Chapter 4
Different Approaches, Similar Outcomes: Same-Sex Marriage in Canada and South Africa

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Abstract The chapter analyses the path followed within the Canadian and South African case-law to recognize same-sex marriage on an equal footing with heterosexual couples. It highlights the similarity of their points of arrival as well as the differences between the Canadian and the South African approaches. Within the Canadian legal system, Courts decisions played a leading role in legitimating same-sex family from a social point of view, granting them legal significance and recognizing same-sex unions and same-sex marriages. On the contrary, the case-law of the South African Constitutional Court was facilitated by a legal formant which was very favourable to legal recognition of same-sex marriage.

4.1 Canada and South Africa: Different Approaches with Similar Outcomes

When compared with each other, experiences in Canada and South Africa regarding the recognition of same-sex marriage show considerable similarities. Moreover, recognition occurred during the same period—2003–2006—and in both legal orders was the consequence of specific judicial rulings and came in the wake of an evolution within case-law which started from questions of a secondary nature and ended up ruling unconstitutional the rule excluding same-sex couples from the institution of marriage.

Furthermore, the similarities are not limited to the above. The two countries are rooted in the common law tradition, in which a debate of primary interest had been established between the traditional rules on marriage—under the law of the land—and the provisions of constitutional law; it should also be pointed out that the constitutional law of these two countries is remarkably similar as regards the

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prohibition on discrimination, i.e. the legal basis which led to the ruling that the prohibition on same-sex marriages was unconstitutional. These points of contact then operate within a more general framework in which Canadian law has exerted an influence—from a cultural and legal policy perspective—on the formant of case-law and, at least in part, that of the literature from the South African legal system.[1]

Essentially, an initial analysis appears to reveal two experiences which are absolutely similar, one of which could have played a decisive role in providing inspiration for the other.

However, this initial impression is misleading. There are numerous differences between the situation in Canada and that in South Africa. In Canada the principle developed gradually, having established its roots in the first half of the 1970s. Although it of course did experience periods of rapid acceleration, the last of which occurred at the start of the new millennium, this does not alter the fact that these decisive moments resulted form a long and important period of incubation in which the development of the super-primary normative source of law—the adoption of the 1981 Charter—and the social context laid the basis for the most significant judgments, and subsequently for the enactment of ordinary legislation.

On the contrary, in the South African legal system the evolution was much more rapid, and resulted from specific provisions of the Constitution which did not leave scope for uncertainty within case-law. The Constitution of the "Rainbow Nation"[2] is rooted in the fight by the native population against the segregationist apartheid regime, and is inspired by the broadest recognition of diversity and the multiplicity of social reality. Consequently, the prohibition on discrimination is not only formed in terms which are much more in keeping with contemporary society, but is less amenable to differences in treatment, the essential justification for which may be found in the common sentiment of the majority of the population.[3]

These preliminary observations explain why, leaving aside the (albeit important) point of contact, the two national experiences are in reality profoundly different and need to be considered separately. This is above all because the purpose of this study is not only to indicate the point of arrival of the evolution which has occurred in the two countries, but above all to demonstrate the paths which have been followed, including from the perspective of their possible imitation in other countries. For that purpose, this contribution is divided into six sections, in addition to this introduction. The first section will analyse the more long-standing experience in Canada, along with the case-law on issues relating to the legal recognition of same-sex relationships (in relation to work, pensions, inheritance etc.), which will lead into an analysis of the period which led to the adoption of the Civil Marriage Act 2005. At

[1] *Ex multis*, see Grant (1996), p. 568, Robinson and Swanepoel (2004), pp. 2–8.

[2] As Nelson Mandela, the first President of the post Apartheid South Africa, said during his *Inaugural Speech* (Pretoria, 5/10/94): "We enter into a covenant that we shall build the society in which all South Africans, both black and white, will be able to walk tall, without any fear in their hearts, assured of their inalienable right to human dignity - a *rainbow nation* at peace with itself and the world" (www.africa.upenn.edu/Articles_Gen/Inaugural_Speech_17984.html).

[3] See De Vos (2007), pp. 435–443.

this stage, attention will be shifted to the African continent in order to analyse the particular constitutional framework in South Africa, and subsequently applying to that country the second and third points from the analytical framework applied to Canada. Finally, several observations of a comparative nature will be offered regarding the two countries and the role which the formant of case-law has played within them.

4.2 Same-Sex Marriage in the Courts: The Initial Experience in Canada

The first case in which a Canadian court was called upon to discuss the question of marriage involving same-sex couples dates back to 1974, shortly after the adoption of the weighty Criminal Law Amendment Act 1968–69 in which—in the wake of the legislation enacted 2 years before by the Westminster Parliament in the Sexual Offences Act 1967—the Canadian Parliament had repealed the sodomy laws in force in the country at the time. The case involved a possible interpretation of the Marriage Act for the Province of Manitoba,[4] the provisions of which regulating the institution of marriage were in fact apparently neutral—with regard to the sex of the married couple—and thus appeared to open up the door to the recognition of same-sex unions,[5] especially given that sexual relations between persons of the same sex had been legalised throughout Canada.

