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THE SOUTH AFRICAN BILL OF RIGHTS AND THE DEVELOPMENT OF FAMILY LAW

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1 INTRODUCTION

Family law is probably the area of South African private law which has expanded and changed most rapidly in the past nine years. Many of these changes have come about as a result of the enactment of a Bill of Rights in both the interim and the final Constitution.[1] On the one hand, this is not surprising, since family law contains many legal rules which are overtly discriminatory on the bases of sex, gender, culture, religion and sexual orientation. On the other hand, legal rules in this area represent a codification of moral and social norms in the quotidian and 'private' lives of many people, which are often resistant to scrutiny and change.[2]

This article represents a preliminary investigation into the influence of constitutional rights on family law. Although I also refer to legislation enacted to give content to fundamental rights, my primary interest lies in judicial responses to the interaction between the Constitution and family law. In the first part I address general issues around the development of the common law in light of the Constitution, while the second part contains more specific analyses of the articulation of fundamental rights in family law. Although family law contains a great deal of common-law rules, I also include cases which deal with the constitutionality of legislation, because tests and approaches developed in assessing the constitutionality of legislation, like the definition of equality, are also relevant to the development of the common law.

The relationship between the Bill of Rights and existing legal rules is commonly described in terms of two distinctions: that between horizontal and vertical application and between direct and indirect application.[3] The issue of horizontal and vertical application of the Bill of Rights relates to the

* LLB LLM (Stell) PhD (Cantab). I wish to thank the following people for assistance in finding materials, reading and commenting on this article: Angelo Pantazis, Marius Pieterse and Chris Roederer.

[1] Acts 200 of 1993 and 108 of 1996, hereinafter referred to, respectively, as the interim Constitution and the final Constitution.

[2] The extent of changes in family law in response to fundamental human rights can be contrasted with other areas of private law, such as the law of contract, where the courts are less willing to change common-law rules. See *Garden Cities Incorporated Association Not For Gain v Northpine Islamic Society* 1999 (2) SA 268 (C); *Knox D'Arcy Ltd v Shaw* 1996 (2) SA 651 (W).

[3] Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* 4 ed (2001) 45–6.

parties who are subject to the operation of the Bill of Rights. It is clear that the Bill of Rights applies vertically in that actions by state organs are subject to its provisions.[4] This reflects the traditional function of constitutional guarantees which is to protect the individual from potentially harmful state action.[5]

Horizontal operation of the Bill of Rights would extend this constitutional function to also protect individuals against potentially harmful actions from other individuals.[6] In *Du Plessis v De Klerk*[7] the Constitutional Court held that the interim Constitution could apply horizontally, but that its horizontal operation could only be indirect. The issue is now regulated by s 8(2) of the final Constitution which determines that: '[a] provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' The reference to the nature of the right relates to the fact that certain fundamental rights in the Bill of Rights are, as a result of their formulation, directly applicable to natural persons. Thus, s 9(4) indicates that 'no person may unfairly discriminate directly or indirectly against anyone' on certain grounds,[8] while s 12(1)(c) contains the right 'to be free from all forms of violence from either public or private sources'.[9]

Where it has been established that the Bill of Rights applies to the actions of a natural person, s 8(3) determines as follows:

> 'When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court —
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right.'

This relates to the distinction between direct and indirect application of the Bill of Rights. Direct application would mean that the Bill of Rights overrides any law which conflicts with it and provides litigants who rely on fundamental rights with special remedies based on their fundamental rights.[10] It would also be possible to found a cause of action on specific fundamental rights without recourse to legislation or the common law.[11] Where the fundamental rights in the Bill of Rights apply indirectly, they do not found a cause of action, but function instead as higher values which provide guidelines for the interpretation and application of existing legal rules, which in turn determine the procedures followed and remedies awarded.[12]

[4] Section 8(1) of the final Constitution determines that '[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'

[5] Alfred Cockrell 'Private law and the Bill of Rights: A threshold issue of "horizontality" ' in *Bill of Rights Compendium* Service Issue 10 (2001) para 3A2.

[6] De Waal et al op cit note 3 at 46.

[7] 1996 (3) SA 850 (CC).

[8] The subsection also requires that legislation be enacted to prevent unfair, private discrimination.

[9] De Waal et al op cit note 3 at 56–7. A detailed discussion of the horizontal application of fundamental rights does not form part of this article. See De Waal et al op cit note 3 at 55–7.

[10] De Waal et al op cit note 3 at 37. Constitutional remedies could also consist of existing common-law actions applied to new situations.

[11] Cockrell op cit note 5 para 3A4.

[12] De Waal et al op cit note 3 at 37; Cockrell op cit note 5 para 3A4; Johan van der Walt '*Progressive* indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence' 2001 (17) *SAJHR* 341 at 345.

Alfred Cockrell indicates that debates around the horizontal application of the Bill of Rights often conflate two issues which are, on the one hand, whether the common law should be subject to the Bill of Rights and, on the other hand, whether private individuals are subject to the Bill of Rights.[13] These should remain distinct, because the common law not only regulates relations between individuals, but also contains rules pertaining to state action.[14] Horizontality therefore relates only to the parties involved in litigation and not necessarily to whether the common law is involved.

Moreover, the impression that all disputes involving the common law would only be indirectly subject to the Bill of Rights, while matters involving legislation would always involve direct application of the Bill of Rights is also incorrect. The Bill of Rights can be applied directly or indirectly to both the common law and legislation. In the case of legislation, indirect application of the Bill of Rights would involve the process of reading down or reading in so that legislation is interpreted according to constitutional values,[15] a process similar to that of developing the common law to reflect the values underlying the Bill of Rights. Direct application of the Bill of Rights to common law would involve those admittedly rare situations where there are no existing common-law rules and remedies to deal with a situation and would require courts to create new common-law remedies.[16]

Family law concerns itself primarily with relations between private individuals such as husbands and wives or parents and children. Therefore constitutional challenges to law family-law rules will often be horizontal. However, family law is comprised of both statutory law and common law and can therefore also be challenged vertically.

Cockrell indicates that as a result of the particular structure of horizontal application in the final Constitution,

> 'the common law is required to play a mediating role, for it is the common law that must be applied or developed in order to give effect to the conclusion already reached (namely, that a particular right binds a private agency). Expressed differently, we may say that constitutional rights do not apply against private agencies in a free-floating manner, for any conclusion reached in terms of section 8(2) is firmly attached to the application and development of the common law in terms of section 8(3).'[17]

This incorporates a 'substantive' style of reasoning into family law, which has hitherto often been more comfortable with formalistic legal reasoning.[18] The

[13] Cockrell op cit note 5 para 3A2.

[14] Cockrell op cit note 5 para 3A3.

[15] De Waal et al op cit note 3 at 70–5. They indicate at 66–70 that this process is the result of the constitutional preference for judicial minimalism. Judicial minimalism will be discussed below.

[16] See for instance *Jooste v Botha* 2000 (2) SA 199 (T) and the discussion of the case by Van der Walt op cit note 12 at 352–5. The issue of direct vertical application of the Bill of Rights has been discussed in depth. See for instance Halton Cheadle & Dennis Davis 'The application of the 1996 Constitution in the private sphere' 1997 (13) *SAJHR* 44 at 61; Chris Sprigman & Michael Osborne '*Du Plessis* is not dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes' (1999) 15 *SAJHR* 25. This debate falls outside the scope of this article.

[17] Cockrell op cit note 5 para 3A10.

[18] Cockrell op cit note 5 para 3A10. See also A P H Cockrell 'Adjudication styles in South African private law' (1993) 56 *THRHR* 590; Alfred Cockrell 'Rainbow jurisprudence' (1996) 12 *SAJHR* 1. This issue will be discussed more fully below.

aim of this article is to provide an analysis and evaluation of different aspects of the way in which courts have fared in this project.

2 OVERVIEW OF AREAS DEALING WITH HUMAN RIGHTS IN FAMILY LAW

2.1 *General*

The purpose of this overview is twofold. It provides a context for the more theoretical discussion which follows and draws attention to developing patterns of jurisprudence within the broader framework of family law. I have surveyed family law cases in certain broad categories: immigration, gay and lesbian families, customary marriage, Muslim marriage, rights of unmarried fathers, relocation, adoption and custody of children, abduction and domestic violence and socio-economic rights of family members. Although some cases do not fall strictly within the realm of family law, they contain formulations of certain fundamental rights which are crucial to the development of family law. Cases dealing with gay and lesbian families, customary law and Muslim marriages are primarily concerned with the recognition of different family groupings and whether the right to family life should be afforded to them as groups. The other categories of cases deal with the relationships between family members, particularly in their roles as parents and children. In this regard the constitutional principle of the best interests of the child plays a central role. However, issues of gender equality are often relevant, especially where rights awarded to parents are gender-specific.

