# Family Law

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34.1 INTRODUCTION

The inclusion of a chapter on family law in a book on constitutional law arises from the inclusion in the Bill of Rights of clauses guaranteeing such things as sex equality, dignity, security of the person, privacy, and protection for children. Both the interim and final Constitutions necessitate an examination of the role of the state in according or denying fundamental rights to family members through its statutory regulation of the family. This role had not previously been susceptible of court challenge. Still, the reach and application of the Bill of Rights remain controversial. The debate around the application of the final Constitution will be traversed fully elsewhere in this work.

Within the public domain a multitude of laws and policies governing taxation, pensions, rights to housing, and health care affect power relations between family members. The entrenched societal expectation that women are exclusively responsible for rearing children, coupled with the structure of paid labour and its assumption that the ideal worker is a man with no child-care responsibilities, are also fundamental in determining which of two partners in an intimate relationship becomes financially dependent on the other. Within the private sphere of the family, women occupy positions that leave them at risk, and men occupy dominant positions that facilitate economic independence. Human capital depreciation for women that flows from the subordination of career advancement to familial responsibility frequently leads to their financial dependence on men and the state when relationships end. In this chapter considerable attention is given to the position of women within society and the family. Connecting family law to the debates about equality and examining how clauses

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1 June Sinclair was the original contributor of this chapter. Victoria Bronstein has written the revisions.
2 Chapter 2 of the Constitution of the Republic of South Africa, Act 108 of 1996 (‘the final Constitution’) and Chapter 3 of the Constitution of the Republic of South Africa, Act 200 of 1993 (‘the interim Constitution’) contain Bills of Rights. This book’s chapter on family law should arguably cover every aspect of this branch of the private law upon which these Bills of Rights will have an impact, including a discussion of children’s rights. It does not attempt full coverage and, in particular, omits children’s rights, which are dealt with in a separate chapter. It does not deal with fiscal legislation that discriminates against women and married women in various ways. The issues canvassed here are more fully set out, along with other matters pertaining to the equality of women, in the chapter by Sinclair ‘Family Rights’ in Dawid van Wyk, John Dugard, Bertus de Villiers & Dennis Davis (eds) Rights and Constitutionalism (1994) 502–72.
3 Although there were debates about including clauses to protect ‘the family’ and ‘marriage’ at the time of the drafting of the interim Constitution, neither featured in Chapter 3. The final Constitution does not specifically protect those rights either. However, in Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) the absence of such rights in the final Constitution was objected to on the ground that, as ‘almost all international human rights instruments include provisions either recognizing the family as the basic unit of society or else protecting the right freely to marry and to establish family life’ (para 96), the final Constitution violated Constitutional Principle II (which insisted that ‘everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties’): paras 96–7). The court dismissed the objection and made the following pronouncement (at para 100):
4 See above, Woolman ‘Application’ §§ 10.1–10.3.
of the kind listed above will impact upon the existing rules governing families are now indispensable exercises for family lawyers.

Section 8 of the interim Constitution (IC) and s 9 of the final Constitution (FC) guarantee to every person equality before the law and the equal protection of the law. The final Constitution also grants everyone the right to equal benefit of the law.¹ Both sections expressly outlaw unfair discrimination, direct or indirect, on one or more of a number of listed grounds, including sex, gender and sexual orientation but without limiting the grounds to those listed. In the final Constitution the categories ‘marital status’ and ‘pregnancy’ have been added to the list.² The implications of the clauses are manifold and are dealt with in the chapter on equality.³ Only some, that may be of special interest to family lawyers, follow in the next five sections.

34.2 ABORTION

Abortion is discussed elsewhere in this volume.⁴

34.3 PARENTAL POWER

In many jurisdictions the label of ‘parental power’ would be unsatisfactory. The emphasis has changed from the power of the parents to the responsibilities of the parents and the rights of the child. The latter are increasingly recognized as fundamental rights and are enshrined in national constitutions and international conventions.⁵

In our law the parental power is made up of two distinct elements — guardianship and custody. The common law provided that the natural guardian of a child born in wedlock (a marital child, a legitimate child) is its father, while that of a child born out of wedlock (an extra-marital child,⁶ an illegitimate child) is its mother.⁷ A guardian is empowered to take decisions regarding both the child’s property and its person. A custodian has control over the day-to-day life of the child. On divorce, the major issues are custody and access, for they determine with whom the child will live, and hence which of the parents will be confined to a right of access (visitation). Orders pertaining to guardianship are rare. Custody of young children is nearly always granted to mothers.

The common law of guardianship of legitimate children was changed by the Guardianship Act of 1993.⁸ Inequalities for mothers, which would certainly have invited constitutional

¹ FC s 9(1).
² FC s 9(3).
⁴ Above, O’Sullivan & Bailey ‘Reproductive Rights’ ch 16.
⁵ See above, Pantazis & Mosikatsana ‘Children’s Rights’ ch 33.
⁶ This label for the illegitimate child was created by the Children’s Status Act 82 of 1987.
⁷ This proposition is not controversial; it is amply supported by authority. See, for example, the authorities cited by PQR Hoberg The Law of Persons and the Family (1977) 315n1, 458, 333n37.
challenge, were removed. Husbands and wives now share equally the right to make decisions affecting their children; they also enjoy the same rights to appoint testamentary guardians. Each parent is entitled independently to exercise any right or power and to carry out any duty arising from guardianship, except in matters pertaining to consent to the marriage of the minor, adoption, removal of the child from the Republic, the application for a passport or the alienation or encumbrance of immovable property belonging to the minor. In these cases the consent of both parents is required unless a competent court orders otherwise.

The common law regulating the parental power in respect of illegitimate children remained unaffected by the Guardianship Act. In fact the legal position of fathers of extra-marital children was largely unaffected by legislation until the Natural Fathers of Children Born out of Wedlock Act came into force on 4 September 1998. The Act was, at least in part, a response to the widely publicized Constitutional Court case Fraser v Children’s Court, Pretoria North, & others. The law relating to natural fathers of extra-marital children was controversial before the interim Constitution came into force. According to the common law, the mother of an illegitimate child alone had the parental power. She was its guardian and its custodian. The father had no inherent right to guardianship of the child, even on the death of the mother, or to custody, although he had the same duty to maintain it as he had in respect of his legitimate children. Although there was considerable dissension about a father’s entitlement to access to his illegitimate child, a recent spate of cases overwhelmingly declares that he had no ‘inherent right’ to access. None denied that he could approach the court to be granted access.

The tenor of recent Appellate Division judgments showed that that court was likely to be circumspect in the face of pressure for wholesale extension of paternal rights. In the most recent Appellate Division case, T v M, the court played down the distinction between fathers. It stated:

‘While at common law the father of an illegitimate child, unlike the father of a legitimate child, has no right of access, the difference between the respective positions of the two fathers is not one of real substance in practice since in our modern law whether or not access to a minor child is granted to its non-custodian father is dependent not upon the legitimacy or the illegitimacy of the child but in each case wholly upon the child’s welfare, which is the central and constant consideration.’

1 Sections 1(1) and 2 of the Guardianship Act. In fact the right of a father to appoint a testamentary guardian to act jointly with the mother is removed by s 2 of the Act. It also effects amendments to s 5 of the Matrimonial Affairs Act 37 of 1953 to provide that only where a court has awarded sole guardianship to a parent or where that parent is the surviving natural guardian of a child is he or she entitled to appoint a testamentary guardian.

