

Lesbians and the Civil Union Act: A critical reflection

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South Africa is the only country on the African continent to have enshrined the right to protection from discrimination based on sexual orientation in its Constitution. Through protracted litigation, homosexuals have been afforded significant rights, most recently the right to marry as legislated in the Civil Union Act, signed into law by Deputy President Phumzile Mlambo-Ngcuka on 30 November 2006. For many lesbian, gay, bisexual, transgender and intersexed (LGBTI) activists this Act represents the culmination of the process begun in the early 1990s with the lobbying of the African National Congress and other political parties to include the prevention of discrimination on the basis of sexual orientation in the equality clause of the Bill of Rights.¹

Lesbians have played a key role in the litigation for rights that are otherwise automatically given to married heterosexual women. These include the right to a deceased partner's pension benefits; the right to immigration of foreign partners; the recognition of children born to same-sex couples by way of donor insemination; the right to non-discrimination in employment; full custody of children in instances of divorce; and the right to become joint, legal parents of adopted children.

The story of litigation for the right to marry ends in the Constitutional Court's *Fourie* judgment in 2006, but in the precedent-setting lead-up to the marriage victory there were significant cases in which lesbians also played a leading role. In *Greyling v Minister of Welfare* (1998) it was found that a lesbian mother could keep her child and not have to hand it over to its grandparents, and in *Mohapi v Mohapi* (1998) a lesbian woman gained full custody of her child.² In *Du Toit and De Vos v the Minister of Welfare and Population Development and Others* (2002) lesbian and gay couples were given the right to become joint, legal parents of adopted children. In 2002, Kathy Satchwell (a High Court judge) sued for her female partner's right to receive the same financial benefits afforded to a heterosexual spouse by the state. In the *Greyling*, *Mohapi* and *Du Toit* cases the issue of the 'shaping and recognition of an alternative parenthood and family' was deemed to be of the essence. In this way, lesbians have contributed notably to a rethinking of marriage and the family as well as to the claiming of their rights. (See pages 55-57.)

These cases give an indication of how lesbian and gay activists have over the last few years successfully chiselled away at deeply patriarchal and sexist institutions. Marriage was regarded as one of the last remaining obstacles to full

equality. It is undeniably important that all South Africa's citizens be afforded all the rights as set out in the Bill of Rights, but we need to ask what the meaning of same-sex marriage is for lesbians – in particular for black lesbians – and to locate such a question within the context of South Africa's present-day socio-economic realities.

The right to marry offers the promise of more substantive equality and inclusive citizenship. At the same time, it must be remembered that the state has consistently been the most ardent opponent in almost every precedent-setting case.³ It can be argued that South Africa does not, in fact, have a benevolent state that embraces the diversity of all its citizens, but has to be forced to live up to its obligations in terms of the Constitution.⁴ Furthermore, the right to marry may confer legal equality on LGBTI people, but we should not overestimate its importance or its efficacy in the battle against homophobic prejudice.

The pursuit of access to LGBTI rights is inflected by race and class. Much of the litigation for these rights has been conducted by privileged, white, educated middle-class lesbian and gay people, or has been driven by LGBTI organizations chiefly funded by foreign donors – although the foot soldiers, supporters and lobbyists came from across gender, race and class divisions. Thus race, class and education give some a distinct advantage in the claiming of constitutional rights such as financial benefits, the right to adopt, to take advantage of donor insemination, and so forth. By contrast, the claim of majority working-class black lesbians to their constitutional rights – and therefore to safety and security – are under the continuous threat of extreme violence, including brutal forms of 'curative' rape and murder.

Lesbian feminism and the problematization of marriage

'That black sister on radio must come here and I will show her what a woman is for' – this comment was made to Nonhlanhla Mkhize, director of the Durban Lesbian and Gay Community and Health Centre, during a radio debate on the Civil Union Bill in 2006. Two years earlier, an unknown lesbian testified to documentary-maker Lovinsa Kavumba, 'I was raped because they wanted to know whether I was a woman.'⁵