2.2 *Immigration cases and the right to family life*

Unlike many international instruments, neither the interim nor the final Constitutions contain rights to family life. Whether the final Constitution was defective because of this was one of the issues in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996.*[19] The court pointed out that there was no international consensus on the necessity for an express right to family life in a constitution, since its presence could fuel controversy about the definition of family life and the ceremonies and formalities which establish a family. It was therefore open to the Constitutional Assembly to protect this right either directly or indirectly. Family life is indirectly protected by the rights of detained persons to communicate with their families and the rights of children to parental or family care. Moreover, the right to dignity indirectly protects family life because any law which infringes the right to marry the person of one's choice, for instance, would also infringe the right to dignity.

This early indication of the incorporation of the right to family life within the right to dignity is developed and applied in several cases dealing with immigration laws which deter spouses and their children from living

[19] 1996 (4) SA 744 (CC), paras 98–102.

together.[20] Particularly important is the Constitutional Court's dictum in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*[21] that families take different forms, and that the state should not entrench one form of family at the expense of others.[22] Any restriction on the abilities of spouses to honour their obligations to one another would infringe upon their rights to dignity and could be unconstitutional.[23]

2.3 *Legal protection of different family groups*

2.3.1 *Gay and lesbian families*

The first extensive analysis of equality in relation to sexual orientation by a High Court can be found in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[24] in which the Coalition challenged the constitutional validity of the common-law and statutory crimes prohibiting gay sexual conduct. Citing Constitutional Court authority on the meaning of the right to dignity, patterns of harm and group disadvantage,[25] the court applied the rational connection test to decide whether the differentiation between gay and straight men served a legitimate government purpose. It held that the criminal prohibitions deprive gay men of the satisfaction of a basic human need which is central to family life, while heterosexual men are not similarly limited in their sexual expression.[26] Since there is no logical basis for this distinction, and since religious or popular beliefs cannot provide such a basis,[27] the court found the offences to be unconstitutional. The link between sexual expression and family life is an important precursor to later cases which extend the right to family life to gay and lesbian partners. Cathi Albertyn and Beth Goldblatt point out that the court's focus on rational connection means that the judgment does not deal with issues of substantial equality and fails to take account of historical patterns of discrimination.[28]

This focus was expressly adopted when the matter came to be confirmed by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.[29] Quoting *Harksen v Lane NO*,[30] the court held that the impact of discrimination on the particular complainants and other members

[20] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (1) SA 997 (C); *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC); *Patel v Minister of Home Affairs* 2000 (2) SA 343 (D); *Makinana v Minister of Home Affairs; Keelty v Minister of Home Affairs* 2001 (6) BCLR 581 (C); *Booysen v Minister of Home Affairs* 2001 (4) SA 485 (CC).

[21] Supra note 20.

[22] Paragraph 31.

[23] Paragraph 37.

[24] 1998 (6) BCLR 726 (W).

[25] At 744C–D, 744H–I and 745F.

[26] At 746E–F.

[27] At 746–8.

[28] 'The decriminalization of gay sexual offences: *The National Coalition for Gay and Lesbian Equality v The Minister of Justice and Others* 1998 (6) BCLR 726 (W)' (1998) 14 *SAJHR* 461 at 463–5.

[29] 1999 (1) SA 6 (CC). The Constitutional Court held that where unfair and unjustifiable discrimination is established there is no need to deal with the rational connection test. See para 18.

[30] 1998 (1) SA 300 (CC), paras 50–1.

of their group will determine whether the discrimination is unfair. This would require an analysis of the position which the complainants occupy in society, the existence of patterns of historical disadvantage and the impact of the discrimination on their dignity.[31] The court held that in order to understand the position of the complainant group fully, it should attempt to place itself in its position.[32] This is significant, since it indicates a shift from the traditional legal epistemology of objectivity and neutrality to one of imaginative empathy in equality jurisprudence. Gay men were described as a permanent minority who lack the political power to improve their social and legal position.[33] Describing their position, the court pointed to existing social prejudice, discrimination in areas such as employment and insurance, the impact of harmful stereotypes on their psychological welfare, and the way in which the prohibition of gay sexual activities encourages harmful behaviour like blackmail, anti-gay violence and police entrapment. Given their impact on the lives of gay men, the statutory and common-law prohibitions therefore constituted unfair discrimination and were struck down.[34]

Moreover, the disputed provisions also infringed the complainants' rights to dignity and privacy, since grounds of unfair discrimination can intersect to produce overlapping vulnerability.[35] The minority judgment extended the right to privacy beyond the right to be left alone to encompass the right to establish and live in supportive personal and public contexts and relationships. This entails a duty upon the state to establish the conditions for the fulfilment of this right.[36] However, both the minority and majority judgments are notable for using the privacy right to focus on the protection of *relationships* rather than sexual *acts* in private.

A failure to extend immigration exemptions in favour of spouses in civil and customary marriages to same-sex couples was declared unconstitutional in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs.*[37] While the High Court found the legislation discriminatory on the basis of sexual orientation,[38] the Constitutional Court found overlapping discrimination on the bases of sexual orientation and marital status.[39] As in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[40] it again embarked upon an in-depth analysis of the impact of the discrimination on the dignity of the complainants,[41] focusing particularly on stereotypical definitions of gay

[31] Paragraph 19.
[32] Paragraph 22.
[33] Paragraph 25.
[34] Paragraphs 23–4 and 26.
[35] Paragraphs 30 and 113–14.
[36] The majority judgment, in para 32, defined privacy as the right to 'establish and nurture human relationships without interference from the outside community'. The minority judgment by Sachs J linked the right to privacy to the right to identity and emphasized the fact that rights are not exercised in isolation, but by people as members of communities. See paras 116–19.
[37] 1999 (3) SA 173 (C). The judgment was confirmed by the Constitutional Court, the decision of which was reported in 2000 (2) SA 1 (CC).
[38] At 185H.
[39] Paragraphs 39–40.
[40] Supra note 29.
[41] Paragraph 41.

and lesbian couples in terms of their sexual practices and their inability to procreate 'naturally', which devalue the family lives of same-sex couples.[42] The court held that same-sex partners could establish all the elements of the consortium omnis vitae, which in common law define a family, and that they should therefore be afforded the legal protection available to other families.[43] The implications for the validity of Muslim marriages and for the rights of cohabitants were expressly limited.[44] This dictum arguably implies that the common-law definition of marriage as the legally recognized voluntary union for life of one man and one woman to the exclusion of all others while it lasts[45] would be unconstitutional, at least as far as same-sex partnerships are concerned. The court held that the appropriate remedy was to read the words 'or partner in a permanent same-sex partnership' into the legislation to confer on same-sex couples the same rights as spouses.[46]

V v V[47] was a custody dispute where the mother was involved in a lesbian relationship. The father relied on the decision in *Van Rooyen v Van Rooyen*[48] to argue that the mother's 'abnormal' sexual orientation would harm the sexual development of her children. The court held that the inclusion of sexual orientation as a prohibited ground in the equality clause of the final Constitution rendered it legally incorrect to refer to a gay or lesbian sexual orientation as abnormal.[49] Moreover, a court could not perpetuate societal discrimination against gay or lesbian parents under the guise of protecting the interests of children.[50] A bold assertion to the same effect can be found in *Ex parte Critchfield*[51] in the context of gay extra-marital affairs by the father in a custody dispute. Apart from the assertions that gay or lesbian sexual orientation could not be said to be abnormal, these cases do not provide any equality analysis whatsoever, but nevertheless develop the common law by disregarding a single precedent in relation to the best interests of children.

In *Langemaat v Minster of Safety and Security*[52] the applicant questioned the constitutional validity of regulations in terms of the South African Police Services pension fund rules which excluded lesbian and gay life partners from the definition of dependants. Despite the fact that the application was directed to the validity of statutory regulations, the court nevertheless held that the common-law duty of maintenance should extend also to same-sex life partners. This was done with a startling lack of authority. The core of the judgment seems to be the judge's

[42] Paragraphs 49–52 and 54.
[43] Paragraphs 46 and 53.
[44] Paragraphs 60 and 87.
[45] *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 309; *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1019H.
[46] Paragraph 86.
[47] 1998 (4) SA 169 (C).
[48] 1994 (2) SA 325 (W).
[49] At 189B.
[50] At 189F–190E.
[51] [1999] 1 All SA 319 (W) at 326d–e.
[52] 1998 (7) SA 312 (T).