2 Section 1(2) of the Guardianship Act.


4 Section 6 of Act 86 of 1997 did not come into force on that date.

5 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC).

6 The duty of support is based on the blood relationship, not on the status of the child.

7 See F v L 1987 (4) SA 525 (W); F v B 1988 (3) SA 948 (D); W v S 1988 (1) SA 475 (N); D v L 1990 (1) SA 894 (W); B v P 1991 (4) SA 113 (T); Van Erk v Holmer 1992 (2) SA 636 (W); S v S 1993 (2) SA 200 (W); B v S 1993 (2) SA 211 (W); B v S 1995 (3) SA 571 (A); T v M 1997 (1) SA 54 (A).

8 B v S 1995 (3) SA 571 (A); T v M 1997 (1) SA 54 (A).

9 1997 (1) SA 54 (A).

10 1997 (1) SA 54 (A) at 57H–I.
After the interim Constitution came into force, claims for fathers’ rights inevitably came to be framed in rights terms. The Constitutional Court dealt with the rights of fathers of extra-marital children for the first time in *Fraser v Children’s Court, Pretoria North, & others*.1 In that case the constitutionality of s 18(4)(d) of the Child Care Act,2 which enabled extra-marital children to be adopted without the consent of their natural fathers, was challenged. The section provided in relevant part that:

‘A children’s court to which application for an order of adoption is made . . . shall not grant the application unless it is satisfied . . . that consent to the adoption has been given by both parents of the child, or, if the child is illegitimate, by the mother of the child . . .’

The facts of the case were that baby Timothy was put up for adoption by his mother Adrianna Naude. His father Lawrie Fraser objected to the adoption. As Timothy was an ‘illegitimate’ child, the impact of s 18(4)(d) was that Fraser did not have a right to veto the adoption. Fraser argued that s 18(4)(d) violated ‘the right to equality in terms of s 8(1) and the right of every person not to be unfairly discriminated against in terms of s 8(2) of the [interim] Constitution’.3

Mahomed DP gave the unanimous judgment of the court. He held that the impugned section did offend against s 8 of the interim Constitution, as it ‘impermissibly [discriminated] between the rights of a father in certain unions and those in other unions’.4 The court explained that while the Child Care Act granted fathers of children born from black customary unions the same rights as fathers of ‘legitimate’ children in relation to s 18(4),5 fathers who have solemnized their marriages ‘in terms of the tenets of the Islamic faith’6 were simply fathers of ‘illegitimate’ children for purposes of the provision. Consequently, their consent was not required in adoption proceedings. This arbitrary checkerboard situation did not pass muster under the limitation clause.

The court also pointed out that

‘in the context of an adoption statute . . . a right to veto the adoption based on the marital status of the parent could lead to very unfair anomalies. The consent of a father who, after his formal marriage to the mother of the child concerned, has shown not the slightest interest in the development and support the child would, subject to s 19,7 always be necessary. Conversely a father who has not concluded a formal ceremony of marriage with the mother of the child but who has been involved in a stable relationship with the mother over a decade and has shown a real interest in the nurturing and development of the child, would not be entitled to insist that his consent to the adoption of the child is necessary.’8

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1 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC).
2 Act 74 of 1983.
3 At para 19.
4 At para 21.
5 At para 22.
6 At para 21.
7 Section 19 of the Child Care Act sets out situations in which consent to adoption may be dispensed with. Section 19(b) provides that ‘[n]o consent in terms of section 18(4)(d) shall be required . . . from any parent’ who inter alia ‘. . . deserted the child and whose whereabouts are unknown; or who has assaulted or ill-treated the child or allowed him to be assaulted or ill-treated; or . . . who is withholding his consent unreasonably’ (s 19(b)(ii), (iii) and (vi) respectively).
8 At para 26.
Although the court found that s 18(4)(d) was unconstitutional, it held that the section, which denied rights to all unmarried fathers in relation to s 18(4), could not simply be replaced by an order

'striking down . . . all the words in s 18(4)(d) of the Act after the word “child” . . . [which] would . . . simply . . . make it necessary (subject to the provisions of s 19) for the consent of every parent to be given for the proposed adoption of their child, regardless of the circumstances. Such a simplistic excision of the subsection would mean that every father could insist on his consent to the proposed adoption of the child even if the child was born in consequence of the rape of the mother. . . .'\(^1\)

Hence it was no solution to give the right to veto an adoption to all fathers (subject to s 19).

The court finally found that s 18(4)(d) was inconsistent with the interim Constitution in that it dispensed ‘with the father’s consent for the adoption of an “illegitimate” child in all circumstances’. In view of the fact that there was a range of possible legislative schemes which could pass constitutional muster, Parliament was given two years to correct the defect in the legislation (in terms of the proviso to IC s 98(5)). In the meanwhile s 18(4)(d) was to remain in force.

Fraser was a particularly strong judgment as the court engaged with the impact that its decision would have on the reality of ordinary women’s lives. It was alive to the danger of giving fathers of extra-marital children increased power over the lives of the mothers of their children in instances where their relationships with the women and children concerned did not warrant it.\(^2\)

Parliament responded first by passing the Natural Fathers of Children Born out of Wedlock Act.\(^3\) The Act does not fundamentally change the common law as natural fathers of extra-marital children still do not have any automatic rights in respect of their offspring. The Natural Fathers Act does, however, explicitly acknowledge that such fathers may have an important role to play in their children’s lives. Section 2(1) of the Act provides:

‘A court may on application by the natural father of a child born out of wedlock make an order granting the natural father access rights to or custody or guardianship of the child on the conditions determined by the court.’

The application shall not be granted unless the court is satisfied that it is in the best interests of the child.\(^4\) Section 2(5) of the Natural Fathers Act contains a list of factors that the court shall take into account when considering the application. They are:

‘(a) the relationship between the applicant and the natural mother, and, in particular, whether either party has a history of violence against or abusing each other or the child;

(b) the relationship of the child with the applicant and the natural mother or either of them or with proposed adoptive parents (if any) or any other person;

\(^1\) At para 27.

\(^2\) The decision to give an order in terms of IC s 98(5) is the most controversial part of the judgment. For a discussion of the benefits and pitfalls of this remedy and possible alternative remedies, see above, Klaaren ‘Remedies’ ch 9.

\(^3\) Act 86 of 1997 (the ‘Natural Fathers Act’).

\(^4\) Section 2(2)(a) of the Natural Fathers Act. The Natural Fathers Act contains the following powerful provision which potentially bolsters children’s rights. Section 2(7) provides that ‘the court may appoint a legal representative to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.’
The effect that separating the child from the applicant or the natural mother or proposed adoptive parents (if any) or any other person is likely to have on the child;

the attitude of the child in relation to the granting of the application;

the degree of commitment that the applicant has shown towards the child, and, in particular, the extent to which the applicant contributed to the lying-in expenses incurred by the natural mother in connection with the birth of the child and to expenditure incurred by her in connection with the maintenance of the child from his or her birth to the date on which an order (if any) in respect of the payment of maintenance by the applicant for the child has been made and the extent to which the applicant complies with such order;

whether the child was born of a customary union concluded according to indigenous law or custom or of a marriage concluded under a system of any religious law; and

any other fact that, in the opinion of the court, should be taken into account.1

The Natural Fathers Act fits with the tenor of Fraser2 in two respects. First, the list of considerations set out in the Act directs judges to engage with the concrete difficulties faced by single mothers and their children in our society. Secondly, the legislative scheme is sensitive enough to allow judges to distinguish between different types of fathers with different levels of commitment to their children so that they can be treated appropriately.