However, the Court rejected the claimant's action, inferring from the law of the land the heterosexual foundation to marriage, which had been disregarded—or perhaps implied—by Parliament. To that effect, the district court did not content itself with references to Canadian precedents, but preferred to engage in a much broader analysis of the institution of marriage under the Common Law. For that purpose, it even referred to a renowned US precedent from 1866 in *Hide v. Hide and Woodmansee* which, in line with the sentiment of its times, inferred the necessarily heterosexual and monogamous nature of marriage—understood as an institution rather than a contract[6]—from arguments of a traditionalist nature and *latu sensu* religious,[7] alongside the more recent English precedent of *Corbett v. Corbett*.

[4] *North v. Matheson* (1975) W.W.D. 55, 52 D.L.R. 280.

[5] See Casswell (2001), p. 222.

[6] This approach has many consequences: see Bailey (2003–2004), pp. 1030–1032.

[7] Judge Penzance wrote: "Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom ... What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the

Leading aside the analysis conducted into the heterosexual basis for marriage under the Common Law, the case of *North v. Matheson* is also of interest for another reason. In fact, the court refused to update the traditional concept of marriage, as provided for under the Common Law, by virtue of the fact that it coincided with the meaning of marriage according to the common sentiments of the body of society. This assertion highlights how, already at that time, the courts were aware that the need for a potentially modernising reinterpretation of a certain legal institution arose within the context of a minimum level of shared values throughout society and that any guiding role played by case-law in the evolution of the law would need to be allied with favourable views which were sufficiently widespread amongst the general public.

A second case of interest arose 20 years later within a changed constitutional context. Indeed, the Charter of Rights and Freedoms, some of the provisions of which would be destined over time to have a profound impact in this area, had been in force for a decade. In particular, section 15 of the Charter is dedicated to equal protection under law and imposes a prohibition on discrimination on the grounds, inter alia, of religion and sex.[8]

In the case of *Layland v. Ontario*, the claim no longer related to the legal concept of marriage, but focused on its necessary heterosexual nature, arguing that this ran contrary to the prohibition on discrimination which was clearly enshrined in the Charter of Rights and Freedoms. However, arguing on strictly formalist grounds, which curiously were circular in nature, the majority opinion refused to endorse the claimant's view. On the contrary, according to the Court, nobody prevents gays and lesbians from contracting marriage with a partner of the opposite sex, in the same manner as any other person; if this does not occur, it is the result of a mere individual preference which has nothing to do with the rights and obligations enshrined under law.[9]

Despite the majority opinion, the entry into force of the Charter of Rights and Freedoms and the changed political and social framework have not been entirely without effect for the matters of interest in this paper. First, the Court's decision was not unanimous. On the contrary, Justice Greer wrote a dissenting opinion which was characterised by a marked openness towards the claimant's demands and towards same-sex marriages. In the first place, Greer endorsed the position of the

voluntary union for life of one man and one woman, to the exclusion of all others" ([L.R.] 1 P. and D. 133).

[8] Sec. 15, first clause, of the Charter sets out: "Every 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".

[9] "The fact that many homosexuals do not choose to marry, because they do not want unions with persons of the opposite sex, is the result of their own preferences, not a requirement of the law. Unions of persons of the same sex are not "marriages", because of the definition of marriage. The applicants are, in effect, seeking to use s.15 of the Charter to bring about a change in the definition of marriage. I do not think the Charter has that effect" (Ontario Divisional Court, *Layland v. Ontario*, para. 14–104 DLR (4th) 214).

Metropolitan Community Church of Ottawa, an intervener in the proceedings, according to which within a changed social context, the common law rules on marriage could no longer be considered to exclude same-sex unions. Moreover, the judge highlighted that the reasoning underlying the majority opinion was exclusively formal in nature and failed to engage with the factual context within which the legislation applied. The provision that marriage was to be exclusively heterosexual contrasted openly with the prohibition on discrimination; in fact, the State must respect the individual lifestyle choices made by private individuals, and may not differentiate between them on the basis of pre-constituted ideological opinions.

4.2.1 Continued: Its Consequences for the Approach to the Issue of Rights for Same-Sex Couples

The *North* and *Layland* cases did not obtain practical results. However, they were decisive in the subsequent development of Canadian society and its view of same-sex marriage for two parallel reasons. In the first place, they stimulated debate within the LGBT community as to which strategies should be pursued in order to obtain recognition for certain types of right, whereas debate had initially focused on which types of rights should be pursued. On this point, it is important to note the gradual shift from principles inspired by a philosophical outlook rooted in Communitarian values to decidedly more liberal visions. The first positions stated at the start of the 1990s by LGBT associations were focused on the claim to special status by same-sex couples and the fact that they could not be brought within the relationship frameworks which had traditionally been applied to heterosexual couples. Indeed, it was only in the second half of the decade that arguments gained ground which were more open to the plurality of individual relations within the social reality and which were more sensitive to the needs and requirements of couples who wanted to give legal stability to their relationship.

As regards the contents of the claims and the overall strategy for achieving legal equality between same-sex unions and heterosexual unions, the path which was eventually pursued was to adopt an intentionally gradualist approach. It was no longer seen as appropriate to apply to the courts seeking immediate recognition of a concept of marriage which was indifferent to the sex of the two partners, and above all to the fact that they had the same sex. On the other hand, it was considered important to focus on intermediate objectives, in order to establish the prerequisites—in both social and legal terms—for the recognition of same-sex marriage, as will be noted below.