Even in a society where violence against women in general is widespread, the rape and murder of black lesbians is sinister. Very particular to South Africa is the 'curative' or 'correctional' rape of black lesbians – the bizarre belief, if it is a genuine belief, that such acts can convert a woman to heterosexuality. Over the last few years there have been several cases of rape and murder of black women who dared to live openly as lesbians. Many of these murders were first highlighted by the 'A Rose Has Thorns' campaign run by the Forum for the Empowerment of Women (FEW), an empowerment and support organization for black lesbians in Gauteng. Zoliswa Nkonyana was murdered in Khayelitsha in February 2006

by a group of young men because she dared to be a lesbian; her friend, also a lesbian, was stabbed in October of the same year. In April 2007, 16-year-old Madoe Mafubedoe, who was openly living as a lesbian, was raped and stabbed to death; on 7 July 2007 Sizakele Sigasa and Salome Masooa were brutally tortured, raped and killed in Meadowlands, Soweto, and their bodies dumped in a nearby field. Just over two weeks later, on 23 July 2007, another lesbian, Thokozane Qwabe, was murdered in Ezakeni, Ladysmith.

Such acts lead one to wonder about the hatred directed at black lesbians and why it is so deep-seated. Is it because these lesbians defy traditional heterosexual norms and challenge patriarchy, heterosexism, culture, religion and masculinity? Is it because they dare to live their sexuality without needing men to economically support or give them their identity? Certainly, lesbianism challenges patriarchal values – and marriage is one of those values. Alongside the strong resistance to the legalization of same-sex marriage from conservative religious bodies, one of its greatest opponents was Contralesa, the Congress of Traditional Leaders of South Africa.⁶

Feminism made it clear that the personal is the political, and this is no more obvious than in the cases mentioned above. There remains the conflict in our jurisprudence between laws that govern public activities and those that relate to private lives. Marriage is a public act that puts private, personal relationships on a social stage. It is important for lesbians to understand this paradox in our legal system if they decide that their lifestyle and sexual orientation is a private affair, because in such a case there is hardly any recourse for redress in cases of discrimination. There have been numerous undocumented narratives by lesbians who claimed that they have lost everything to their deceased partner's family because they could make no claim to a legitimate relationship

Although feminists have historically been proponents of the granting of liberal rights to ensure equality for women in both the private and public domains, some have also been antagonistic towards institutions such as marriage. Marriage, they contend, is a patriarchal institution that poses severe impediments to the freedoms women have fought for. As Ralph Smith and Russel Windes put it, 'The fundamental truth of marriage is that it is seen as a heterosexual institution: a union of one man and one woman as man and wife.'⁷

In her book *The Creation of Patriarchy*, Gerda Lerner⁸ traces the systematic subordination of women through the ages and points to the fact that women's sexuality and reproductive potential held the capacity to acquire property and wealth for men on many different levels. Historically, a man's wealth could be measured in terms of the number of wives he had and the number of children he could father; women were thus seen as part of his larger material property. Paula Giddings mentions Plato, 'who placed women into three categories: whore, mistress and wife – the last of whom was expected to organize the household

and provide 'legitimate' heirs to their husband's material acquisitions.'⁹ Modernity has changed the means of wealth creation, but patriarchal ideas – which are deeply entrenched in our society – still see women as the property of men.

Hence some feminists argue that marriage is essentially a patriarchal institution and its main purpose is to control women's bodies and sexuality. Marriage is firmly embedded in the 'private' domain, giving men power over a woman's reproductive rights, as well as unlimited access to unpaid domestic labour. As the anarchist thinker Emma Goldman observed, 'Marriage makes woman a parasite at best, a prostitute at worst.'¹⁰

Coming from within the broader feminist movement, it was lesbian feminists who tended to take this radical view. Some felt that the wider feminist movement failed to include the specific needs of lesbians, and in many instances were in fact hostile towards those needs. Because of this disillusionment with the exclusion of lesbian-specific concerns, lesbian feminists developed theories and strategies to emphasize their specific needs. Consequently they focused less on the extension of liberal rights and more on seeking to dismantle patriarchal and heterosexist institutions in general. One of their strategies was (and is) to promote lesbianism as a *choice* for women.