Parliament addressed the immediate problem giving rise to the Fraser judgment in the Adoption Matters Amendment Act 1998.3 This Act amends s 18(4)(d) of the Child Care Act to extend veto rights over an adoption to a natural father who has acknowledged himself in writing to be the father of his extra-marital child and who has made his identity and whereabouts known in accordance with the procedure required by the Act.4 The Act confronts some of the concerns of the Fraser judgment by denying veto rights to any natural father who has failed to discharge his parental duties to his extra-marital child, who has been found to have assaulted or raped the mother of his extra-marital child, or whose extra-marital child was conceived in an incestuous relationship.5 The natural father of an extra-marital child also loses any veto rights that he might have had if he fails within 14 days to respond to official notice of the proposed adoption of his extra-marital child. Note that these restrictions of the veto right apply only to fathers of extra-marital children, and not to any other parents.

Sinclair has consistently argued6 that, in the light of the content of the Bill of Rights and the insistence in international conventions such as the United Nations Convention on the Rights of the Child and the European Convention on Human Rights that illegitimate children

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1 Section 2(5)(a)–(g) of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. The status of children mentioned in s 2(5)(f) still needs to be properly regulated by legislation (see § 36.6 below). The Act sets out procedures for applications that often involve the family advocate. It is beyond the scope of this chapter to comprehensively discuss the legislation.

2 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC).


4 This ordinarily involves registering these details in the official register of the birth of the child. Where such registration has not taken place before the mother of the child consents to the adoption, the unmarried father has no veto right unless details of his whereabouts and identity are provided by the mother at the time that she gives her consent, or by a social worker at any time before the adoption takes place. See s 19A of the Child Care Act 74 of 1983 as amended by the s 6 of the Adoption Matters Amendment Act 56 of 1998. Section 8 of the Adoption Matters Amendment Act amends s 11 of the Births and Deaths Registration Act 51 of 1992 to provide a mechanism for a natural father to register his details in the official register of the birth of his extra-marital child.

5 Section 19(b)(vii)–(ix) of the Child Care Act as amended by s 5 of the Adoption Matters Amendment Act.

6 See, for example, her chapter ‘Family Rights’ in Van Wyk, Dugard, De Villiers & Davis Rights and Constitutionalism.
not be discriminated against, we should comprehensively reform our law of parent and child to incorporate full sharing of all parental rights and responsibilities, regardless whether the child is born in or out of wedlock. This would mean joint guardianship, joint custody and automatic rights of access in cases where joint custody is departed from by a court or by agreement. No adoption could ordinarily take place without the consent of both parents. However, the court would clearly retain wide powers to intervene to alter all of these automatic incidents of parental responsibility whenever the interests of the child required that it should do so. The Natural Fathers Act and the Adoption Matters Amendment Act fall somewhat short of this.

Sinclair takes a position on one side of an irresoluble debate. While she sees formal legal change as a necessary precursor to real change in society, other commentators are concerned that single mothers, who already bear a disproportionate burden, will be weighed down further by the extension of paternal rights. For example, in the context of extra-marital children Cockrell takes the view that

"the maternal preference does not violate a deeper notion of substantive equality which underpins our constitutional commitment to equality. Substantive equality requires us to take note of the structural division of roles within the family in real life, and the lived reality for many women in South Africa is that it is predominantly they who care for extra-marital children . . . It may no doubt be correct that there may be rare situations where the father of an extra-marital child is the primary caregiver, and where it would accordingly be in the child’s best interests that the father be awarded natural guardianship. It is submitted, however, that those infrequent cases are adequately catered for by the existing rule which allows a court to award guardianship of an extra-marital child to the father in appropriate cases, conjoined with the constitutional injunction that the child’s best interests are paramount in such applications. It is submitted that in the standard scenario, where the mother and father of an extra-marital child live apart and the child lives with the mother, the existing common-law rule which regards the mother as the natural guardian to the exclusion of the father is justified by deep notions of substantive equality and should not be held to be in violation of the father’s constitutional right to equality."¹

Cockrell’s position resonates with the position that the court has taken in Fraser and the judgments of Goldstone and O’Regan JJ in President of the Republic of South Africa & another v Hugo.² On this view the Natural Fathers Act and the Adoption Matters Amendment Act can be seen as reflecting a fair balance between the rights of mothers and fathers of extra-marital children even though they are not treated identically by the legislation. On this understanding there are no substantial constitutional problems with the provisions of the Acts discussed above.

It is worth drawing the link between Kriegler J’s dissenting judgment in Hugo and Sinclair’s position. In Hugo Kriegler J wrote:

"In my view the notion relied upon by the President, namely that women are to be regarded as the primary care givers of young children, is a root cause of women’s inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns . . . Reliance on the generalization that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely."³

³ At para 80.
Several glaring inequalities ensuing from the law of marriage were removed by legislation passed at a late stage of negotiations for a new constitutional dispensation. A large measure of formal equality has been achieved. But the more subtle forms of inequality, deriving from stereotyped role allocations for women, remain within marriage and within other intimate relationships.

The most notable example of a glaring inequality in our law was the marital power. Our common law provided that on marriage, unless the marital power was excluded by antenuptial contract, a wife was relegated to a status similar to, but in many respects worse than, that of a minor. Under the perpetual tutelage of her husband, who administered her and his property, the married woman had limited contractual capacity and limited *locus standi in judicio*. The marital power was abolished by the Matrimonial Property Act for non-African marriages celebrated after its commencement, and these provisions were extended to the marriages of Africans by the Marriage and Matrimonial Property Law Amendment Act for marriages of such persons celebrated after its commencement. Neither Act eradicated the marital power from marriages celebrated prior to the dates of their commencement. The General Law Fourth Amendment Act of 1993 ‘repealed’ the common-law rule that gave the husband marital power ‘over the person and property of his wife’ and abolished any marital power that any husband may have been exercising immediately prior to the coming into operation of the Act. It finally cleansed our legal system of this inequality for wives and avoided an inevitable striking-down by the Constitutional Court.