> 'experience and knowledge of several same sex couples who have lived together for years. The stability and permanence of their relationship [sic] is no different from the many married couples I know. Both types of union are deserving of respect and protection. If our law does not accord protection to the type of union I am dealing with then I suggest it is time it does so.'[53]

The case contains no equality analysis, no engagement with the principles of the common law, and seems to replace legal reasoning with mere assertions as to what the law ought to be.[54]

The Constitutional Court analysis in the *Minister of Home Affairs* case[55] was followed closely in *Satchwell v President of the Republic of South Africa*,[56] in which the constitutionality of sections of the Judges Remuneration and Conditions of Employment Act 88 of 1989, which denied spousal benefits to the same-sex partners of judges, was challenged. The impact of the laws on same-sex couples was held to be similar to that of the immigration regulations and they were held to discriminate on the bases of sexual orientation and marital status.[57] The argument on behalf of the President that the Act merely reflected the common-law position that there is no duty of support between same-sex partners was dismissed by reference to the dictum in *Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equality Intervening)*[58] that a duty of support can extend beyond common-law marriage, and to the finding in *Langemaat* that such a duty exists between same-sex partners. However, problems with the *Langemaat* judgment were not addressed, nor was its inadequate exposition of the common law supplemented. Counsel for the President also argued that the common-law definition of marriage, rather than the content of the Act, caused the discrimination in this instance and should have been the focus of attack.[59] However, following the *Minister of Home Affairs* case, the court did not address this issue.

Sections 17 and 20(1) of the Child Care Act 74 of 1983 allow for the joint adoption of a child by spouses, but unmarried couples are not allowed to adopt jointly, with the result that gay and lesbian partners cannot both have parental rights in respect of adopted children. This is confirmed by s 1(2) of the Guardianship Act 192 of 1993, which determines that mothers and fathers have equal rights of guardianship in respect of legitimate children, but fails to give similar rights to same-sex, unmarried parents. This legislation was the subject of an unopposed constitutional challenge in *Du Toit v Minister of Welfare and Population Development*.[60] The court held that the lacunae in the legal rules rendered them unconstitutional, but failed to analyse the right to equality or the best interests of the child apart from referring to the applicants' affidavits

[53] At 316F–H.

[54] See Ockert Dupper & Christoph Garber 'The provision of benefits to and discrimination against same-sex couples' (1999) 20 *ILJ* 77; Ronald Louw '*Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T): A gay and lesbian victory but a constitutional travesty' (1999) 15 *SAJHR* 393.

[55] Supra note 37.

[56] 2001 (12) BCLR 1284 (T).

[57] Paragraphs 14, 17–21 and 23.

[58] 1999 (4) SA 1319 (SCA) at 1328B.

[59] At 1289C–E.

[60] 2001 (12) BCLR 1225 (T).

and arguments.[61] The main basis for the decision seems to have been that the legislation compromised the dignity (as understood in the law of delict) of same-sex adoptive parents[62] without any reference to the extensive constitutional interpretations of the rights to dignity and family life in other same-sex cases.[63] The *Du Toit* judgment did not even state the basis upon which the discrimination was held to exist. The practical and symbolic effects of the current legal position for same-sex parents as a group and their position in society, including patterns of discrimination against such parents, were simply assumed.

In the same-sex partnership cases the willingness of courts to provide relief is evident. The Constitutional Court's analysis of intersecting grounds of discrimination, the judicial stance of imaginative empathy, the substantive and contextual equality test and the progressive formulation of the right to privacy are particularly noteworthy in this regard. Also striking is the way in which these developments have been driven by strategic litigation by the National Coalition for Gay and Lesbian Equality. It chooses not to attack the root cause of their exclusion from family law, namely the common-law definition of marriage, but to focus on separate common-law and legislative provisions with the aim of extending the consequences of common-law marriage to same-sex relationships. In this the Constitutional Court has assisted it, most manifestly by indicating that same-sex couples are capable of all the elements of the consortium omnis vitae traditionally ascribed to marriage. However, the court has been careful to limit its pronouncements to same-sex partnerships and avoided all mention of the common-law definition of marriage.

Notwithstanding this, the judgments in *V v V*[64] and the *Langemaat, Satchwell* and *Du Toit* cases indicate that some High Courts are not entirely comfortable with the kind of reasoning which the Bill of Rights requires. They appear eager to assist same-sex couples, but seem to lack the reasoning skills to justify their decisions, instead merely asserting discrimination. However, the Constitutional Court's jurisprudence has filtered down to the lower courts and also to other tribunals, such as, for instance, the Pensions Fund Adjudicator, which deals essentially with horizontal discrimination. Same-sex couples have successfully challenged pension fund rules that define spouses and beneficiaries in terms of common-law or customary marriages, thus excluding same-sex partners. The tribunal has found such omissions to be discriminatory and has ordered that definitions be amended to include them.[65]

[61] Paragraphs 9 and 16–17.

[62] Paragraph 14.

[63] See for instance *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 29, paras 14 and 28; *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* supra note 20, para 35.

[64] Supra note 47.

[65] See *B M Till v Unilever SA Pension Fund* (case no PFA/GA/788/99/SM) in the Tribunal of the Pension Funds Adjudicator; *R Martin v Beka Provident Fund* (case no PFA/GA/563/99) in the Tribunal of the Pension Funds Adjudicator (*ftp://fib.fsb.co.za/public/pfa/martin.htm*); *TWC, DM, JC, GT, AH v Rentokil Pension Fund* & DVR (case no FPA/KZN/129/98) in the Tribunal of the Pension Funds Adjudicator (*ftp://fsb.co.za/public/pfa/chapman.htm*).

2.3.2 *Customary families*

It is well documented that African women represent the largest number of people in the lowest educational, social and economic position in the country.[66] In *Mthembu v Letsela*[67] a customary rule according to which the wife and female children of a deceased man cannot inherit was challenged by a wife. The case also involved a factual dispute about the existence of a customary marriage between the applicant and the deceased. The gender discrimination argument on behalf of the wife was dismissed on the basis that, in rural areas, this rule of succession was accompanied by an obligation upon the male heir to maintain the widow and children. This rendered the differentiation between men and women fair.[68] The court not only failed to analyse the disadvantaged position of women who find themselves in the position of the applicant, but failed to consider the fact that the applicant actually lived in an urban area where, according to her evidence, the duty to maintain was not practised. The judge also held that '[i]n view of the manifest acknowledgement of customary law as a system existing parallel to the common law by the Constitution . . . and the freedom granted to persons to choose this system as governing their relationships, . . . I cannot accept the submission that the succession rule is necessarily in conflict with s 8.'[69] A contextual analysis of the circumstances under which women like the applicant live would have indicated clearly that the notion of their having chosen to be regulated by customary law is unrealistic. In any event, the fact that people can choose to have a legal system apply to their lives does not remove the constitutional need to develop those rules.

The matter was referred for the presentation of oral evidence about the existence of a marriage.[70] Neither party presented evidence at the second hearing and the matter was therefore finally decided on the basis that the girl born from the relationship was illegitimate.[71] The mother then argued that the rule of succession according to which her child would not inherit discriminated on the basis of gender. The court, however, pointed out that the reason for the child's not inheriting was not her gender, but the fact that she was born out of wedlock and therefore that the equality principle had not been infringed.[72] The court was then invited to develop the customary law of succession in accordance with s 35(3) of the interim Constitution. This invitation was declined since changing the customary rule of succession in relation to female heirs would impact on the whole system of customary law, a task best left to the legislature.[73]

[66] Debbie Budlender (ed) *The Fourth Women's Budget* (1999) tables 7.1 and 7.7.

[67] 1997 (2) SA 936 (T).

[68] At 945A–J and 946C–D.

[69] At 945J–946A. Section 8(2) contained the prohibition on discrimination in the interim Constitution.

[70] The second case was reported as 1998 (2) SA 675 (T).

[71] The wife would have been deterred from bringing evidence of a marriage by the clear indication that the court would then apply the customary rule in terms of which the husband's father would have been the heir.

[72] At 686D–H. The interim Constitution did not prohibit discrimination on the basis of birth.

[73] At 686H–687C.