On the other hand, the second consequence of the initial rulings concerns procedural strategies. In other words, these initial experiences provided counsel representing the requests of same-sex couples with the minimum amount of material which was necessary in order to ascertain the claims that needed to be brought before the courts, along with the legal and factual bases for the claims, which

thereby increased the likelihood that they would be accepted. In this second regard, it is interesting to note the attention dedicated to the facts of individual cases, in increasingly articulate and detailed terms, along with the assessment of the contribution of scientific disciplines other than the law.[10] This fact will come as no surprise. The developments—which were at times ground-breaking—in the case-law on equality, above all in common law countries which give particular importance to the principle of *stare decisis*, were almost always supported by and derived argumentative force from references to the principal social sciences, which performed the delicate task of linking up the fundamental principles under the Constitution with the calls emerging from society, and of giving a new depth to their meaning and effect.

4.3 The Rights of Same-Sex Couples and Discrimination on the Grounds of Sexual Orientation in the 1990s

The cases which followed throughout the 1990s in a certain sense paved the way for the change which occurred within the case-law on same-sex marriage after the turn of the millennium.

These developments occurred along two principle lines, which to some extent complemented each other. On the one hand, there was a significant increase in the cases brought seeking recognition for same-sex couples of the benefits which Canadian law granted to unmarried couples. Here, the courts almost completely equalized the position of the former with that of the latter. This point is of major importance for one essential reason: in granting or refusing these benefits to same-sex couples on the basis of the rules in place for unmarried heterosexual couples, the courts appeared to presume that the two types of union were entirely similar, and disregarded the substantial difference that, at the time, only heterosexual couples were able to marry. In some sense, this appeared to set out the logical prerequisites for the recognition of same-sex marriage.

On the other hand, a specific interpretation of the prohibition on discrimination emerged.[11] In other words, the courts—and in particular the Supreme Court of Canada—asserted that discrimination on the grounds of sexual orientation was entirely equivalent to discrimination on the grounds of criteria expressly indicated as suspect under section 15 of the Charter of Rights and Freedoms. Whilst it is certain that, for the time being, the particular restrictive rules on same-sex unions are justified under the terms of section one, it is nonetheless clear that the recognition of the discriminatory nature of these rules represented an important turning point.

[10] See Manderson and Yachnin (2003–2004), pp. 484–485.

[11] See MacDougall (2000–2001), p. 252.

As regards the first issue, it is important to mention certain significant judgments of the Canadian courts in which the position of same-sex couples was deemed to be equivalent to that of unmarried heterosexual couples.

In reality, Canadian case-law moved along a twin-track approach. On the one hand the courts displayed an openness to claims seeking the 'social' recognition of same-sex unions,[12] whilst on the other hand expressed much greater deference to the choices made by Parliament where the claimants' requests were aimed at obtaining benefits directly from the public authorities.

As regards the first prong of the approach, at the start of the 1990s the courts began to display a general openness to unmarried couples and to interpret the concept of spouse—which is often provided for under Canadian law[13]—as also including individuals who are united by a bond of affection.[14] This occurred for example in *Miron v. Trudel*, in which the Supreme Court of Canada held that it was not permitted to discriminate between married couples and unmarried couples in relation to the payment of damages for personal injury resulting from a road traffic accident, provided that the couple is co-habiting and that the bond of affection uniting them also includes a promise of mutual assistance, including of a material nature.[15]

A similar ruling was made in relation to employment benefits. Here, the reference legislation already covered unmarried heterosexual couples. The exclusion of homosexual couples was ruled unlawful by the British Columbia Supreme Court on the grounds that it breached the prohibition on discrimination in the judgment *Knodel v. British Columbia*,[16] which also had an impact outwith the province in providing guidance to the Ontario Human Rights Board of Inquiry, starting from the case of *Leshner v. Ontario*.[17]

However, the position which emerged from the decisions in *Rosenberg v. Canada* and above all *Egan v. Canada*[18] appears to contradict with the cases cited above. The latter case related to a claim, made by a same-sex couple, seeking a supplementary pension provided for under the Old Age Security Act for heterosexual couples only, where their income fell below a particular threshold. Similarly, the *Rosenberg* case involved a claim brought by a woman seeking recognition of a survivor's pension following the death of her same-sex partner. The claims were rejected in both cases. However, a certain deference towards the choice by Parliament to define the range of beneficiaries of public benefits may be noted in the

[12] See Lahey (2001), pp. 243–247.

[13] For a broad analysis on case-law, see Chaplick (1997).

[14] Rusk (1993–1994), pp. 174–203, who explores the discriminations faced by same-sex couples claiming spousal rights at the beginning of 1990s.

[15] *Miron v. Trudel* (1995) 2 S.C.R. 418.

[16] *Knodel v. British Columbia* (1991) W.W.R. 728.

[17] *Leshner v. Ontario* (1992) 16 C.H.R.R. 184. Its consequences are analysed by Berg and Nunnelley (2002), pp. 218–221.

[18] (1995) 2 S.C.R. 513.

judgments, which manifested itself in the choice to justify the difference in treatment on the basis of section one of the Charter of Rights and Freedoms.