Lesbian feminists question the institution of marriage, which is traditionally based on the union between one man and a woman to the exclusion of all others – the common-law definition we had in the past. The radical lesbians of the early 1970s imagined a society free of oppression of any sex or gender, and in which the categories of homosexuality and heterosexuality would disappear. They were deeply suspicious of monogamy and saw it as part of the oppression of women. They also came out strongly against the butch/femme stereotype within lesbian culture, seeing it as a perpetuation of patriarchal and heterosexist roles.¹¹

Adrienne Rich¹² contends that any form of feminist theory that considers lesbianism as simply an 'alternative lifestyle' or a mere 'sexual preference' is inherently flawed. She uses the terms 'lesbian existence' and 'lesbian continuum', indicating that lesbians have always been part of history and that there are a variety of women-identified experiences that do not necessarily focus on the desired genital sexual experience. These experiences include a myriad relationships of mutual support and love between women. Rich and other lesbian theorists questioned the assumption that heterosexuality is normal and natural, and indicated that honest feminist analysis will prove that many women are forced to live heterosexual lives and thus to marry.¹³

Sheila Jeffreys argues that such lesbian political theory transformed lesbianism from a stigmatized sexual practice into a political practice that challenges male supremacy and thus its basic institution, heterosexual marriage.¹⁴ These interventions are important because they draw a connection between patriarchy

and heterosexuality. From this perspective, it is important to identify lesbian identities and relationships as disruptive of the status quo. This analysis of marriage is crucial in considering its underlying social and ideological meanings. It means we need to think about the distinct political and social positioning of particular groups within the larger LGBTI community. We need to take into account the particular class-inflected, gendered and racialized ways in which certain groups, more than others, stand to lose from marriage as an institution.

Lesbian feminists felt excluded from the broader feminist movement, and black feminists experienced exclusion from white feminist discourse. Black feminists, amongst them Audre Lorde, Patricia Hill Collins and bell hooks, felt that white middle-class feminist theory excluded their realities, or, if included in mainstream theorization, their experiences merely became an add-on. They laid great emphasis on the intersectionality of race, class and sex.

This approach to intersecting identities and oppressions is clearly evident in the work of Barbara Smith: 'Feminism is the political theory and practice that struggles to free *all* women: women of color, working-class women, poor women, disabled women, lesbians, old women – as well as white, economically privileged, heterosexual women. Anything less than this vision of total freedom is not feminism, but merely female self-aggrandizement.'¹⁵

bell hooks takes this further, arguing that poor black women could hardly afford to seek social equality with black men, since the majority of black men are also exploited and oppressed.¹⁶ Kimberlé Crenshaw also challenges the mainstream feminist view that the battle is about powerful men and powerless women: 'Black men and women live in a society that creates sex-based norms and expectations which racism operates simultaneously to deny; black men are not viewed as powerful, nor are black women seen as passive.'¹⁷

Even black women's experience of violence is different. Ien Ang uses the well-known maxim '*No means No*' as a poignant example. She points to the fact that when that slogan is used by a white woman it implies a certain culturally loaded context. The slogan belongs to a 'repertoire of rules for social interaction which prizes individualism, conversational explicitness, directness and efficiency – something that may not be available to 'other' women.'¹⁸ This is a very important statement, as will become clear when we consider the environment in which black lesbians in South Africa have to negotiate their lives.

Black women's bodies have long been a site of sexual violence. Valerie Amos and Prathibha Parmar note that 'Black women's sexuality has been used in various oppressive ways throughout imperialist history. For instance, during slavery women were forced to breed slave labour force, raped, assaulted and experimented on; practices that still continue today under "scientific" and sophisticated disguises.'¹⁹

In South Africa, the sexual domination of indigenous women can be traced back to the beginning of the 1650s and European occupation of the land. It was common practice for settlers to have sexual relations with slave women, and the most valued slave was a child of a slave mother and white father. Thus women slaves were 'valued' in terms of their reproductive roles as well as their labour. As Giddings reminds us, 'The black woman alone could give birth to a slave. Blacks constituted a permanent labor force and metaphor that were perpetuated through the black woman's womb.'²⁰ Hence the necessity, even long after the demise of slavery and the dismantling of colonialism, for women to decolonize their bodies, as Cheryl Clarke puts it.²¹ Lesbians – especially black lesbians – living out their sexuality may be the most radical form of such 'decolonization'.

What, then, might marriage mean to a black lesbian?