There were major conflicts between the laws of the former self-governing territories and the TBVC states, on one hand, and the national law of South Africa, on the other. The KwaZulu Code of Zulu Law, for example, stipulated that a married woman shall be subject to the marital power of her husband. Neither the Marriage and Matrimonial Property Law Amendment Act nor the General Law Fourth Amendment Act was made to apply in the former KwaZulu. The marital power also operated in Transkei, for example, and could not be excluded by antenuptial contract. Likewise, Transkei did not import the South African

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1 Another anachronism from our common law, and one that was expressly imported into s 13 of the Matrimonial Property Act 88 of 1984, is the rule that the husband is the head of the family. It should not have been included in the 1984 legislation. Its mere deletion from that Act by s 30 of the General Law Fourth Amendment Act 132 of 1993 arguably leaves intact the rule of the common law, and it clearly violates the right not to be unfairly discriminated against on the ground of sex, entrenched in IC s 8 and FC s 9. See further Sinclair ‘Family Rights’ in Van Wyk, Dugard, De Villiers & Davis *Rights and Constitutionalism* 544.
4 Section 11(1) and (2) of Act 132 of 1993, which came into operation on 1 December 1993 — GN R123 GG 15308 of 1 December 1993 (Reg Gaz 5211). Section 11(3) automatically replaces the marital power with the concurrent administration provisions contained in Chapter III of the Matrimonial Property Act 88 of 1984 in all marriages affected by the reform, and s 11(4) provides that no transaction effected prior to the abolition of the marital power shall be affected by the change.
5 Act 16 of 1985 of the KwaZulu Legislative Assembly.
6 Section 27(3). The section permits the exclusion of the marital power by antenuptial contract, but only where the civil marriage is out of community.
7 Sections 37 and 39 of the Transkei Marriage Act 21 of 1978.
statutes. These inconsistencies have, however, now been removed by the Justice Laws Rationalisation Act. Section 2 of the Act extends the operation of the Matrimonial Property Act, as amended, to the whole national territory.

Aside from the equality problems attendant upon civil marriage, one should consider the customary marriage of Africans and the religious marriage of Muslims. Both systems permit polygyny, thus subjecting women to an inferior status. Of all the features of African customary law that subordinate women, the marital power appears to be the most objectionable. Section 11(3) of the Black Administration Act provides that African customary wives, except those living in Natal, are deemed to be minors and are subject to the guardianship of their husbands. Section 11A, however, exempts women from customary law for certain purposes related to leasehold, sectional title and ownership of immovable property. An African wife has only limited capacity to own property and limited locus standi in judicio. What she earns becomes the property of her house and thus subject to the control of her husband. The marital power of the husband in customary law is described as ‘vast’ by Ronald Thandabantu Nhlapo. The author explains that the husband has the final say in matters concerning both the person and property of his wife. He can dictate what she should wear, with whom she may associate, and whether she may seek employment or consult a doctor. In some systems the marital power even includes the right to administer corporal punishment. This constellation of rules governing status and capacity, some written into legislation and some not, clearly conflicts with the right to sex equality contained in the Bill of Rights. The abolition of the marital power from the civil law of marriage has not freed African women from inequality.

1 Act 18 of 1996. The Act came into effect on 1 April 1997.
2 Prior v Battle & others 1998 (8) BCLR 1013 (Tk) confirms that the sections of the Transkei Marriage Act 21 of 1978 that purported to retain the marital power in Transkeian civil marriages are unconstitutional. The common-law rule that a husband acquires the marital power over his wife in the absence of an antenuptial contract which provides to the contrary was also held to be inconsistent with the Constitution. The lacuna is filled by the Matrimonial Property Act 88 of 1984 (at 1022).
3 Act 38 of 1927.
4 The exclusion from this disability of women in Natal was brought about by s 1 of the Laws on Co-operation and Development Amendment Act 91 of 1985. Section 11(3)(b) of the Black Administration Act was made inapplicable in KwaZulu as from the enactment of the KwaZulu Act on the Code of Zulu Law, Act 6 of 1981 (now superseded by Act 16 of 1985).
6 See South African Law Commission The Harmonisation of the Common Law and the Indigenous Law (Customary Marriages) (Project 90, Discussion Paper 74, 1997), which recommends legislative reform, inter alia to give women subject to customary law ‘contractual capacity, locus standi and proprietary capacity . . . on a par with men . . . In addition, [the paper recommends that in order to] cure many years of uncertainty, provision must be made that the Age of Majority Act [57 of 1972] applies to persons subject to customary law’ (at vi). It further argues that spouses should be given ‘equal capacities and powers of decision making’ (ibid) and states that it is necessary to pass legislation which declares that women are capable of owning and possessing property (ibid). The discussion paper is excellent and the recommended reforms would cure many of the disabilities experienced by African women. Legislative reform is obviously highly desirable, but in its absence these matters have to be tackled by courts. If legislation were to be passed, its constitutionality might well be brought into issue. See generally V Bronstein ‘Reconceptualizing the Customary Law Debate in South Africa’ (1998) 14 SAHHR 384.
What emerges from all of this is that the law relating to the marital power is inordinately complex. The sooner conflicts between national law and the law of the various territories and states that were part of the apartheid constitutional dispensation is resolved, the better. A code of family law, drawing together the disparate common-law and statutory rules and making uniform their application, is overdue.

34.5 INEQUALITY ON DIVORCE

(a) Matrimonial property

As noted above, stereotyped role-allocation for women has been a major source of their impoverishment. In addition, great changes have occurred in the transmission of family wealth.

‘Whereas of old, wealth transmission from parents to children tended to center upon major items of patrimony such as the family farm or the family firm, today . . . wealth transmission centers on . . . the investment in skills.’

Despite this preoccupation with what is known as ‘human capital’, which might compensate for the decline in the transmission of traditional property, the socialization and education of girls do not equip them, in the same way as boys are equipped, to pursue successful financial careers as adults. Young women still rely heavily on the dangerous notion that they will marry, have children, and be supported throughout their lives by their husbands.

Many legal systems have responded to the inability of women, especially those with child-care responsibilities, to achieve some degree of financial security. Some jurisdictions have developed highly structured matrimonial property systems, such as the deferred sharing of acquests (Zugewinngemeinschaft) and equalization of pension benefits (Versorgungsausgleich) of the German law. Others have developed the practice of judicial discretion in order to redistribute property on divorce, of which the English law is a prime example.

South Africa, a country whose common law is based on universal community of property and of profit and loss, has incorporated both of these features into its matrimonial property law.\(^1\) There can be no doubt that the introduction of the accrual system (which amounts to a deferred sharing of profits of spouses married out of community) and the provision for judicial interference with the consequences of complete separation of goods via the transfer of property from one spouse to the other on divorce, have mitigated the harsh consequences that ensue from a system that excludes all sharing.

Not to be overlooked, however, is that the accrual system is frequently excluded in the antenuptial contract in situations which reflect the choice of the party whose estate is most likely to increase (the husband), rather than the informed choice of both parties. In such marriages judicial discretion cannot remedy an injustice that may flow from the chosen system. The reason is that the judicial discretion is formulated in a highly restrictive way.\(^2\) The provision permits a redistribution of property by the court on divorce only (inter alia) if the marriage was celebrated with an antenuptial contract excluding all forms of sharing, prior to the commencement of the Matrimonial Property Act of 1984.\(^3\) The equivalent provision for the civil marriages of Africans requires that the marriage was celebrated out of community, prior to the commencement of the Marriage and Matrimonial Property Law Amendment Act of 1988.\(^4\) The inevitable demise of the judicial discretion will occur when all such marriages celebrated prior to the commencement of the two Acts have been dissolved.

It must be questioned whether this differentiation based on the date of marriage will withstand the scrutiny of the Constitutional Court. If the purpose of the adjustable discretion is to avoid injustice, and that was the justification adduced for its introduction into our legal system, then the date of one’s marriage and the range of the available choices should not constrain the power of the court. It has to be recognized that the premise of adjustable judicial discretion is to avoid injustice, and that was the justification adduced for its introduction into our legal system.