Hlope v Mahlalela[74] concerned a custody dispute between the maternal grandparents and the father of a child born from a customary marriage. The grandparents argued that the father had not paid all the lobolo for the marriage and therefore did not have a right to custody of the child. The court held that, although s 1(1) of the Law of Evidence Amendment Act 45 of 1998 allows a court to take cognizance of customary law, the principles relating to children have been modified in three respects. First, the best interests of the child should take precedence over customary rules; secondly, where parents were also married according to civil law, the civil-law rules would apply; and thirdly, '[a]ny arrangement that smacks of the sale of or the trafficking in children will not be enforced'.[75] These developments were regarded as confirmed by the best interests principle in the interim Constitution. The decision to award custody to the father was motivated by holding that the Swazi custody rules were insufficiently established and that it would be in the best interests of the child to live with her father.[76]

This case is disturbing for several reasons, not the least of which is the description of customary custody rules as possibly amounting to the sale of children. The fundamental tension between the best interests standard as applied in civil law and constitutional rights to culture and religion is not even acknowledged. It may well be in the best interests of an African child to be raised according to customary norms. Developing customary law in accordance with the Bill of Rights should not merely entail the replacement of customary rules by civil-law rules.

The validity of a customary marriage where a man negotiated for, and paid, lobolo to the mother of the bride was in issue in *Mabena v Letsoalo*.[77] Although the mother's receiving the lobolo would be contrary to customary law, the court held that a practice was developing whereby the mother could receive lobolo when the father had left the family.[78] The court acknowledged the difference between the official versions of customary law as recorded by anthropologists in the 19th century and the 'living law' actually observed by people and held that customary law should, like all systems of law, develop to meet the changing needs and circumstances of the community which practises it. Developing the customary rule to allow the mother of the bride to receive lobolo would be in accordance with the spirit and objectives of the Bill of Rights.[79]

Although the outcome of this case is welcome in ameliorating the material and social disadvantages faced by this disadvantaged group of women and children, it lacks a sustained analysis of the conflicts around gender equality

[74] 1998 (1) SA 449 (T).

[75] At 458F–459E.

[76] Despite the ostensible concern for the interests of the child, the court nevertheless declined to interview the 11-year-old girl and disregarded her testimony that she would prefer to remain with her grandparents, without giving its reasons (at 461D–G).

[77] 1998 (2) SA 1068 (T).

[78] At 1074C–G.

[79] At 1074H–I and 1075B.

and the rights to culture. The court merely asserts that a particular development would accord with the objects of the Bill of Rights without taking into account the complex dynamics which will continue to plague this area of law. There was, for instance, no analysis of the social function of lobolo in customary marriages, nor a contextual analysis of gender equality as it relates to the particular parties or others in the same position.[80]

Section 37 of the Transkei Marriage Act 21 of 1978 provides that in both civil and customary marriages husbands are the guardians of their wives, while s 39 precludes parties to a civil marriage from excluding the marital power by way of antenuptial contract.[81] The applicant in *Prior v Battle*[82] argued that these provisions were unconstitutional in respect of civil marriages, both where lobolo had been paid and where it had not been paid, and in respect of customary marriages. The court declined to make a ruling in respect of customary marriages, since that would require a separate investigation into the effects of polygamy and the significance of patriarchy in customary marriages.[83] However, the court embarked on an equality analysis, reflecting on the effect of the marital power on the applicant and other wives in civil marriages. The marital power limited the applicant's ability to administer her estate and gave her husband power over her person.[84] It also affected her rights to dignity, access to the courts and the right to acquire and hold property. As such it amounted to 'the most notable example of glaring inequality in our law'.[85] African women in respect of whose civil marriages lobolo had been paid, are similarly affected and the ruling should also apply to them, on the basis that their marriages retain the character of civil marriages.[86]

Although the case contains a rudimentary equality analysis in relation to civil marriages where no lobolo had been paid, a detailed contextual examination would have indicated both the similarities and the differences between the positions of women married according to customary law, those married in terms of civil law with the inclusion of lobolo and those married in terms of civil law without lobolo. The narrow dichotomy between women married in terms of civil law and customary law, respectively, fails to recognize that the latter may suffer from exactly the same restrictions as a result of the marital power. The idea, implied in the quote above, that customary law may be so fundamentally patriarchal that it cannot accommodate gender equality without disrupting its very fabric, associates customary law and African culture with male domination while the same assumption is not made in relation to

[80] Many African women who are abandoned by their husbands, because of the system of migrant labour, lack the legal capacity in customary law to regulate their family lives. Section 6 of the Recognition of Customary Marriages Act 120 of 1998 now provides that wives married in terms of customary law have legal capacity equal to that of their husbands.

[81] The Law Commission's *Report on the Review of the Marriage Act 25 of 1961* (Project 109, 2001) 189 recommends that the Marriage Acts in the previous homelands be repealed and that the (South African) Marriage Act 25 of 1961 apply uniformly across the country.

[82] 1999 (2) SA 850 (Tk).

[83] At 860H.

[84] At 858F–859A.

[85] At 859D–J and 859B.

[86] At 861D–I.

civil law. The right to culture is, it seems, only viewed as relevant to customary marriages, with the tacit assumption that civil-law marriage is culturally neutral.

In *Metiso v Padongelukfonds*[87] it was held that a customary duty of support should be recognized in civil law[88] on the basis of the Supreme Court of Appeal's decision in *Amod v Multilateral Motor Vehicle Accident Fund*.[89] The court also recognized the customary rule that the consent of the child's mother and her family was unnecessary for the adoption of a child. It held that where it was shown that the mother had abandoned the child, requiring her consent for its adoption would be contrary to the best interests of the child and thus contra bonos mores.[90]

The judgment was based on the existence of a customary rule and on the best interests of the child generally, but failed to deal with constitutional rights to culture and, more importantly, the issue of gender discrimination. If the customary rule regarding adoption was to be accepted, the rule should have been developed to reflect the demands of gender equality and the changing behaviour of the community practising customary law. In *Kewana v Santam Insurance*[91] the court held, for instance, that in the Transkei the customary rules of adoption have changed as the result of women's emancipation to allow unmarried women to adopt children. Moreover, it could be regarded as being generally in the interests of a child to require the consent of its mother to its adoption.

When comparing these cases with those involving gay and lesbian families, the infrequent and superficial reference to constitutional rights is remarkable. Even in *Mabena v Letsoalo*,[92] where customary law was developed, the court failed to embark upon the detailed and contextual equality analysis found in the gay and lesbian cases. The judicial stance of imaginative empathy required when analysing the impact of subordination is simply absent when courts deal with the problems faced by African women. In other cases like *Prior v Battle*,[93] *Hlope v Mahlalela*[94] and *Metiso v Padongelukfonds*[95] courts simply refuse to develop customary rules which discriminate on the basis of gender. Central to debates around the recognition of both customary law and Muslim marriage is the issue of competing fundamental rights to culture and gender equality. This debate should be addressed by way of rigorous constitutional analysis, and not merely ignored. Moreover, except for *Mabena v Letsoalo*,[96] the cases seem to take the content of customary rules at face value, ignoring the existence of a well-documented distinction between 'official' versions of

[87] 2001 (3) SA 1142 (T).
[88] At 1150D–I.
[89] Supra note 58.
[90] At 1147H–I and 1149D–E.
[91] 1993 (4) SA 771 (TkA).
[92] Supra note 77.
[93] Supra note 82.
[94] Supra note 74.
[95] Supra note 87.
[96] Supra note 77.

customary law and contemporary cultural practice which is neither static nor homogeneous.[97]

2.3.4 *Muslim families*

Unlike customary marriages, Muslim marriages are not recognized as legally valid.[98] This leaves wives and children unable to inherit intestate from a deceased husband and courts are unwilling to provide wives with maintenance and a share of the husband's estate at divorce. In *Kalla v The Master*[99] a Muslim widow sought a share of her husband's estate on the basis of a marriage in community of property, alternatively on the basis of a tacit universal partnership. The Muslim marriage was held to be invalid at common law on the basis that it was potentially polygamous and therefore offended against the boni mores.[100] The interim Constitution was not applicable, since it did not operate retrospectively,[101] and in any event 'the principle of gender equality may well lead to the conclusion that polygamous (and potentially polygamous) marriages are as unacceptable to the mores of the new South Africa as they were to the old'.[102] This is unacceptable, since the issue of gender equality was not canvassed properly at all. The statement assumes all Muslim marriages to be patriarchal, while civil marriages are presumably all egalitarian. It would be cold comfort for the particular litigant to be told that legal relief is refused in order to protect her from the consequences of a patriarchal marriage.[103]

In *Ryland v Edros*[104] the parties were also married before the adoption of the interim Constitution, but the court held that it was applicable, since the relevant time was not that of the conclusion of the marriage contract, but rather when a court was asked to enforce it.[105] The matter was decided on the basis of the validity of the marriage contract and not on the validity of Muslim marriages in general. The court held that the meaning of open-ended common-law concepts like boni mores and public policy should be informed by basic constitutional values such as freedom and equality.[106] The constitutional values of equality and accommodation of religious diversity made it unacceptable for one group to impose its values on all others.[107] The judgment, however, strongly emphasized the monogamous nature of the

[97] See for instance Martin Chanock 'Neither customary nor legal: African customary law in an era of family law reform' 1989 (3) *International Journal of Law and the Family* 72 at 78–81; Gregory Hund 'Jurisprudence and legal anthropology: The roles of theory and method revisited' 1979 *CILSA* 188; A J G M Sanders 'How customary is customary law?' 1987 *CILSA* 405 at 407.