The meanings of same-sex marriage: A speculation

It is crucial to consider how lesbian women actually experience marriage, and what psychological, legal, social and emotional value they may derive from it. Exploring this topic in detail would require careful investigation. In the discussion that follows I will simply identify some important patterns that might be useful for further research. LGBTI people may be able to achieve important rights and social acceptance within the broader heteronormative society through their ability to marry, but by the same token they can actually validate heterosexist and patriarchal social norms by turning to marriage and entrenching gendered behaviours such as butch/femme roles in their relationships. At the same time, lesbian women and gay men, but especially lesbians, have crafted institutions that somehow transcend heterosexist ones and can use marriage to confirm their own social structures.

In South African townships the butch/femme stereotype persists, both for men and for women. The perceived necessary pairing is that of a masculine-seeming person with a feminine-seeming person. This is a form of assimilation to heterosexist norms. Rather than requiring friends and family to embrace their union on their own terms, many lesbian and gay people naturally want to 'fit in', to make their behaviour, their roles, and their conduct echo patterns evident in mainstream heterosexist society. Since marriage has been traditionally the union of a man and a woman, it may be that there is more pressure for lesbian and gay couples to indulge in roles that mimic such norms.

At the same time, the heterosexual institution of marriage may be disrupted, challenged and transformed by the addition of alternative perceptions and practices of marriage. Same-sex and heterosexual marriages are often seen to be alike, but there are many different interpretations of apparently similar values. The concept of sexual monogamy, for instance, is not as firmly cemented in same-sex marriage as it is in heterosexual marriage.²² According to Josephine Mills and Leila Armstrong, same-sex marriage has the potential to create a

social network of ‘family’ that is inclusive of past and present partners and children and couplings that challenge the historical notion of marriage.²³ Many non-heterosexuals, argues Jeffrey Weeks, strongly believe that they have greater opportunities than most heterosexuals to achieve egalitarian relationships.²⁴

Over and above the desire on the part of lesbian and gay people to get married so that their intimate relationships can be publicly and legally recognized, legislation such as the Civil Union Act restructures families. Lesbians in long-term partnerships have long been adopting children, but previously the law only allowed for one member of the couple to become the legal parent. It was argued that to ensure that both are acknowledged as the legal parents of either the adopted child(ren), or of offspring through artificial insemination, marriage would be the best way to ensure legal parenthood. Procreation may or may not be one of the reasons why lesbian and gay people want to marry. Many lesbian and gay people have children already – from previous relationships, through adoption, artificial insemination, or, in many instances in South Africa, rape.

Black lesbians have always negotiated their socialization and their complex relationships within an extreme heteronormative, patriarchal and oppressive society. One of the first same-sex couples to publicly express their intention to get married under the new Civil Union Act was a lesbian couple from Soweto; they were aware that neither their community nor the broader society would accept their marriage.²⁵ If they went ahead one cannot but admire their courage. The statistics on same-sex marriages since the Bill was passed indicate that LGBTI people are using the institution of marriage as a means to gain acknowledgement of their relationships: between 1 December 2006 and 31 December 2007, 935 couples formed civil unions; 519 of those were lesbian couples.²⁶

Because of South Africa’s apartheid history, race still plays a divisive role even within the historically oppressed LGBTI community. Black lesbians tend to form intimate relationships within their specific ‘race’ groups. This can be ascribed to a variety of factors, among them the fact that many still reside in the historically black residential areas and attend historically racialized educational institutions. Race, class and economics play important roles in the formation of lesbian networks. Legal transformation has not translated into socio-economic transformation. During the apartheid years, the privileged middle-class homosexual could afford to pay for privacy and anonymity; in the post-apartheid era, such people can afford to pay for the acquisition of their constitutional rights.

For many lesbians the issue is still to be able to survive in an aggressively hostile world. Marriage includes legal contracts; marriage shifts the boundaries of commitment into the legal sphere; marriage also includes the possibility of divorce. So far same-sex marriage has not destigmatized same-sex love and relationships. It has, however, destabilized and challenged the notion of marriage

as an exclusively heterosexual preserve, and thus the basis of heteronormativity. The wide public coverage given to the hearings around the Civil Union Act – and the opposition from religious groups and organizations such as Contralesa – indicates the degree to which it upsets patriarchal norms.