The natural evolution of the case-law under examination occurred in the case of *M. v. H.*, involving a dispute between two women who had been united for a long time as a same-sex couple. At the end of the relationship, one of the women sought financial support from the other pursuant to section 29 of the Ontario Family Law Act. In contrast to the two previous cases, this case involved relations between private individuals[19] and, in particular, the obligation for a former partner to support the other partner who is in financial difficulty where the situation of economic weakness of the former is a result of the relationship. Consequently, there were no grounds to exercise deference towards Parliament,[20] and the Supreme Court of Canada held that this case could be distinguished from *Egan*. This means that the limitation of the obligation to provide maintenance to heterosexual couples alone not only ran contrary to the prohibition on discrimination, but also had no justification within a 'free and democratic society'.

One last issue which is of certain interest relates to the issue of adoptions. Here, the Canadian system displays features of absolute originality since the courts of Ontario have allowed minors to be adopted by same-sex couples[21] since 1995. In the case of *K. and B. Re*[22] in fact, the Provincial District Court held that the prerequisite of heterosexuality provided for under applicable legislation was incompatible with the principle of non-discrimination and that such discrimination could not in any way be justified given the legislation's purpose of favouring the minor's interest in having a nuclear family of his or her own.[23]

This line of case-law is significant in that it opened up the path towards the legal recognition of same-sex unions, and above all resulted in a profound cultural change in relation to homosexuality and the consideration of homosexual relations. However, from a strictly legal point of view, the second issue to be analyzed is absolutely decisive since it provided the basis for establishing the material from case-law which, over the following decade, would enable the courts to rule unconstitutional the requirement that marriage must involve heterosexual couples.

In essence, the situation saw an evolution in the interpretation of section 15 of the Charter of Rights and Freedom. In fact, the wording of the Charter expressly prohibits only discrimination based on "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" and gives no consideration to sexual orientation. However, case-law ended up holding that this feature had equivalent *status* to those which were expressly listed, according to an approach adopted following a claim by a lesbian woman to (to continue to) serve in the

[19] See Radbord (2003), pp. 20–22.

[20] "The possibility of increase demands on public founds is not an issue".

[21] For a broad analysis about adoption law of the nine Canadian Provinces regarding same-sex couples, see Dort (2010).

[22] (1995) 31 C.R.R. (2D) 151. See also *Fraess v. Alberta*, 2005 A.B..Q.B. 889.

[23] Dort (2010), p. 297.

Canadian army. In the case of *Douglas v. R.*,[24] the Federal District Court held that the army's policy of excluding homosexuals was to be deemed to breach the prohibition on discrimination enshrined in the Charter. Whilst the case in itself amounted to a judgment on a policy of a State administration, as a matter of principle the Court recognised that discrimination on the grounds of sexual orientation was unconstitutional.

The next stage came with the judgment in *Haig v. Canada*[25] by the Ontario Court of Appeal which supplemented by content of the Canadian Human Rights Act insofar as it did not include sexual orientation under the suspect classifications which cannot be used as a basis for different treatment. In other words, the Court held that sexual orientation is to be deemed to be entirely equivalent to the grounds for discrimination expressly specified in section 15 of the Charter of Rights and Freedoms. This position was then reasserted 3 years later by Canada's highest court in *Egan v. Canada*,[26] and was also applied to relations between private individuals, again by the Supreme Court of Canada, in 1998 in *Vriend v. Alberta*.[27]

The Egan case concerned, *inter alia*, the recognition of the rights of same-sex couples in relation to social security benefits. As noted above, the Court rejected the claim, but only in a highly circumscribed majority opinion, which was accompanied by a rather lively dissenting opinion, which was drawn up by Justice Iacobucci. In summary, the majority opinion openly recognised that, in the light of section 15 of the Charter, discrimination on the grounds of sexual orientation is prohibited in the same way as discrimination on the grounds of race, sex, religion, etc.[28] The legislation limiting the rights of homosexual couples was however upheld on the basis of section 1, in the light also of the fact that Parliament is vested with a certain margin of appreciation and flexibility when recognising situations which require social protection by the State.

The judgment gave considerable *impetus* in the drive towards the recognition of same-sex marriage. On the one hand, it enshrined the principle that regulations based on sexual orientation are inherently suspect. This significantly reduces the range of arguments which may be used in order to justify the requirement that marriage must be heterosexual in nature.[29] In particular, it is no longer acceptable to argue that gays and lesbians may marry a partner of the opposite sex, and that if they do not marry due to their sexual orientation, this is merely the result of their free choice. On the contrary, the traditional rule that marriage must be heterosexual in nature must, according to the Supreme Court, be deemed to constitute

[24] 16 C.H.R.R. D-226.

[25] 94 D.L.R. (4th) 1.

[26] *Egan v. Canada*, see note 18.

[27] (1998) 1 S.C.R. 493.

[28] "Sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s[ect]. Fifteen protection as being analogous to the enumerated grounds". *Egan*, see note 18, at 514.

[29] See, for example, Schnurr (1996–1997), pp. 34–38.

discrimination. The issue with reference to which it is now necessary to argue whether same-sex marriages should be recognised or by contrast whether their prohibition is legitimate now turns upon whether or not it is justified to enact specifically discriminatory legislation[30] within a free and democratic society. This is an area which is evidently more amenable to the demands of LGBT movements than to conservative views, and provided fertile ground for a turning point within the case-law which, on the facts, was not late in arriving.