[98] The issue is currently being investigated. See the Law Commission's Discussion Paper *Islamic Marriages and Related Matters* (Project 59, 2001).

[99] 1995 (1) SA 261 (T).

[100] At 266A–D.

[101] At 269C–270A.

[102] At 270G–H.

[103] See Joan Church 'The dichotomy of marriage revisited: *Ryland v Edros*' (1997) 60 *THRHR* 292.

[104] 1997 (2) SA 690 (C).

[105] At 709G–H.

[106] At 704D–705D and 709A.

[107] At 707B–I and 708J.

marriage and added that this analysis would not necessarily apply to polygamous Muslim marriages.[108] Even though issues of gender equality were mentioned by a witness for the applicant,[109] the tension between equality and religious rights was once again ignored, perhaps because the court did not work with fundamental rights, but with values underlying the Constitution. This is problematic. Although ostensibly affording some recognition to Muslim marriages, the applicant's main claim for a share in her husband's estate was dismissed on the basis that a progressive system of profit sharing between Muslim husbands and wives has not been adopted in the South African Muslim community.[110]

Most recently, in *Amod v Multilateral Motor Vehicle Accidents Fund*[111] the issue was whether the common law should be developed to recognize a duty of support arising from a Muslim marriage. The matter was complicated by the fact that the death of the husband occurred before the operation of the interim and final Constitutions.[112] The court of first instance[113] held that it did not have the authority to change the existing common-law position that any contract which creates a duty of maintenance in relation to a potentially polygamous marriage would be invalid on the grounds of public policy.[114] *Ryland v Edros*[115] could not be followed because it dealt with the enforcement of a duty of support between the spouses themselves, which did not mean that the marriage was valid, or that the duty of support would bind third parties.[116] The applicant requested leave to appeal directly to the Constitutional Court,[117] which in turn referred the matter to the SCA.[118]

In this court the interim Constitution was held to be applicable.[119] The court held that in Roman-Dutch law the action for loss of support required a legally enforceable duty to support, that the right to support should be worthy of legal protection and that this latter requirement should be determined by the boni mores of society.[120] The older cases which required a widow who claims for loss of support to prove that the duty of support flowed from a legal marriage were held to be incorrectly decided.[121] A duty of support which flowed from a contract like a Muslim marriage would suffice if it could be shown that it was worthy of legal protection. In this instance the duty of support qualified for legal protection because it was the result of a de facto monogamous marriage according to the tenets of a major religion and

[108] At 707F and 709D.
[109] At 717F.
[110] At 717D–E.
[111] Supra note 58.
[112] Although the various approaches to retrospective application of the interim and final Constitutions make interesting reading, the topic cannot be included in this discussion.
[113] The first case was reported in 1997 (12) BCLR 1716 (D).
[114] At 1724A–1725C.
[115] Supra note 104.
[116] At 1725D–1726F.
[117] This case was reported in 1998 (4) SA 753 (CC).
[118] Supra note 58.
[119] Paragraphs 20–1.
[120] Paragraph 12.
[121] Paragraphs 17–19.

involved a public ceremony, formalities and obligations on both parties.[122] The issue of cohabitants' contracts and polygamous marriages was expressly left open, and it was made clear that other incidents of Muslim marriages would not necessarily be covered by the judgment.[123] Despite the court's statement that the case did not involve difficult policy and political choices,[124] the judgment has been persuasively criticized for the political and social implications of its narrow focus on contract, rather than family relationships, for its failure to extend its ambit to other incidences of Muslim marriages and its pre-occupation with the de facto monogamous nature of the marriage. Beth Goldblatt indicates that this minimalist approach excludes polygamous and other family groups from the ambit of legal protection and retains the traditional common-law bias in favour of monogamous family groups.[125] This offers little hope of legal assistance to the most disadvantaged group of Muslim women who are involved in polygamous marriages. The conservative nature of the judgment emerges particularly when contrasted with courts' willingness to extend the incidents of marriage to gay and lesbian families. Although the courts in the gay and lesbian cases are similarly unwilling to confront the common-law definition of marriage, their substantive equality analyses draw attention to the practical and symbolic effects of their exclusion from the institution of marriage for gay and lesbian couples. No similar analysis is to be found in relation to Muslim marriages and the issue of gender equality is not canvassed at all, despite the fact that the Commission for Gender Equality acted as an amicus curiae in the SCA *Amod* case.[126]

When compared with the cases involving customary marriage, it is obvious that courts are equally reluctant to face the issues around gender equality and the recognition of freedom of religion. With the exception of *Mabena v Letsoalo*,[127] courts seem unwilling to enter into debates around the contents of both Muslim personal law and customary law, and reluctant to change or develop these rules to give effect to the dictates of gender equality and to accommodate changing practices in South Africa.

2.4 *Relationships between family members*

2.4.1 *The rights of fathers of children born out of wedlock*

The debate about the common-law rule that fathers of children born out of wedlock have no inherent rights of access or custody, but may obtain such rights where it would be in the interests of the child, was initiated by *Van Erk v Holmer*.[128] Basing its decision on the duty on such fathers to pay maintenance

[122] Paragraphs 20 and 23.
[123] Paragraphs 24 and 27.
[124] Paragraph 28.
[125] '*Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA)' (2000) 16 *SAJHR* 138.
[126] Supra note 58.
[127] Supra note 77.
[128] 1992 (2) SA 636 (W).

and the best interests of the child, the court held that fathers of extra-marital children have, according to the common law, inherent rights of access to their children.[129] The decision was criticized by a judge in the same division[130] before being overruled by the Appellate Division in *B v S*.[131] The court stated that the common-law rule was that 'the right to access depends for its existence on parental authority. A father such as this appellant does not have that in the eyes of the law. But he may be granted access if that is in the best interests of his child.'[132] Subsequent cases did not assert that fathers of extra-marital children had automatic rights, but based their decisions to allow access on the fact that the biological bonds between children and their natural fathers rendered contact between them in the interests of the children.[133]

The matter was driven to a head by the applications of Laurie Fraser to be allowed to adopt his son, born out of wedlock. The first case[134] involved an attempt to prevent the mother from giving the child up for adoption. The application for a prohibitory interdict was dismissed on the basis that the father of a child born out of wedlock has no clear right upon which to base his case. This was followed by a review of the adoption proceedings[135] in terms of the Child Care Act 74 of 1983. The court set aside the adoption order on the basis that the father had suffered prejudice because the Children's Court did not afford him a hearing in the adoption. The issue of the constitutionality of s 18(4)(d) of the Act, which requires only the consent of a mother for the adoption of an extra-marital child, was referred to the Constitutional Court.