For a long time, lesbians have been in stable relationships and have raised families within the confines of conservative and prejudiced communities. Black lesbians, in particular, have, in spite of cultural and religious pressures, defied the constriction of normalized heterosexuality. As in many other areas of post-apartheid South African life, there has been gradual change in the level of acceptance of previously taboo practices; hence there is hope that same-sex marriages will lead to greater tolerance of alternative sexualities.

In the course of lobbying for the right to complete and inclusive citizenship, lesbians have already had a far-reaching effect on the transformation of South African society. The building of case law challenged religious morals, customary practices and patriarchal perceptions – and set precedents that transformed the law. Lesbians have brought about new transfigurations of the definition of conception and birth, and of family law; and they have introduced new dimensions to the Birth and Registration Act, the Children's Act and divorce law. Lesbians too have shaped inheritance law because by getting married they automatically receive the same inheritance privileges that heterosexual married women have been awarded all along, as well as the same financial benefits for same-sex partners. In fact, the field of jurisprudence has unequivocally been transformed. South African citizenship has acquired a whole new meaning. Lesbians in this country have upstaged the patriarchy and heterosexism like no other activist group has ever done.

The backlash against such advances may be read in the irrational fear that translates into violence against lesbians – as well as continued, everyday discrimination. A pertinent case would be that of a white lesbian who made inquiries at a hospital about fertility treatment and was turned away because of the hospital's exclusionary policy.²⁷ This kind of discrimination is still deeply embedded in our society. Members of the LGBTI community who belong to the working class, especially the black working class, are still struggling with issues of acceptance by family, community and religious structures; with matters of identity and empowerment of the self. As Supreme Court of Appeal Judge Edwin Cameron has said: 'There is rampant racism, rampant inequality and prejudice against gays and lesbians. We have a long way to go before the constitutional promises are translated.'²⁸ In spite of progressive laws such as the Civil Union Act, there is still a need for the education of the broader community in which we live to understand and accept the diversity that exists within it, and within the homosexual community itself.

Notes

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- 2 *Mohapi v Mohapi* (WLD 1998, unreported); *Greyling v Minister of Welfare and Population Development* (WLD case no. 98/8297, unreported), cited in Human Rights Watch, *More than a Name: State-Sponsored Homophobia and Its Consequences in Southern Africa* (Human Rights Watch, 2003), 184; <http://www.hrw.org/reports/2003/safrica/safriglhc0303.pdf> (last accessed 10 December 2007)
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- 4 Mary Hames, 'Sexual Identity and Transformation at a South African University', *Social Dynamics*, 33:1 (June 2007), 53
- 5 Lovinsa Kavuma (producer/director), *Rape for Who I Am* (documentary, DVD, 2004)
- 6 'Contralesa Slams Legalisation of Gay Marriages', <http://www.africanveil.org/Southafrica084.htm> (last accessed 10 December 2007)
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- 9 Paula Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America*, second edition (Quill/William Morrow, 1996), 34
- 10 Quoted in Maria Bevacqua, 'Feminist Theory and the Question of Lesbian and Gay Marriage', *Feminism and Psychology* 14:1 (2004), 36
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- 12 Adrienne Rich, 'Compulsory Heterosexuality and Lesbian Existence', *Signs* 5:4 (1980), 632
- 13 Bevacqua, *op. cit.*, 37
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- 15 Barbara Smith, *The Truth That Never Hurts: Writings on Race, Gender, and Freedom* (Rutgers University Press, 2000), 50
- 16 bell hooks, *Talking Back: Thinking Feminist, Thinking Black* (South End Press, 1989), 19
- 17 Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', in Joy James and T Denean Sharpley-Whiting (eds.), *The Black Feminist Reader* (Blackwell, 2000), 222
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- 21 Cheryl Clarke, 'Lesbianism: An Act of Resistance', in Beverly Guy-Sheftall (ed.), *Words of Fire: An Anthology of African-American Feminist Thought* (The New Press, 1995), 242
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- 24 Jeffrey Weeks, 'Same-sex Partnerships', *Feminism and Psychology* 14:1 (2004), 162

25 'A Couple Wants First Wedding' (2006), <http://www.africanveil.org/Southafrica064.htm> (last accessed 11 December 2007)

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28 Candice Bailey, 'Gay Rights Still Just a Promise, Says Judge', *Cape Argus*, 14 August 2007