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1 Marriages with the standard-form antenuptial contract always excluded sharing. Since the enactment of the Matrimonial Property Act 88 of 1984 and the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, marriage by antenuptial contract carries with it the accrual system, unless this consequence is expressly excluded (s 2 of the Act). The judicial discretion to divide property on divorce was also a creation of the above Acts. It was designed to mitigate the harshness of complete separation of goods in marriages celebrated before the introduction of the accrual system.

2 For comment on the unduly restrictive formulation, see June Sinclair An Introduction to the Matrimonial Property Act (1984) 47–52.

3 Act 88 of 1984, which commenced on 1 November 1984.

4 Act 3 of 1988, which commenced on 2 December 1988.
power is to avoid grossly inequitable discrepancies in the financial positions of the parties on divorce. Such discrepancies do not depend solely or even fundamentally on the nature of the matrimonial property system. All that can be said is that some systems, notably complete separation of property, are more likely than others to produce injustice. If this is so, then, at the very least, whenever complete separation of property applies, the court should be able to intervene. And this is what the argument being advanced here is all about. Although it advocates as a matter of justice the application of the judicial discretion across the spectrum of matrimonial property systems, its more limited purpose is the constitutional argument that the current criterion is unsound: the date of the marriage cannot serve to differentiate between people in identical circumstances. The Constitutional Court should strike down this criterion because it is arbitrary; it unfairly discriminates against people married according to the system of complete separation of property on the ground of the date of their marriage. The discrimination takes the form of denying to those people a remedy to relieve injustice that is granted to persons married with an identical system, but earlier.1

What is the significance to South Africans of the constitutional challenge to the formulation of the judicial discretion? For couples who live on their salaries and do not have the opportunity to amass property, the matrimonial property system that governs their marriage does not turn out to be the panacea for the poverty that will be experienced most acutely by the divorced woman. For the poor, matrimonial property law is as important as an elaborate estate planning exercise. But for many thousands of people the matrimonial home and a share in pension and other retirement benefits accumulated during marriage make the difference between forced reliance on exiguous welfare and some form of financial security. To these people the sharing of property acquired by joint effort is crucial. To be denied an equitable remedy on the ground of the date of one’s marriage is unacceptable.

(b) Custody

A second question to be raised in connection with inequality on divorce is the question of who should be the caretaker of the children of divorced parents.2 Unlike the matter of guardianship, no formal legal rule dictates which parent is entitled to custody. The court is required to make its order to serve ‘the best interests of the child’. But this is a notoriously elusive concept. There is no doubt that our courts favour women over men to be custodians of minor children after divorce.

The constitutional question that arises here is whether fathers are entitled to an equal chance to obtain custody of their children after divorce. Countless court orders granting custody to women without a serious consideration of the possibilities for an award of joint custody have been made. Indeed, our courts are not enthusiastic about joint custody, although it has on occasion been ordered.3 Equality between the spouses appears to entail a reversal...

1 These arguments are more fully canvassed, and the opposing views considered, in Sinclair’s chapter ‘Family Rights’ in Van Wyk, Dugard, De Villiers & Davis Rights and Constitutionalism 549–53.
2 It is a question not entirely dependent on marriage and its corollary, divorce. Who should care for the children of former cohabitants is also at issue.
3 The reluctance of the courts even to give effect to joint custody agreements is apparent from cases such as Heimann v Heimann 1948 (4) SA 926 (W) and Edwards v Edwards 1960 (2) SA 523 (D). A notable departure from...
of this position. Formal equality could be achieved by giving expression to the right of fathers to be custodians in legislation requiring an award of joint custody unless the interests of the child demand a different order.

Some may consider this solution to be unduly harsh on women, who are most often primary caretakers of minor children, and who would most often be seeking variation. It may be argued that the court deciding custody should first ascertain which of the two parents is the primary caretaker and apply a presumption that that parent deserves custody unless the other can prove that a different order would better serve the interests of the children. The argument would be that the formal equality inherent in a joint custody dispensation entails actual inequality for women. The argument is not without force. But by implication it sanctions the inequality now experienced by fathers because our society and the labour market are structured in such a way as almost inevitably to make mothers primary caretakers. Further, the inexorable delegation by society to women of parenting responsibilities is not a good thing for mothers, or fathers, or children.

Not without diffidence, it is suggested that equality of parental responsibility in the law is the correct message. It assumes that children have a fundamental right to preserve the strongest possible bond with both of their parents despite the breakdown of the parental relationship. It would encourage equitable sharing of parental responsibility, which would in turn conduce to the broader achievement of real equality for women.¹

34.6 AFRICAN CUSTOMARY MARRIAGES AND MUSLIM MARRIAGES

Two kinds of intimate relationships to which the full range of family laws has not been extended are African customary marriages and religious Muslim (and Hindu) marriages. Both are potentially polygynous and for this reason are not regarded as valid by our law. These relationships are, however, family units, and questions arise about their recognition as valid marriages and the rights of the parties within them. Customary law is the subject of another chapter, but mention of some of the issues pertaining to customary and Muslim (and Hindu) marriages will be made here.

The Chapter on Fundamental Rights in the interim Constitution stated in s 14, the clause on religion, belief and opinion, that nothing in the chapter shall preclude (a) legislation recognizing a system of personal and family law adhered to by persons professing a particular religion, and (b) legislation recognizing the validity of marriages concluded under a system of religious law subject to specified procedures.² The provision related only to legislation, which never came to exist. In terms of the interim Constitution it seems that if legislation

this view came after the widening of the court’s discretion by the Divorce Act 70 of 1979 (see s 6(3)), in Kastan v Kastan 1985 (3) SA 235 (C). Here the court incorporated the terms of an agreement providing for joint custody into its order. By contrast, the court refused to do so in Schlebusch v Schlebusch 1988 (4) SA 548 (E). The court was at pains to stress that Kastan did not represent ‘a departure from existing principles . . . or a stepping stone to the granting in future of joint custody at the mere request of the parties’ (at 551). See also Venon v Venon 1993 (1) SA 763 (D); Pinion v Pinion 1994 (2) SA 725 (D).


² IC s 14(3).

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was passed recognizing, for example, the system of Muslim family law, it would have been
immune from attack under the Constitution even if aspects of the protected system violated
fundamental rights by being unfairly discriminatory on the grounds of sex. African customary
family law, on the other hand, was not a system adhered to by persons professing a particular
religion. The system of African customary family law, therefore, even if it was expressly
recognized in legislation, would not, it seems, have been immune from attack. Muslim
women would have been denied the right of constitutional challenge that African women
retained in these circumstances.

FC s 15(3), which corresponds with IC s 14(3), has been substantially transformed. FC s 15(3)(a) reads:

'[Section 15] does not prevent legislation recognising —
(i) 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.'

FC s 15(3)(b) provides that:

'Recognition in terms of paragraph (a) must be consistent with . . . [s 15] and the other provisions
of the Constitution.'

Legislation which falls into the categories mentioned under FC s 15(3)(a) has no special
immunity from constitutional scrutiny. In that respect the final Constitution is profoundly
different from the interim Constitution.¹ Unlike IC s 14(3), FC s 15(3)(a) now clearly applies
to legislation which encodes African custom.