The Constitutional Court[136] found the provisions unconstitutional because they discriminated unfairly between fathers in different unions. While the Act required the permission of fathers of children born from customary marriages, no such permission was required from fathers of children born from Muslim marriages. Since both of these are potentially polygamous, the differentiation was held to be unfair and unjustified.[137] The argument that the provisions also discriminated unfairly between mothers and fathers failed to take account of the different positions of mothers and fathers of new-born children which could justify different legal treatment. However, in respect of older children who had formed strong bonds with both parents, the legal treatment should be the same.[138] A further argument, that the provisions constituted unfair discrimination between married and unmarried fathers, was likewise partially successful. Although there may be some justification for differentiating between married and unmarried fathers in certain contexts, a

[129] At 648H–I and 649G–H.
[130] *S v S* 1993 (2) SA 200 (W).
[131] 1995 (3) SA 571 (A).
[132] At 579H.
[133] *Chodree v Vally* 1996 (2) SA 28 (W) at 32E–F; *Bethell v Bland* 1996 (2) SA 194 (W) at 209G–H; *T v M* 1997 (1) SA 54 (A) at 60B–C. See my analysis of this trend in 'Of biological bonds, new fathers and the best interests of children' (1997) 13 *SAJHR* 622.
[134] *Fraser v Naude* [1996] All SA 99 (W).
[135] *Fraser v Children's Court, Pretoria North* 1997 (2) SA 218 (T).
[136] *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC).
[137] Paragraphs 21–3.
[138] Paragraph 25.

blanket rule which assumes that all married fathers have bonds with their children, while all unmarried fathers do not, was unsatisfactory. However, any blanket rule which would require permission from all fathers of extra-marital children would mean that men who father children through rape or incest would be placed in the same position as committed, caring parents.[139] The court found the legislation to be unconstitutional, but suspended the declaration for a period of two years to enable Parliament to draft nuanced legislation which would take into account all of these factors.[140] It cautioned that in doing so, Parliament should be careful not to add to the disadvantages suffered by single mothers, and that solutions adopted in first-world countries would not necessarily be suitable in the South African context.[141]

This careful, balanced judgment seemed to have brought the issue of adoptions into line with the common-law position regarding access, namely that the father of a child born out of wedlock would be able to obtain parental rights, not automatically, but on convincing a court that it would be in the best interests of the child.[142] However, in *Wicks v Fischer*[143] a court granted a final interdict preventing the mother of an extra-marital child from relocating to the United Kingdom with her child on the basis that the father had shown reasonable chances of success in a proposed application for custody of the child.[144] The decision represented an extension of the common law and was justified by referring to the constitutional duty to develop the common law and the Constitutional Court judgment in the *Fraser* case.[145] However, the court failed to explain fully the constitutional reasoning behind the decision. Instead, it focused on the fact that having access to his father was in the interests of the child and even referred to 'his right of access to both parents'.[146]

Decisions to allow unmarried fathers access, and some decisions to refuse permission to custodian parents to relocate, are often justified by referring to the rights of children to have relationships with both parents. I have pointed out elsewhere that the existence of this legal right would be put to the test when a child claimed access rights from a reluctant father.[147] This occurred in *Jooste v Botha*,[148] where a child born out of wedlock claimed love, recognition and access from his father who was prepared only to meet his maintenance obligations. The child claimed that his constitutional rights were horizontally enforceable against his parents and that the court had a duty to develop the common law to incorporate this right or to provide a remedy in

[139] Paragraphs 26–9.

[140] The result is the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 which allows a father to apply for custody, access or adoption under circumstances which indicate that he had developed a bond with the child.

[141] Paragraph 44.

[142] The two further Fraser cases, *Naude v Fraser* 1998 (4) SA 539 (SCA) and *Fraser v Naude* 1999 (1) SA 1 (CC), concern technical matters and are not relevant to this discussion.

[143] 1999 (2) SA 504 (N).

[144] At 511F–G.

[145] At 510H–I. *Fraser v Children's Court, Pretoria North* supra note 136.

[146] At 508B and 509F–G.

[147] 'Clean breaks: Custody, access and parents' rights to relocate' (2000) 16 *SAJHR* 486 at 491.

[148] Supra note 16.

the form of a mandamus.[149] The exception that the claim showed no cause of action was upheld on the basis that, despite the existence of children's constitutional rights to family or parental care,[150] the common law did not afford a child a right to parental affection.

The court held that the child's right to family or parental care was only vertically applicable against the state in the form of a duty not to interfere with the family unit,[151] but not directly applicable against parents. The right would be indirectly horizontally applicable in the sense that it would influence the exercise of judicial discretion and the interpretation of public policy.[152] The court refused to develop the common law to give effect to these rights for two reasons. First, the recognition of such rights would infringe upon the privacy rights of fathers and their new family units[153] and, secondly, the 'right' to affection was, despite the tendency to describe it as a right, a moral entitlement and unenforceable as between spouses and between parents and children.[154]

The court defined the words 'parent' and 'family' in s 28 to refer to the custodian parent and the child.[155] Moreover, it held that the best-interests principle in s 28(2) of the Constitution amounts not to a legal right which should be applied horizontally, but a general guideline.[156] The difference between this case and cases where rights are claimed by parents and not by children should be obvious. A more satisfactory understanding of the access rights of children is found in *V v V*,[157] where the court held that '[a]ccess is therefore not a unilateral exercise of a right by a child, but part of a continuing relationship between parent and child'.[158]

2.4.2 *Children: Relocation, custody and adoption*

Adoption is regulated not by the common law but by the Child Care Act 74 of 1983, which does not allow a South African child to be adopted by non-citizens.[159] The constitutionality of this section was challenged in *Minister of Welfare and Population Development v Fitzpatrick*.[160] The court held the provision to be unconstitutional on the basis that it may sometimes be in the interests of a child to be adopted by foreigners.[161] In the course of the

[149] The arguments on behalf of the child are summarized at 203D–E.
[150] Section 28(1)(b) of the final Constitution.
[151] At 205E, 207I–J and 208F.
[152] At 209D–E.
[153] At 205F–G.
[154] At 206B–G and 207C–E.
[155] At 208F–G and 209A–B.
[156] At 210C–E.
[157] Supra note 47.
[158] At 189C–E.
[159] Section 18(4)(f). See *SW v F* 1997 (1) SA 796 (O), which deals with the effect of the interim Constitution on a decision to dispense with parental consent to adoption where the consent is withheld unreasonably.
[160] 2000 (7) BCLR 713 (CC). The case was first heard by the Cape High Court and reported as *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 (3) SA 139 (C).
[161] Paragraphs 19–20.

judgment it held that although the best interests standard was a vague and ill-defined concept, it enables courts to take account of different considerations in different cases and contexts.[162] Thus, 'what *is* actually in the best interests of a particular child or children is obviously a question of fact in each specific case'.[163]

In relocation cases, courts are required to balance the rights of custodian parents freely to make decisions about their lives, the access rights of non-custodian parents and the interests of the children.[164] At common law a court will not lightly interfere with a reasonable and bona fide decision of the custodian parent to relocate.[165] Post-Constitution cases sometimes refer to the constitutional principle that the best interests of the child should be regarded as paramount,[166] but others fail even to mention the Constitution in this area of law.[167] The reason seems to be the assumption by courts that the application of the best interests principle in the common law accords with the Constitution[168] and that this area of law therefore requires no development. I have indicated elsewhere that decisions in this area of family law, despite the apparent simplicity of the common-law principle, remain unpredictable and contradictory and that an analysis of the various constitutional rights may be useful in formulating a more explicit principle.[169]

Interesting developments in this area relate firstly to the definition of family in the post-divorce setting. There are indications that some High Courts are unwilling to reconstitute the pre-divorce family at the expense of the unit of custodian parent and children.[170] Another is the use of the concept of the primary caretaker and the recognition that the financial and emotional interests of children are linked to those of their primary caretakers.[171] These trends are not, however, found in the majority judgment in the latest SCA decision.[172] Instead, it emphasized the importance of maintaining emotional bonds between a non-custodian mother and her young daughters.[173]

[162] Paragraph 18.

[163] *Lubbe v Du Plessis* 2001 (4) SA 57 (C) at 66E.

[164] *Latouf v Latouf* [2001] 2 All SA 377 (T) at 385i–j; *Schutte v Jacobs (2)* 2001 (2) SA 478 (W) at 481H–I.

[165] *Jackson v Jackson* 2002 (2) SA 303 (SCA).

[166] *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) at 437F–G.

[167] *Godbeer v Godbeer* 2000 (3) SA 976 (W); *Latouf v Latouf* supra note 164; the minority decision in *Jackson v Jackson* supra note 165 mentions the best interests principle at 308A–B and 315F, but the majority decision contains no mention of the Constitution.

[168] In *H v R* 2001 (3) SA 623 (C) at 627I the court says of the best interests principle in the Constitution: 'This is nothing new and has always been the traditional approach of our Courts.' The case is also reported as *Heynike v Roets* [2001] 2 All SA 79 (C). See also *Jackson v Jackson* supra note 165 at 315F.

[169] Bonthuys op cit note 147. The only case in which such an analysis is attempted is *Van Rooyen v Van Rooyen* supra note 166 at 437I, which mentions that the rights of parents should be considered in the light of the best interests of the child.

[170] *Van Rooyen v Van Rooyen* supra note 166 at 439H; *Godbeer v Godbeer* supra note 167 at 982A–C and 983A; *H v R* supra note 168 at 628F–G.

[171] *Van Rooyen v Van Rooyen* supra note 166 at 438F–H and 439A–G; *Godbeer v Godbeer* supra note 167 at 980I–J.