4.4 The Courts, the Federal Parliament and the Recognition of Same-sex Marriage

At the start of the new millennium, the battle seeking legal recognition within the courts of same-sex unions was engaged with as a matter of priority by the LGBT[31] community, and led first to the adoption of two foundational judgments—*EAGLE* and *Halpern*—and later, on the basis of these judgments, the approval of the Civil Marriage Act 2005 which completed the journey towards full recognition of same-sex marriage.

In reality, both the *Halpern* judgment and the appeal judgment in the *EAGLE* case did nothing other than infer the consequences of the case-law analysed in the previous paragraph.

However, in spite of the fact that all legal and constitutional prerequisites had been met, the shift was nonetheless of considerable importance and was difficult to implement in practice. And it was not by chance that, as late as 2000, in the proceedings at first instance in the *EAGLE* case,[32] the District Court of British Columbia refused to endorse the claimant's view, and even reached diametrically opposed conclusions: it not only held that there was an express prohibition under the common law on same-sex marriages, but also that the Canadian Constitution had chosen to endorse by reference the concept of marriage contained in the law of the land at the time it was adopted, and therefore that ordinary legislation could not provide for any form of recognition beyond the simple civil partnership. As regards equal protection under law on the other hand, the Court held that the provision requiring that marriage must be heterosexual in nature was discriminatory, but that such discrimination is to be deemed to be lawful in the light of section one of the Charter of Rights, given the (alleged) reproductive goals of the institution of marriage.[33]

It was only thanks to the federal form of the Canadian State that the decisive rejection by the British Columbia court did not constitute a serious obstacle to the

[30] See Kuffner (2000), p. 262.

[31] Among Canadian LGBT associations, EAGLE played the most active and significant role.

[32] 2001 BCSC 1365 (CanLII).

[33] Loosemore (2002), p. 53.

process under analysis. In fact, whilst the legal concept of marriage is exclusively a federal matter, powers over the celebration of marriage are vested in the provinces. Consequently, disputes relating to the law on marriage are brought in the first instance before the circuit courts of the individual provinces, which also rule on the concept of marriage and its constitutionality, according to the normal arrangements applicable to questions of constitutionality brought before the lower courts. In any case however, every citizen of the Federation is fully at liberty to contract marriage in the province of his or her choosing.

This explained why the decision by the District Court of British Columbia could be contradicted within such a short space of time by that given by the circuit courts of a different province, Ontario, and why as such the latter decision generated a domino effect within such a short space of time which was capable of spreading throughout the Federation. First, the principle of *stare decisis* does not apply within horizontal relations, or between the courts of different provinces. Secondly, the recognition of the admissibility of same-sex marriage within one province renders that institution available to any Canadian couple—provided that they contract marriage in the province in which the court which decided to that effect is based—and thus has a trail-blazing effect which cannot fail to have an impact on judgments by the courts of other provinces.

Following the judgment at first instance in *EAGLE*, the general schema set out above was applied in practice by the judgment of *Halpern v. Canada*,[34] given by the District Court of Ontario.

In the *Halpern* case, the process of refinement of the procedural strategy highlighted above reached its culmination. On the one hand, the writ of summons sought to contextualise the facts of the case and to enrich them with contributions from the social sciences regarding the most salient points.[35] The claimant couples and their requirements are described in entirely normal terms; sociology and psychology are used in order to demonstrate the harm suffered due to the limitation imposed by the strictly heterosexual nature of marriage, as regulated at that time in the Country[36]; it was demonstrated that the law plays an irreplaceable role in processes of self-identification and social recognition and acceptance.

On the other hand, as regards the legal basis on which the claimant's claim was based, the utmost prominence was given to the case-law on the prohibition on discrimination.[37] The argument, which was already experimented in *EAGLE*, that the common law needs to evolve in order to keep pace with the emerging needs of society, was not placed at the forefront. On the contrary, the emphasis was placed on section 15 of the Charter of Rights and Freedoms, and on the specific prohibition—already recognised by the Supreme Court in *Egan*—on discrimination

[34] 225 DLR (4th) 529.

[35] Van Kralingen (2004), pp. 159–160.

[36] See Davies (2008), p. 123.

[37] Davies, see note 36, p. 112.

on the grounds of sexual orientation.[38] In particular, the risk that differences in treatment may be justified on the basis of section 1 of the Charter was pre-empted. To that effect, the claim asserted that the inability of the claimant couples to marry was at odds with the model of a free and democratic society, as expressly enshrined in the Charter of Rights and Freedoms,[39] and ultimately with the value of human dignity which asserted on various occasions within constitutional case-law.

The trial court accepted the claimants' action. However, given the delicate nature of the issue and the fact that the ruling struck down as unconstitutional federal legislation in this area, notwithstanding that it had been adopted by reference to the provisions of common law, it also ruled that the effect of the judgment was to be deferred, and allowed Parliament 2 years in order to regulate the situation in a manner compatible with the prohibition on discrimination laid down by the Charter of Rights.[40]

The *Halpern* judgment led to a rapid change in the courts' perspective of the issue of same-sex marriage.[41] Less than 10 months later, in the appeal proceedings in the *EAGLE* case,[42] the British Columbia court endorsed the position adopted by the Ontario court, and went so far as to declare that only equal access to the institution of marriage—and not the mere recognition of 'civil partnership'—could satisfy the prohibition on discrimination,[43] whilst agreeing that Parliament should be granted a 2-year period in order to take action. For its part, the Ontario Court of Appeal upheld the trial court's judgment and ruled that it should take effect forthwith.