The subject of Muslim marriages has been tackled in the courts. *Ryland v Edros*² is a
ground-breaking case in which Farlam J enforced the contractual consequences of a Muslim
marriage. In this case the wife claimed

(a) arrear maintenance (from January 1977 to 14 January 1993, this last date being the
date 3 months after her marriage was terminated by a third *talaq* (notice of termination));
(b) a compensatory gift to which she was entitled because her husband had allegedly
divorced her without just cause;
(c) ‘transfer, alternatively payment, of an equitable share of the growth of the plaintiff’s
estate . . . such equitable share in the present circumstances being one-half of such
growth and representing one-third of the plaintiff’s entire estate at the said date: in
support of this claim the defendant alleged that she had contributed labour, effort and
money, both directly and indirectly, to the plaintiff’s estate, as a result of which it
benefited’.³

The wife (Edros) claimed that she was entitled to (a), (b) and (c) under Muslim law, which
underpinned her marriage contract. (It was uncontroversial that the rules of the Shafi’i school
of Muslim jurists were applicable in this case.)

When they married the parties agreed that their marriage would be governed, ‘inter alia,
by Islamic personal law in terms of which claims for arrear maintenance do not prescribe’.
However, after analysing the relevant civil law Farlam J held that he had to apply the

¹ This coheres with FC ss 30 and 31.
² 1997 (2) SA 690 (C), 1997 (1) BCLR 77 (C).
³ At 80A.
principles of prescription to the claim for arrear maintenance. Consequently, Edros was only entitled to claim maintenance for the period from 25 October 1991 to 14 January 1993. Because of Farlam J’s finding on prescription, his order deviates fundamentally from the position which (all the experts in the case agreed) exists under Muslim law. In this case Muslim family law was subjected to the constraints inherent in South African contract law.

In respect of claim (b) the parties agreed, and the court ordered, that the wife was entitled to a consolatory gift from her former husband if he had dissolved the marriage without just cause. On the more controversial issue of whether the wife was entitled to ‘[an equitable share of her tangible and intangible contributions to the growth of the plaintiff’s estate] the parties’ experts, both of whom [held] degrees in Islamic theology and law, expressed diametrically opposed views’.¹ One of the experts, a progressive Muslim jurist called Dr Moosa, interpreted Shafi’i law as providing for a judicial discretion to redistribute property equitably on divorce. Dr Moosa argued that his view accorded with legislation passed in Malaysia (a Shafi’i jurisdiction) which ‘would only [have been] adopted in Malaysia after careful consultation with experts on Islamic law . . . Indeed, he described the Act in question [which provides for equitable redistribution of property on divorce] as a codification of Islamic law.’²

Farlam J rejected Dr Moosa’s evidence on the basis that no Islamic country other than Malaysia has a legal regime of that type and most South African Muslims do not perceive it to be the practice. He stated:

‘In the absence of such a custom there is, in my view, no basis for holding that the provisions of Islamic personal law which the parties incorporated into their contract included a term to the effect that on divorce the defendant would be entitled to an equitable share of the growth of the plaintiff’s estate during the marriage.’³

Hence the judge ruled that the defendant was not entitled to an equitable share of her husband’s estate based on her tangible and intangible contributions to its growth.⁴

*Ryland v Edros* was an agonizingly hard case and Farlam J has struggled to make the best of a particularly difficult situation. While he may have improved the law by giving Muslim women an effective forum in which to assert themselves, he has also left huge unresolved problems. Farlam J expressed concern ‘that the points in issue between the parties . . . [would], regard being had to the fact that Islam is a “revelational culture”, involve the court in deciding points of doctrine, . . . [which] would be inappropriate . . .’. But ‘[b]oth sides [agreed] that the particular issues arising for a decision in this case [did] not — despite the fact that there is a continuity of Muslim law, religion, culture and identity and no clear barrier between the religious and secular spheres — require any religious doctrines to be interpreted’. Both parties said that there was no question of ‘doctrinal entanglement’ in this case. Farlam J accepted this assurance somewhat blithely in view of the fact that a few pages later he finds himself deeply engaged in the exercise of establishing whether equitable redistribution of assets on divorce is part of the relevant Muslim law. The consequence of his judgment is that our judiciary is going to have to adjudicate on complex questions of

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¹ At 97G–H.
² At 98I.
³ At 100H.
⁴ At 100I.
Muslim law. Exactly how much arrear maintenance must be paid? Did the husband in this case divorce the wife without just cause? These are doctrinal questions which were reserved for another day.

How is the court going to choose between the views of different Muslim jurists? Islam is not monolithic. Women are treated very differently in different parts of the Muslim world.\footnote{See, for example, Marie-Aimee Helie-Lucas ‘Strategies of Women and Women’s Movements in the Muslim World vis-à-vis Fundamentalisms: From Entryism to Internationalism’ (at 251) and Haleh Afshar ‘Fundamentalism and Women in Iran’ (at 247) in O Mendelsohn & U Baxi (eds) The Rights of Subordinated People (Oxford University Press, Delhi 1994).} At present there is no South African legislation about Muslim marriages so our courts will have no solid mooring in deciding these disputes.\footnote{But see Ryland v Edros 1997 (2) SA 690 (C), 1997 (1) BCLR 77 (C) at 101, where the Code of Muslim Law approved by the Council of India in 1760 is discussed.} The court in \textit{Ryland v Edross} has taken a leap into unchartered territory. It may well be impossible for courts to make defensible decisions about religious law. The US Supreme Court has, albeit in a completely different context, articulated the point that religious beliefs cannot be subjected to rational scrutiny. It stated:

‘Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. Board of Education \textit{v} Barnett 319 US 624. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths . . . Men may believe what they cannot prove . . . Religious experiences which are as real to life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it could hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many.’\footnote{\textit{United States v Ballard} 322 US 78 (1943).}

How are judges to choose between arguments that lead unrelentingly back to different people’s perceptions of the will of the deity.\footnote{The position would be easier if there was a legitimate ecclesiastical court to which the parties wanted to submit. For example, in a hypothetical case in which there was an order of the Jewish Ecclesiastical Court, the ‘Beth Din’, the situation would be much simpler, as a civil court could simply decide whether, subject to the provisions of the equality clause and the freedom of religion clause in the 1996 Bill of Rights, it would be prepared to make the religious court’s order an order of court. This is very different from the process which has been set in motion by \textit{Ryland v Edros} 1997 (2) SA 690 (C), 1997 (1) BCLR 77 (C), where the court has to interpret the provisions of a religion.} These painful problems are simply sidestepped in the judgment.

There are also other problems raised by this judgment. Contract is a very stultifying model upon which to base the proprietary consequences of any marriage. Contract is backward-looking. In this case Farlam J strives to divine the agreement between the parties in order to enforce the contract between them. This approach creates very little room for manoeuvre. The contract model contrasts sharply with our usual approach to family law. When courts deal with principles of civil or customary law they deal with developing entities that change, especially in the light of the Bill of Rights. Although it was common cause between the parties that ‘an Islamic marriage is not a sacrament, but a contract’\footnote{At 82B.}, it is clear that in reality
Muslim marriages are far more than contracts. They should affect status and legitimize children. The judgment in *Ryland v Edros* achieves neither of these goals. (It is also particularly unsatisfactory to note that in this case the interaction between civil and religious law placed the wife in a worse position than she would have been in under any of the Muslim law regimes relied upon by the parties. On the one hand, as a result of the applicable civil law most of her claim for arrear maintenance was held to have prescribed; on the other, she was not entitled to share in her husband’s estate.)

