would just like to indicate that the interview would probably take 10-15 minutes. I would like to ask you your first question:

Are you available to respond to these questions at this time?

PARTICIPANT 10:

Yes

INTERVIEWER:

May I audio record the interview as it would help me to listen to it at a later stage?

PARTICIPANT 10:

That’s fine yes

INTERVIEWER:

Can you please sign the letter of informed consent so I can use your response for official research?

PARTICIPANT 10:

Yes

INTERVIEWER:

And then I am going to start with some general questions if you don't mind.

First and foremost where did you complete your tertiary qualification?

PARTICIPANT 10:

At the RA University

INTERVIEWER:

Which year did you finish?

PARTICIPANT 10:

Let's have a look, it's a long time ago – B Proc 1992 and my LLB 1994

INTERVIEWER:

Why did you choose to become a family advocate as a career path?

PARTICIPANT 10:

Well I was an attorney, and I actually basically closed up my practice, (*inaudible*) my retirement and there was a position advertised in Durban where (*inaudible*) spending time with my son, (*inaudible*).

INTERVIEWER:

Ok...how many years of experience do you have as a family advocate?

PARTICIPANT 10:

I commenced working in 2009, October 2009

INTERVIEWER:

What are the aspects that you like most of your profession?

PARTICIPANT 10:

Helping children...

INTERVIEWER:

Do you find your profession challenging?

PARTICIPANT 10:

Legally not in as far as the administrative demands...yes

INTERVIEWER:

If you don't mind I would like to move onto the essence of my research:

What is your understanding of the "best interests of the child" principle?

PARTICIPANT 10:

In a nutshell we are there to ensure that the child is protected and (*inaudible*) and common law and has enough precedence of recent statute has given us certain guidelines of aspects that we can look at in ascertaining what would be in the best interests of the child.

INTERVIEWER:

Do you feel that the "best interests of the child" principle should be applied within the framework of South African marriage law, where minors enter into a marriage relationship?

PARTICIPANT 10:

I think we should apply the principle to all minors

INTERVIEWER:

Do you think that the principle is adequately applied within the national framework currently within South Africa?

PARTICIPANT 10:

Quite frankly I have never dealt with a situation where a minor had been married

INTERVIEWER:

Are you familiar with the Civil Union Act and in particular Section 1?

PARTICIPANT 10:

The definition clause yes...

INTERVIEWER:

Are you aware that Section 1 of the Civil Union Act precludes all minors from entering into a civil union regardless of their sexual orientation?

PARTICIPANT 10:

The definition of a civil union, you mean (*inaudible*)...

INTERVIEWER:

Do you think that the best interests of the child's standard is considered in terms of Section 1 of the Civil Union Act?

PARTICIPANT 10:

Hard to say...it's like saying (*inaudible*)

INTERVIEWER:

Do you think that the best interests of the child is considered by Section 1 of the Civil Union Act precluding all minors from entering into a Civil Union?

PARTICIPANT 10:

I would say I can't find where it actually doesn't consider the best interests of the child, certainly there is no mention of the best interests of the child there, (*inaudible*) when it comes to guardianship, when it comes to age majority which is mentioned in the children's act.

I don't think there has been specific mention of the word best interests of the child to indicate that it has been considered and to say that its contrary to the best interests of the child or then we it can be argued as well that the age majority is then also contrary to the best interests of the child because it doesn't have a criteria that because that has a criteria of a certain age as well ...very much along the same line. It can be argued along the same line with respects to guardianship that the child would require consent from a parent till the age of 18.

Then as far as guardianship is concerned it's also not in the best interests of the child there is an age attached to it as well.

I don't think it's a big no, I think that each case can be individually looked at on its merits. I do not know if there are any cases being brought before court but I would imagine that if it is done so that you would obviously have the constitution which would be uppermost and which would provide that the best interests of the child is paramount and therefore we would probably be able to look at the best interests of the child despite this clause and provision in this all (*inaudible*).

Keeping in mind if you look at Section 18 it allows that parents can give consent, guardians can give consent for a child to be married under the age of 18.

INTERVIEWER:

Correct, the issue and this is also part of the thesis that I am interviewing though is that in terms of Section 1 of the Civil Union Act it categorically prohibits any minor whether the parents' consent to the marriage or not from entering into a marriage, it does not make provision at all for minors to get married.

PARTICIPANT 10:

Mmmhmm...

INTERVIEWER:

What are your views on the exclusion of same-sex minors from entering into a civil union?

PARTICIPANT 10:

On the exclusion of...sorry

INTERVIEWER:

What are your views on the exclusion of same-sex minors from entering into a civil union?

PARTICIPANT 10:

I'm not aware of it...

INTERVIEWER:

Ok...if I could just elaborate on this for you to get your opinion. In terms of the Civil Union Act, it is the only piece of legislation that allows for same-sex couples to enter into a marriage. By specifically precluding minors from entering into a civil union, if they are not of the age of 18, then it automatically precludes same-sex minors from entering into a civil union and therefore I asked your viewpoint on the exclusion of same-sex minors.

PARTICIPANT 10:

It would be the same as the previous answer then.

INTERVIEWER:

Thank you...do you think that there is a need to change the current marriage law system of South Africa specifically in respect of minors?

PARTICIPANT 10:

It would appear now as you have indicated that there is obviously a contradiction in as far as the 2 piece legislation is concerned so therefore that would require some kind of addressing in the future.

INTERVIEWER:

Is there anything else you would like to add to our conversation or interview? Specifically relating to my topic?

PARTICIPANT 10:

Probably not...no

INTERVIEWER:

I would like to thank you for your participation in this interview process, this concludes our interview for today, concluding interview number 10.

PARTICIPANT 10:

Thank you very much...

*****End of Transcription*****

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