The judgments examined immediately gave rise to a round of rulings by the provincial courts which, over the following 2 years, acknowledged that same-sex marriage should be recognised within the majority of Canadian provinces,[44] and above all called for urgent action by the political authorities. In the first place, a few weeks after the judgment in the appeal in Ontario, Canadian Prime Minister Chrétien announced that the government did not intend to pursue an appeal and that it would table draft legislation in Parliament on the regulation of same-sex marriages. Amongst other things, the procedure which led to the adoption of the

[38] "If the Halpern and Rogers application for a marriage licence said Colin Rogers instead of Colleen Rogers, Hedy Halpern would today be legally married. … The State therefore denies Hedy Halpern the mate of her choice. In doing so, the law draws a distinction between the applicant and others, based on the personal characteristics of sex and sexual orientation".

[39] "Similarly being restricted from affirming relationships and domestic life in the public sphere through the virtually universal currency of marriage constitutes a curb on public recognition as a valid actor in civil society".

[40] Van Kralingen (2004), pp. 153–156.

[41] See Casswell (2004), pp. 710–716.

[42] *Barbeau v. British Columbia*, 2003 BCCA 251 (CanLII).

[43] See Romano (2003), pp. 6–10.

[44] See: *Hendricks and Leboeuf v. Quebec*, 2002 CanLII 23808 (QC CS)—Quebec; *Dunbar and Edge v. Yukon and Canada*, 2004 YKSC 54—Yukon; *Vogel v. Canada* (2004) M.J. No. 418 (QL)—Manitoba; *Boutilier v. Canada and Nova Scotia*; (2004) N.S.J. No. 357 (QL)—Nova Scotia.

Marriage Act 2005, which definitively enshrined the neutral *status* of marriage throughout the Federation, involved a further court ruling. In fact, the federal government seised the Supreme Court of Canada on a consultative basis seeking answers to four questions, namely (1) whether the Federal Parliament has exclusive powers to enact legislation stating the prerequisites for individuals who wish to contract marriage; (2) whether freedom of religion provides religious ministers with a guarantee that they may refuse to celebrate same-sex marriages; (3) whether the recognition of the right to marry also to homosexual couples was constitutional; and (4) whether the necessarily heterosexual nature of marriage is contrary to section 15 of the Charter of Rights and Freedoms.

In its ruling in Reference *Re Same-Sex Marriage*, the Supreme Court refused to consider the merits of the third and fourth questions, considering that the government had decided not to appeal against the judgments in *Halpern* and *EAGLE*, thereby implicitly endorsing the rulings of the two lower courts[45]; as regards the other questions, the Court stated that the area of law fell within the exclusive jurisdiction of Parliament, and that the principle freedom of religion dictated that religious ministers could not be required to celebrate unions which were contrary to their belief.[46]

The Supreme Court's judgment represented the last and definitive move prior to the enactment of the Marriage Act 2005, which to all intents and purposes provided for equality between same-sex and heterosexual marriage. It should be pointed out however that there were certain minor differences, in addition to the right for celebrants—and religious confessions—to state a general refusal to celebrate same-sex marriages. The federal nature of Canada also had an implication on the legislation applicable to marriages, with the result that certain forms of different treatment provided for under provincial legislation are still in force, and will remain so until a court rules that they breach the principle of non-discrimination. In any way, these are now residual elements which only the passage of time will sweep away, and bring the law into line with the new path inaugurated by *Halpern* and *EAGLE*.

4.5 The Constitution of the Rainbow Nation and Sexual Orientation

The process which led to the recognition of same-sex marriages under South African law was certainly less complex than that followed under Canadian law. There are two reasons for this. First, the historical background is certainly of significance: the watershed provided by the move from the apartheid regime to the constitutional democracy represented a historic change to the very form of the

[45] Murphy (2005), p. 25.

[46] See MacDougall (2006), pp. 360–363.

State, which means that experiences in the two countries are incommensurable. Moreover, the South African Constitution, which was adopted in 1996, is a highly modern document which implements the experiences accrued in matters relating to equality and the protection of rights from the principal countries of the Western Legal Tradition.

The 1993 provisional Constitution already laid down a principle of equality imposing a prohibition on unfair discrimination on the grounds, *inter alia*, of sexual orientation[47]; the 1996 Constitution reasserted and expanded the provision from the provisional Constitution,[48] provided for its effect also in horizontal relations and expressly established a rebuttable presumption that any difference in treatment grounded on the characteristics listed would be unlawful.[49] On the other hand, the 1996 Constitution also contains a clause on the limitation of fundamental rights which enables the legislature to limit such rights only by general legislation and provided that the limits are reasonable and justifiable within an "open and democratic society based on human dignity, equality and freedom".[50]

The wording of section 9 and section 36 appears in part to have been inspired by the analogous provisions of the Canadian Charter of Rights and Freedoms. However, there are two differences which are not negligible. On the one hand, the South African experience imposes a prohibition on discrimination on the grounds of sexual orientation, whereas this principle was only adopted into Canadian law a decade after the entry into force of the Charter and as a result of judicial interpretation. On the other hand, any justification of discriminatory treatment must be deemed to be justified not only within an open and democratic society, but also in one based *inter alia* on the principle of equality laid down under section 9. This means that different treatment may only be deemed to be justified in specific limited situations, and provided that the differences are directly and strictly aimed at implementing other principles of constitutional standing.