[172] The minority judgment in *Jackson v Jackson* supra note 165 at 317D–F does, however, explain the common-law rule by saying that it is in the best interests of a child that the custodian parent, who bears primary responsibility for raising the children, should be unfettered in her reasonable decisions about the raising of the children.

[173] At 323C.

This links to the question whether gender-specific common-law rules, like that of the maternal preference, are constitutionally sound. In *Fraser* the Constitutional Court indicated that where fathers and mothers are differently situated in respect of children, such rules would not necessarily be regarded as discriminating impermissibly on the basis of gender.[174] In *President of the Republic of South Africa v Hugo*[175] the constitutionality of a special remission of prison sentences of mothers of young children was challenged on the basis of gender equality. The minority judgment by Kriegler J held that women's primary responsibility for childcare is both a cause and a consequence of patriarchy in a society where childrearing is held in low esteem. Pardoning women because of their childrearing role would therefore reinforce this stereotypical and prejudicial division of labour and harm women generally.[176] In her minority judgment O'Regan J argued that although the long-term goal should be the equal treatment of women and men, equal treatment in circumstances where they do not actually perform the same functions, would entrench inequality. Thus, different treatment on the basis of family responsibilities, where it is clear that women bear the burden of childcare, should be allowed.[177]

Thus, it would seem that retaining the maternal preference rule in custody cases where the mother had been the primary caretaker would be permissible and that the dictum in *Van der Linde v Van der Linde*[178] — that men nowadays participate in childcare to an extent which would justify the adoption of a gender-neutral custody rule — should not be followed. The only custody case which has dealt more extensively with fundamental rights after the adoption of the Constitution is *Ex parte Critchfield*.[179] On the authority of the *Fraser* and *Hugo* cases, the court held that the prohibition of discrimination on the basis of gender would not mean that mothers and fathers should be treated absolutely the same.[180] While mothers should be regarded as the preferred custodians of young children, a court should also take notice of factors which favour fathers in particular instances. This would not only accord with the best interests principle, but also with the common law.[181] However, most of the custody cases do not refer to the Constitution or attempt a constitutional analysis. Like the relocation cases, courts seem to assume the common-law

[174] See the text which pertains to note 136.

[175] 1997 (4) SA 1 (CC).

[176] Paragraphs 80 and 83.

[177] Paragraphs 110–14. This was also the position taken in the majority judgment by Goldstone J (see paras 37–47). See, however, *Woolworths (Pty) Ltd v Whitehead (Women's Legal Centre Trust intervening)* 2000 (3) SA 529 (LAC), in which the court, holding that a refusal to employ a pregnant woman could be justified on economic considerations, stated in para 143 that 'Western culture could derive much wisdom from the view prevalent in African, Hindu, Muslim and Chinese cultures that the first few weeks of a child's life should be a special time with its mother, with both of them freed as much as possible from outside distractions and surrounded by love and support. Moreover, motherhood is not some minor inconvenience in a woman's life. I also think we should be astute not to cultivate the idea that motherhood is entirely secondary to the greater glories of job satisfaction.'

[178] 1996 (3) SA 509 (O) at 515B–H.

[179] Supra note 51.

[180] At 327h.

[181] At 330a–c.

position to be in line with the Constitution. This is also the position in relation to access.[182]

2.4.3 *Abduction and the effects of domestic violence on the child*

The central constitutional issue in abduction cases is whether the provisions of the Hague Convention on the Civil Aspects of Child Abduction (1980) give effect to the best interests of children who are to be returned to their countries of origin in terms thereof. *Kirsch v Kirsch*,[183] which was decided before the Convention became part of South African law,[184] held that the abducted child should be returned as if the Convention applied. The reason was that the constitutional and common-law principle of the best interests of the child had to be interpreted in accordance with international law.[185] The Convention embodies the idea that it would be in the interests of a child for a custody dispute to be decided by a court of origin.[186] In the particular circumstances of the case, where the mother alleged that the father had been guilty of abusing the child, the courts in the country of origin would be in the best position to have access to and evaluate the evidence of such abuse.[187]

The Convention was declared to be compatible with the best interests principle and thus constitutional in *Sonderup v Tondelli*.[188] The court distinguished between the long-term interests of children, which were relevant to custody decisions, and 'the interplay of the long-term and short-term best interests of children in jurisdictional matters'[189] and held that the latter was compromised by the Convention mechanisms that prevent a South African court, which has to decide whether to return the child, from consulting the best interests of the child. However, after conducting a proportionality analysis in terms of the limitations clause,[190] the court held the limitations on the best interests of the child to be justifiable.

My main difficulty in respect of this case is not the issue of constitutionality, but its treatment of the domestic violence alleged by the mother to be endangering both her and her child. Even though the court held that the existence of domestic violence towards the mother could also pose a risk of harm to the child,[191] it found no grave risk of serious harm to the child. The main harm facing the child was considered to result from the contested

[182] See *Lubbe v Du Plessis* supra note 163; *Allsop v McCann* 2001 (2) SA 706 (C); *I v S* 2000 (2) SA 993 (C).

[183] [1999] 2 All SA 193 (C), also reported as *K v K* 1999 (4) SA 691 (C).

[184] This was done by the Hague Convention on the Civil Aspects of Child Abduction Act 72 of 1996.

[185] At 204f–g.

[186] At 205f–207d.

[187] At 210h–211i. See also *WS v LS* 2000 (4) SA 104 (C) and *Smith v Smith* 2001 (3) SA 845 (SCA), which deal with the interpretation of the Convention and are not directly relevant to this article.

[188] 2001 (1) SA 1171 (CC).

[189] Paragraph 28.

[190] Section 36 of the final Constitution.

[191] Paragraph 34. See also *S v Baloyi (Minister of Justice & another Intervening)* 2000 (2) SA 425 (CC), paras 16 and 18, where the Constitutional Court had shown some understanding of the ways in which patriarchy, the private/public dichotomy and liberal understandings of the concepts of privacy and autonomy interact to deprive women of protection against domestic violence.

custody case as exacerbated by the mother's illegal conduct in removing the child.[192] The mother's submissions, however, included evidence of a restraint order against the father and comments by a Canadian judge that the father was angry, hostile and barely in control.[193] I am not suggesting that whenever a woman alleges that there has been domestic violence the Hague Convention should not apply. Nevertheless, it is disappointing that the Constitutional Court seems to view domestic violence as an almost normal consequence of marital conflict and fails to regard it seriously,[194] especially in light of the constitutional right to be free from violence from public or private sources.[195]

2.4.4 *Economic rights of family members*

Courts' eagerness to extended the duty of support to gay and lesbian life partners and spouses in Muslim marriages seems to extend also to applications for maintenance pendente lite. In *Heystek v Heystek*[196] the defence to a wife's application for maintenance pendente lite was that the money would be used to maintain her three children from a previous marriage. The court acknowledged that at common law a man had no legal duty to maintain his stepchildren, but held that, during the subsistence of a marriage in community of property, he had a duty to contribute to the common household of which the children formed part. It added that the children's rights to parental care were not limited to their natural parents, but extended also to stepparents.[197] This clearly conflicts with *Jooste v Botha*,[198] where the constitutional rights of children were interpreted to coincide with existing common-law rules. The court added, without analysing the need for an consequences of its statement, that the common law should be changed 'to serve the constitutional imperatives of the child in a heterogeneous democratic society'.[199]

In *Cary v Cary*[200] a wife claimed a contribution to costs for a pending divorce action. According to the common law the scale of the contribution to which a spouse is entitled depends on the scale on which the other spouse will litigate, the complexities of the case and the means of the respondent.[201] Not content with having articulated the common-law position, the court added that it should, in the exercise of its discretion as to the amount awarded, be informed by the constitutional rights to equality, equal protection of the law and dignity. This would entail that 'the applicant is entitled to a

[192] Paragraphs 46–7.

[193] Paragraphs 38–40.

[194] This is frequently so in custody and access cases. See Elsje Bonthuys 'Spoiling the child: Domestic violence and the interests of children' (1999) 15 *SAJHR* 308 at 317–19 and the cases cited there.

[195] Final Constitution, s 12(1)(c). See also *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC), in which the obligation upon the state to protect women from gender-based violence was held to require the development of the common law of delict.

[196] 2002 (2) SA 754 (T).

[197] At 757A–B and 757C–D.

[198] Supra note 16.

[199] At 757E–G.

[200] 1999 (3) SA 615 (C).