*Amod v Multilateral Motor Vehicle Accident Fund* illustrates the stultifying effect of conceptualizing Muslim marriages as contracts. Mr Amod, a man married in terms of Islamic law, had died in a motor accident in 1993. His wife lodged a claim against the Multilateral Motor Vehicle Accident Fund for compensation for the loss of support she suffered as a result of her husband’s death. The Fund repudiated her claim on the basis that her marriage was not registered as a civil marriage. Consequently the issue of whether the Fund was liable to compensate Mrs Amod for loss of support came before the High Court. It was common cause that the Fund would only be liable if the driver who negligently caused the death of the deceased would have been liable at common law. The court agreed with *Ryland v Edros*, which held that the contractual undertakings that underlie a Muslim marriage can be enforced. However, it pointed out that *Ryland* did not hold that a marriage in terms of Muslim rites was a lawful marriage or that it generated a legal duty of support. Consequently Meskin J found that the contract which constitutes a Muslim marriage can only be enforced *inter partes*. For this reason Mrs Amod was unsuccessful in obtaining relief from the Fund.

Meskin J refused to develop the common law in order to give Mrs Amod relief on the grounds that to do so would be to usurp the role of the legislature. It is, however, difficult to imagine any case where judicial development of the common law would be more appropriate. In recognizing that Muslim marriages give rise to a contractual duty of support, Meskin J firmly stated that ‘no right-thinking person in the community at large would regard it as immoral or inimical to the interests of such community’ that a man should be held to an undertaking to support his wife.

‘On the contrary, . . . any such right-thinking person would consider that he ought indeed to be held to such undertaking and should not be at liberty to renege thereon whenever he might choose and thus cause financial hardship, and possibly even physical suffering, to the woman.’ Meskin J should have gone further and acknowledged that right-thinking persons would not approve of the defendant escaping liability simply because the plaintiff was serendipitously a party to a *de facto* monogamous Muslim marriage rather than a civil marriage. This is another situation in which non-recognition of Islamic marriages causes grave injustice.

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1. 1997 (12) BCLR 1716 (D).
2. At 1719L.
3. 1997 (2) SA 690 (C), 1997 (1) BCLR 77 (C).
For an analysis of the issues implicated in development of the common law, see above, Woolman ‘Application’ § 10.8(a)(iv).
5. At 1726D.
6. This case was taken to the Constitutional Court on appeal in *Amod v Multilateral Motor Vehicle Accident Fund* 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC). The court held that the Supreme Court of Appeal rather than the Constitutional Court was the appropriate court to deal with the case.

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Both judicial reform and proper legislation that can survive the rigours of the equality clause are necessary to deal with Muslim marriages. (The Malaysian Islamic Family Law (Federal Territory) Act, 1984 seems to illustrate that very attractive proprietary regimes which take account of women's rights are compatible with Islam.)

34.7 POLYGNY

African customary marriages and Muslim marriages have traditionally been refused recognition as valid marriages in our legal system on the argument that polygyny is ‘reprobated by the majority of civilized peoples, on the ground of morality and religion'. In the case of Ismail v Ismail, declaring invalid a religious, Muslim marriage not celebrated in terms of the Marriage Act, the Appellate Division added that ‘in view of the growing trend in favour of the recognition of complete equality between marriage partners, the recognition of polygamous unions . . . may even be regarded as a retrograde step'. In Ryland v Edros Farlam J rejected the ratio of Ismail on the basis that it does not cohere ‘with the spirit, purport and objects of Chapter 3'. Farlam J castigated the Appellate Division for cultural imperialism, saying:

‘It is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right thinking people in the community and not only by one section of it.'

Farlam J decided that the fact that Muslim marriages are potentially polygamous is no reason to place all Muslim marriages in the same tarnished category. His judgment makes a radical break from the past because he attaches contractual consequences to a Muslim marriage that was in fact monogamous. However, he makes it clear that nothing in his judgment would necessarily apply to marriages that [are] actually as opposed to potentially polygamous'. The latter question will need to be addressed in the light of the equality clause.

The constitutional question now is whether polygyny is discriminatory against women and, if so, what to do about it.

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1 Seedat’s Executors v The Master (Natal) 1917 AD 302 at 307. The Appellate Division in Ismail v Ismail 1983 (1) SA 1006 (A) at 1026 added that it is ‘contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society’. The implicit exclusion of Africans and Muslims from ‘society’ invites trenchant criticism (see also A J Kerr (1984) 101 SALJ 445).

2 1983 (1) SA 1006 (A).

3 At 1024.

4 1997 (2) SA 690 (C), 1997 (1) BCLR 77 (C).

5 See IC s 35(3).

6 At 90E-G.

7 This question was not confronted directly in Ryland v Edros 1997 (2) SA 690 (C), 1997 (1) BCLR 77 (C).
Felicity Kaganas and Christina Murray remark that within African customary law it is difficult to envisage a polygynous household in which the husband does not dominate. They consider it arguable that polygyny facilitates stereotyping and the objectification of women to a greater degree than monogamy does.

‘Symbolically polygyny may have become so closely associated with the oppression of women that it could be seen as incompatible with a social order in which the liberation of women is a recognized goal’.  

Yet they are concerned to identify the benefits to women of the system of multiple wives. It enables the sharing of domestic and farm work, provides companionship, reduces sexual demands made on each wife, facilitates the spacing of children, and may even promote independence through freeing wives to engage in economic activities and to join self-help groups.

In the event that the Constitutional Court is seized of a claim that polygyny discriminates against women, the source of the offending notion may require identification since the meaning of the new application clause in the final Constitution is by no means obvious. Polygyny, as has been said above, is a fundamental unwritten notion underlying both African customary and Muslim marriages. But it finds legislative expression also in the Black Administration Act. Section 22(1) of that Act, for example, lays down that a couple between whom a customary ‘union’ subsists may marry each other at civil law, provided that the man is not also a partner in a subsisting customary union with another woman. Here is implicit recognition of the polygynous nature of the African customary marriage. No parallel legislative provision for Muslim marriages could be found.

On the assumption that polygyny does fall within the ambit of the Constitution, and that it is found to be discriminatory, what should the court do? Simply to declare that polygyny is inconsistent with the Constitution and therefore outlawed would create undue confusion. It is submitted that the only feasible option, in these circumstances, would be to invoke the proviso in FC s 172(1)(b)(ii), which permits the court to suspend its declaration of invalidity in order to allow the legislature the opportunity to correct the defect by prohibiting polygyny prospectively; preserving the existing rights of women and children involved in polygynous unions; and fully recognizing customary marriages and Muslim (or Hindu) marriages celebrated in specified circumstances after the reforming legislation.

This ‘solution’ will not be without its problems. First, attention is drawn to the fact that in those communities in which polygyny remains fundamental and is still practised it would probably continue, whatever the law may dictate. The effect of the court’s intervention might simply be to remove from the law’s consciousness (and limited protection) those who participate (some more truly out of free choice than others) in polygyny.