In this regard, section 15, which authorises Parliament to grant legislative recognition to the plurality of unions present within society, thus seems to be particularly significant in relation to same-sex marriages.[51] This provision, which is aimed at granting equal consideration to all traditions and religious confessions present in South Africa, as part of the Rainbow Nation principle, is particularly suited to providing specific cover to laws recognising homosexual marriage,[52] and

[47] Sec. 8.2, Const. 1993.

[48] See sec. 9.3, Const. 1996: "The 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".

[49] See Lind (2001), p. 285.

[50] See sec. 36.1, Const. 1996.

[51] Wolhuter (1997), p. 395.

[52] See Williams (2004), pp. 47–51.

above all precludes constitutional interpretations aimed at limiting access to marriage on the basis of traditional interpretations of the institution.

4.6 Recognition of Same-Sex Unions, from *Langemaat* to *Fourie*

Within the constitutional framework described above, the first case of significance for same-sex couples concerned the *status* of the partner of a woman employed by the State Police and her entitlement to be eligible for medical scheme aid, under the same conditions as the spouses of other police officers. In the *Langemaat* case,[53] the High Court of Pretoria did not rule directly on the principle of non-discrimination, but approached the question from a different perspective, ruling that the legal *status* of the union was not relevant since "the relationship between the two parties create a duty to maintain" and the duty to maintain was based on principles such as equality, affection and the sense of decency. On the other hand, the Court went on, both marriages and *de facto* unions deserve equal respect and protection; consequently,

> parties to a same sex union which has existed for years in a common home, must surely owe a duty of support, in all senses to each other.[54]

The Court did not consider the problem of discrimination on the grounds of sexual orientation, which would inevitably have led the Pretoria court to reach conclusions which would either have been inconclusive or incompatible with the principle that the court order must rule on the remedy sought. However, on the facts it held that the social significance and need for consideration and protection of any couple was fully equivalent, irrespective of sexual orientation.[55] On the contrary, it may without doubt be asserted that the Court would regard as unacceptable any difference in treatment which depended upon whether or not the couple was heterosexual. Similarly, it endorsed a kind of legal fiction by on the one hand disregarding the impossibility for same-sex couples to contract marriage, whilst on the other hand deciding whether the law and the Police Regulations provided for different treatment solely on the basis of the free choice by the partners over whether to contract marriage.

Similar findings[56] were reached in the *Satchwell* case,[57] which was considered by the Constitutional Court with more reference to the principle of equality and

[53] *Langemaat v. Minister of Safety and Security and Others* (1998) 4 B.C.L.R. 444.

[54] *Langemat*, see *supra* note 53.

[55] Dupper and Garbers (1999), pp. 766–769.

[56] On the case-law about discrimination in the employment benefits, see Wood-Bodley (2008), pp. 484–488.

[57] *Satchwell v. President of the Republic of South Africa and Another*, 2002 (9) BCLR 986 (CC).

human dignity underlying the right to marry, and the *Du Toit* case[58] on adoptions by same-sex couples, which was resolved in their favour on the basis of the intimate connection between human dignity and full recognition of the fundamental right to family life.[59]

The question left unaddressed by the Pretoria Court soon arose again in a decisive case which enabled the Constitutional Court to rule on the issue: *Minister of Home Affairs and Another v. Fourie and Another*.[60]

The heart of the decision by the Constitutional Court did not concern the violation of the principle of non-discrimination by the strictly heterosexual nature of marriage, as enshrined under the common law and enacted in the Marriage Act.[61] In this regard it is sufficient to note, in the wake of the *Satchwell* and *Du Toit* cases, that the group excluded from marriage has been historically vulnerable, disadvantaged and the victim of prejudice.[62] Consequently, the different treatment causes immediate harm to human dignity[63] and is unfair—the prerequisite for ruling unconstitutional any situation which *in re ipsa* appears to constitute discrimination.[64]

The issue on which the Court focused was rather the lack of any justification for the different treatment. The most controversial aspects were two intimately related issues: in the first case, whether the extension of capacity to marry is liable to undermine the fundamental nature of the institution, thereby compromising its legal and social significance; and secondly, whether this would also run contrary to the religious sentiment of (heterosexual) couples who decide to marry. The Court considered the alleged grounds provided as justification to be entirely inconsistent. With regard to the former, it held that the principle that the degree of social dissemination of a prejudice can never justify the retention of discriminatory legal institutions was all-embracing. In fact, the task of the law, given the *drittwirkung* of the principle of equality, is to avoid detriment also through the removal of all forms of unfair discrimination. On the other hand, the South African Constitutional Court argued, the legal recognition of same-sex marriage does not have any impact on the ability of each couple to contract marriage in accordance with the requirements of their own religious belief.

Essentially, the Court concluded, marriage has both a practical and a symbolic impact. Consequently, there is no plausible justification which can salvage a regulation of the institution which discriminates on the grounds of sexual orientation. On the other hand, any provision for same-sex unions which fell short of full

[58] *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)*, 2002 (10) B.C.L.R. 1006 (CC).

[59] Himonga (2004), p. 731.

[60] 2006 (13) BCLR 355 (CC).

[61] See Marriage Act, Sec. 30.

[62] Barnard (2007), p. 510.

[63] See Romeo and Winkler (2010), pp. 391–392.

[64] De vos and Barnard (2007), pp. 802–806.

recognition for their capacity to contract marriage would be at odds with history and with the fundamental characteristics of the Rainbow Nation; it would amount to a reassertion of the principle of "separate but equal", in opposition to which the Republic of South African reconstructed its essential features from the foundations upwards. Essentially,

> in a context of patterns of deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples.[65]

Whilst ruling that the requirement that marriage be heterosexual was unconstitutional, the Constitutional Court deferred the efficacy of the judgment for 1 year, in order to enable Parliament to regulate the question, in accordance with the findings of the *Fourie* judgment.

Parliament responded to the Court's judgment within the required time-scale, although on the facts the judgment encountered considerable political and social resistance, which resulted in an initial draft of the Civil Union Bill that betrayed the essence of the Constitutional Court's decision and merely created a regime providing for the legal recognition of homosexual couples. However, the incontrovertible clarity of the judgment's findings, which was stressed by the State Law Advisor, and the desire of the parliamentary majority to avoid conflicts with the Constitutional Court,[66] led to the bill being redrafted. This bill, which was then approved, involved the institutionalisation of a dual level of recognition for couples—civil unions and marriage—both of which are available under fully equal conditions for any couple, irrespective of the sexual orientation and sex of the couple.[67]

4.7 The Recognition of Same-Sex Couples Between the Courts and the Legislature: Some Comparative Comments

As the previous pages have attempted to demonstrate, the path followed within the Canadian case-law was not particularly similar to that followed in South Africa. Only the point of arrival is similar: the recognition of same-sex marriage on an equal footing with heterosexual couples. Whilst officials may only raise objections on the grounds of conscience[68] against same-sex couples, it may easy be understand that this option was provided in order to ensure that the move from a traditional legal framework to a decidedly more liberal arrangement was less divisive and traumatic.

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[65] *Fourie*, see note 29, at 153.

[66] *De Vos and Barnard*, see note 64, pp. 806–807.

[67] See the Civil Union Act 2006.

[68] On this issue, see MacDougall et al. (2012), p. 148, and Bonthuys (2008), pp. 477–482.

The differences between the two approaches do not relate solely to the length of time taken in Canada, compared to the relatively short time required by South African case-law. On the contrary in fact, the case-law of the South African Constitutional Court was facilitated above all by a legal formant which was very favourable to full legal recognition of same-sex unions, thus enabling it to force through a change which caused social strains, going by the heavy pressure exerted on Parliament during the discussion of the Civil Union Bill seeking to limit the impact of the *Fourie* judgment on the recognition of civil partnerships and civil unions, and thus excluding same-sex marriages.

Conversely, the Canadian experience was in part different. The case-law was able to use a legal formant which was suited to this purpose, especially following the *Egan* judgment of the Supreme Court according to which sexual orientation had become a suspect discrimination for all intents and purposes. However, the social rooting of the battle for same-sex marriage, within a country which is rooted in the liberal culture,[69] had a predominant influence. It is not by chance that the political initiatives adopted to combat the recognition of same-sex marriages did not take root even in Alberta, the most conservative Canadian province, in spite of the fact that they would nonetheless have been practicable—at least on a symbolic level. In fact, it must not be forgotten that, from a formal point of view, the *Halpern* and *Eagle* judgments were not binding on the other Canadian provinces and that the courts of Alberta never accepted that the strictly heterosexual conception of marriage was discriminatory in nature.

Within the Canadian experience, the gradual evolution of the formant of case-law was itself of fundamental import. The decisions of the courts which started granting legal significance to same-sex unions also legitimized that kind of family from a social point of view and led to a diffuse culture which was finally free from stereotypes and open to re-assessing in positive terms first and foremost same-sex relationships, and thereafter same-sex unions.

In other words, the Canadian example shows how much open public debate may bear fruit within a free and democratic society and how important the contribution of law, and above all of the courts, is to its orderly development.

On the other hand, the South African example started from a much more explicit legal formant compared to the Canadian experience, and specifically benefited from the experience gained in other countries both in relation to equality and equal protection before the law as well as the protection of rights and their connection with the schema of values underlying the Constitution, along with the over-arching value of human dignity, with all of the consequences for the prerequisites for and purposes of any limitation, as elaborated within late twentieth century constitutional theory.

Within this framework, the insights provided by comparative law are particularly prominent, as they are useful not only in the process of constitutional amendment and the elaboration of the principal categories within the literature, but also

[69] See Montalti (2008), pp. 73–77.

where a legal operator—here, the Constitutional Court—is confronted with complex and stimulating issues and problems.

This is the situation for same-sex marriage; in fact, the evolution of case-law in South Africa was facilitated by the reference—which is moreover typical of a newcomer—to judgments from foreign legal systems which, given the partial similarity within the legal formant, often originated precisely from Canadian law. These references were undoubtedly useful in rooting the domestic case-law approach in tendencies common to the countries of the Western Legal Tradition. However, they also appear to have left the social dimension to law excessively exposed, resulting in a divide between the legal country and the real country, which risks partially thwarting the modernizing effort made by case-law and legislation.

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