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2 Kaganas & Murray ‘Law, Women and Family’ 129.
3 Kaganas & Murray ‘Law, Women and Family’ 130.
4 Act 38 of 1927.
5 This raises the customary marriage to the status of an impediment to a civil marriage except between the partners to the customary marriage. Section 22 of the Act regulates the civil marriages of Africans and the interface between civil marriage and customary marriage.
Another point that may be raised in objection is that the current refusal of the legal system fully to recognize African customary and Muslim\(^1\) (and Hindu) marriages, because of their polygynous nature, amounts to unfair discrimination based on culture in the first instance and religion in the second.\(^2\) The equality clauses in both Constitutions expressly prohibit both forms of discrimination. The fact that the civil law of marriage is available to Africans and Muslims, as it is not, by contrast, to gay or lesbian couples,\(^3\) may not be a sufficient answer to such objection. Insistence on the monogamy that forms part of our common-law definition of marriage as ‘the legally recognized union for life of one man and one woman, to the exclusion of all others while it lasts’\(^4\) may infringe the culture and religion grounds in the equality clause. In this situation the court would be faced with a conflict between protecting equality on the ground of sex, which, on the assumption outlined above, would require it to strike down polygyny, and preventing discrimination based on culture and religion. It is submitted that here the court must protect sex equality at the expense of culture and religion. This flows from the formulations of the right to culture, and the rights of cultural and religious communities (in FC ss 30 and 31), which effectively subordinate those rights to the equality clause.\(^5\)

34.8 BRIDEWEALTH

The institution of bridewealth (known variously as lobolo, lobola, bohadi) is a contract between the groom and the bride’s father, in terms of which, traditionally, cattle was delivered to the bride’s father in consideration of the transfer of the woman and her reproductive capacity from the father’s family to that of the husband. One of the major purposes of lobolo was to provide security for the woman if the marriage ended through no fault of hers. It remains an essential element of a valid customary marriage in many uncodified systems of African customary law,\(^6\) and is not an uncommon accompaniment to the civil marriages

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1 Ryland v Edros 1997 (2) SA 690 (C), 1997 (1) BCLR 77 (C) did not recognize a Muslim marriage. Rather it enforced the contract which underlay the marriage, which is a different thing. The status of the parties and their children was not altered by the judgment in Ryland v Edros. See also Amod v Multilateral Motor Vehicle Accidents Fund 1997 (12) BCLR 1716 (D).

2 The refusal of our legal system to recognize Muslim marriages has long since been a cause of grievance in the Muslim community. See F Cachalia ‘Citizenship, Muslim Family Law and a Future South African Constitution’ (1993) 56 THRHR 392.

3 Gay and lesbian marriages are entirely prohibited. It seems that our common-law definition of marriage, insisting as it does on heterosexuality, unfairly discriminates against persons on the ground of their sexual orientation — also expressly prohibited by IC s 8 and FC s 9. To say to homosexuals that their incapacity is relative — they can marry, but they must marry a person of the opposite sex — is unlikely in my view to be a good enough answer.

4 ‘Marriage’ is statutorily defined in s 35 of the Black Administration Act as ‘the union of one man with one woman in accordance with any law for the time being in force in any Province governing marriages, but does not include any union contracted under Black law and custom . . .’.

5 See further below, Currie ‘Indigenous Law’ § 36(4)(d) and (e).

6 Cl s 38 of the KwaZulu Code (the KwaZulu Act on the Code of Zulu Law, Act 16 of 1985) and s 38 of the Natal Code of Zulu Law (Proc R151 GG 10966 of 9 October 1987).
of Africans. Section 1 of the Law of Evidence Amendment Act\(^1\) lays down that it shall not be lawful for any court to declare that the custom of *lobolo* is repugnant to public policy or natural justice. Bridewealth is thus a protected institution. But it has not been subjected to constitutional scrutiny against a Bill of Rights demanding equality before the law and outlawing unfair discrimination.

Objections to the payment of bridewealth take the form that the payment of *lobolo* treats women as property, objectifies them, commercializes marriage, and has been corrupted. Bennett concludes that customary marriage has become commercialized and that there is justification for the claim that bridewealth contributes to the subordination of women.\(^2\) He goes on to say that the institution is now dysfunctional, having none of the benefits previously claimed for it. Sandra Burman,\(^3\) on the other hand, sees possibilities for the updating of the institution so that it might serve its original purpose of providing a safety-net for the woman and her children.

The rejection of *lobolo* on the ground that it infringes equality or undermines efforts to create a society in which men and women are treated equally seems to be the correct conclusion. The issue is, however, an extremely sensitive one. Far better than a challenge in the courts would be legislation regulating the matter. The legislature would likely reflect the views of the people better than a court of unelected judges. If nothing else, the legislature is more likely to be seen as legitimate.

### 34.9 Gay and Lesbian Relationships

In a number of recent cases the equality clause has been used successfully to increase recognition of gay and lesbian relationships. In *Langemaat v Minister of Safety and Security & others*\(^4\) the applicant was a member of the South African Police Services and the Police Medical Aid scheme (Polmed). She was in a stable, long-term lesbian relationship and she had unsuccessfully tried to register her partner as a dependant for medical aid purposes. Her application to the fund had been automatically refused because Polmed’s rules made provision only for legal spouses (and children) to be registered as dependants. The applicant proceeded to challenge the relevant rules of the medical aid scheme on the basis that they violated the equality clause by discriminating unfairly against her on the basis of her sexual orientation.\(^5\) Roux J made the far-reaching finding that ‘*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*’.\(^6\) Polmed’s rules which automatically excluded partners in same-sex relationships from being registered as dependants thus could not survive constitutional scrutiny.

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4. 1998 (3) SA 312 (T), 1998 (4) BCLR 444 (T).
5. FC s 9(3).
6. At 316H–I.

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A similar fate befell s 25(5) of the Aliens Control Act\(^1\) in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*.\(^2\) Section 25(5) confers on foreign spouses and dependant children of South African citizens certain immigration privileges. These privileges are not available to same-sex life partners. Davis J accordingly struck down the section as an unconstitutional provision that discriminated unfairly on grounds of sexual orientation.

Alongside *Langemaat* and *National Coalition for Gay and Lesbian Equality* there has been a welcome, if unduly cautious, retreat from the homophobic decision in *Van Rooyen v Van Rooyen*,\(^3\) where the court structured an order regulating a lesbian mother’s access to her children to protect the latter from ‘the wrong signals’ they might receive from their mother’s intimate relationship with her partner. *V v V*\(^4\) concerned a custody order flowing out of a divorce where the defendant was now involved in a lesbian relationship. After referring to the equality clause, Foxcroft J observed that the law could not continue to treat gay and lesbian relationships as abnormal. He also pointed out that to deny a lesbian mother custody of her children had implications not only for her rights to equality\(^5\) but also for her children’s rights to parental care. Foxcroft J accordingly declined the plaintiff’s invitation to follow *Van Rooyen v Van Rooyen*. Instead, he made an order of joint custody which, he held, would be consistent both with the constitutional rights of the defendant and with the best interests of the children.

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\(^1\) Act 96 of 1991.

\(^2\) 1999 (3) SA 173 (C), 1999 (3) BCLR 280 (C).

\(^3\) 1994 (2) SA 325 (W).

\(^4\) 1998 (4) SA 169 (C).

\(^5\) See also *Ex parte Critchfield & another* 1999 (3) SA 132 (W) at 139B–D.