[201] See *Nicholson v Nicholson* 1998 (1) SA 48 (W) at 50C–G; *Senior v Senior* 1999 (4) SA 955 (W) at 963G–H.

contribution towards her costs which would ensure equality of arms in the divorce action'.[202] In light of the detailed common-law rule which would not only ensure equality of arms, but also litigation on a scale which is adequate to the complexity of the matter, this attempt at constitutional embroidery seems unnecessary. Moreover, apart from mentioning the constitutional rights, the court failed to explain how they were to operate and interact in the present context.

In contrast with the zeal for legal reform displayed in these cases, *Greenspan v Greenspan*[203] did not even mention the Constitution. An application for a lump sum of maintenance pendente lite to cover the expenses of moving out of the communal home and the purchase of furniture and transport was dismissed on the basis that maintenance envisages periodic payments and would not extend to lump sum payments. This technical interpretation was overruled on appeal without reference to the Constitution.[204] One could, however, argue that the hardship which is caused for wives and children should be subject to a constitutional analysis and that this is an area of the common law which is in need of development.[205] The common-law rule that arrears maintenance cannot be claimed unless the wife had contracted debts in order to maintain herself[206] is another area of maintenance law which could arguably be in need of reform, but, despite the reference to it in the *Cary* case,[207] the rule has not yet been constitutionally challenged.

A widow has an action for loss of support against the person who unlawfully caused the death of her husband. In *Glass v Santam Insurance Ltd*[208] the court held that as soon as a widow remarries, her loss of support ends, since she is then maintained by the new husband and evidence that the second husband is financially worse off than the deceased husband would not be admissible. In *Ongevallekommissaris v Santam Bpk*[209] the correctness of this position was questioned. The court explained that the aim of the action for loss of support was to place the widow in the same financial position she would have occupied, had her husband not been killed. Where the action is heard before the widow's remarriage, the chances of her remarrying are factored into the calculation of the amount. Where, however, a widow had remarried, evidence that her second husband is less able to support her than the deceased husband should be allowed in order to compensate her adequately. The argument that this rule discriminated between widows who had not remarried and those who had remarried was not accepted. The court held that the calculation of the chances of remarriage of an unmarried widow had to be made at the time when the claim was heard.[210] However, beyond the

[202] At 621D–E.
[203] 2000 (2) SA 283 (C). See also *Zwiegelaar v Zwiegelaar* 1999 (1) SA 1182 (C).
[204] *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA).
[205] The definition of maintenance in the new Maintenance Act 99 of 1998 would now preclude such an interpretation.
[206] *Dodo v Dodo* 1990 (2) SA 77 (W).
[207] Supra note 200 at 622E.
[208] 1992 (1) SA 901 (W).
[209] 1999 (1) SA 251 (SCA).
[210] At 262H–236B.

mere assertion that there was no impermissible discrimination, the court did not perform a thorough equality analysis.[211]

In *Lebeloane v Lebeloane*[212] a wife applied for the committal to prison for contempt of court of her ex-husband who failed to obey a maintenance order in respect of their minor child. The respondent argued that imprisonment for contempt is unconstitutional. The court simply refused to decide the constitutional issue because the amount of money involved was small, it involved maintenance and should therefore not be delayed, and the constitutional aspects were insufficiently argued. Moreover, finding the committal proceedings unconstitutional would have far-reaching consequences.[213] This is not convincing. The small amount of money should be irrelevant, since small amounts of maintenance are important to poorer people who are as entitled to constitutional rights as the affluent. Moreover, if the court was dissatisfied with the constitutional arguments it could have called for further argument.

3 FORM: HOW DO THE COURTS DEAL WITH THE OPERATION OF THE BILL OF RIGHTS ON AN ABSTRACT LEVEL?

3.1 *Developing the common law*

The text of the Constitution does not indicate precisely how, if it is found to be deficient, the common law should be developed.[214] Johan de Waal et al argue[215] that indirect application of the Bill of Rights to the common law takes three forms. First, courts alter common-law principles to bring them in line with the Bill of Rights; secondly, they apply existing common-law rules in a manner which would be consistent with the Bill of Rights; and, thirdly, the fundamental constitutional values inform open-ended common-law principles like boni mores and public policy. Direct application of the Bill of Rights to the common law, although a rare occurrence, would involve declaring unconstitutional common-law rules invalid as in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[216] or the creation of new constitutional remedies or the award of constitutional damages. This was unsuccessfully attempted in *Botha v Jooste*.[217]

Where the need arises for the development of the common law the *Carmichele* case[218] indicates that

> 'there are two stages to the inquiry a court is obliged to undertake. They cannot be hermetically separated from one another. The first stage is to consider whether the existing common law, having regard to the section 39(2)[219] objectives, requires development in

[211] The reduction of claims on the basis that a widow has a chance of remarriage may in itself be unconstitutional.

[212] 2001 (1) SA 1079 (W).

[213] Paragraph 26.

[214] Belinda van Heerden et al *Boberg's Law of Persons and the Family* 2 ed (1999) 13–14.

[215] Op cit note 3 at 75–7. See also the *Carmichele* case supra note 195, para 56.

[216] Supra note 29. This was unsuccessful in relation to customary law in *Mthembu v Letsela* supra note 67.

[217] Supra note 16.

[218] Supra note 195.

[219] It states that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

> accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives.'[220]

Where the common law is said to be unfairly discriminatory, the first step of this analysis should be an equality analysis, taking account of constitutional jurisprudence on the nature of discrimination.[221]

In measuring cases which deal with the development of the common law against the two-step procedure identified in the *Carmichele* case,[222] certain patterns or styles of judgment emerge. In contrast with the detailed analysis of the impact of the common law crimes by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[223] many courts do not embark on such an analysis of the common law at all. Certain cases, especially those dealing with the best interests of children, assume simply that the existing common law perfectly reflects the proper balance between fundamental rights and therefore fail to deal with the first question.[224] A variant in this category is the failure to acknowledge or a denial of glaring constitutional issues in the form of conflicting rights to culture or religion and gender equality.[225] This includes the failure to deal with the degree to which the common law conforms with the Constitution, but in these cases courts assume that common law is incompatible with the Constitution and proceed to change the common-law rules drastically.[226]

The second part of the procedure in *Carmichele*[227] involves the development of the common law. In an article examining adjudication styles in private law Cockrell points to the belief that judges do not create common law, but merely discover and declare pre-existing common-law rules.[228] An interesting interplay between this fiction and the necessity for developing the common law in response to the Constitution is to be found in the High Court judgment in the *Amod* case.[229] The court was faced with the dilemma of having to apply the final Constitution retrospectively to overturn Appellate Division authority which held that no duty of support arose between spouses in Muslim marriages. The court held that changes of common-law rules in response to the Bill of Rights would inevitably be retrospective, because the common law is not created, but merely found.[230] This means that, where the

[220] Paragraph 40.

[221] This will be discussed below.

[222] Supra note 195.

[223] Supra note 29.

[224] See the above discussion headed 2.4.2 Children: Relocation, custody and adoption.

[225] See *Mthembu v Letsela* supra note 67; *Hlope v Mahlalela* supra note 74; *Prior v Battle* supra note 82; *Metiso v Padongelukfonds* supra note 87; *Kalla v The Master* supra note 99; *Sundenip v Tondelli* supra note 188; *Ongevallekommissaris v Santam* supra note 209; *Cary v Cary* supra note 200; and *Lebeloane v Lebeloane* supra note 212.

[226] See *Langemaat* supra note 52; *Cary v Cary* supra note 200; *Heystek* supra note 196.

[227] Supra note 195.

[228] Cockrell op cit note 18 at 591. This leads to a formal style of reasoning in relation to the common law (at 593–6).

[229] Supra note 113.

[230] At 1721D–I. The court based itself on the use of this fiction by the Constitutional Court in *Du Plessis v De Klerk* supra note 7, para 65.

common law is adapted in response to constitutional values, the law holds that the 'new, adapted' common-law rule has always existed, but has not been recognized until 'discovered' by the court developing the rule. If revised common-law rules always exist in a state of limbo until their discovery, it would only be fair and in the interests of justice that the Constitution should apply to disputes involving the common law, regardless of whether the cause of action arose before or after its enactment.[231]

This raises another dilemma: High Courts should logically then be required to overturn pre-constitutional Appellate Division formulations of the common law which fail to reflect fundamental constitutional rights. In order to overcome this problem, the High Court in *Amod* held that the ability to develop the common law was limited to incremental extensions of common-law rules, but did not extend to the elimination of existing common-law rules which directly contradict fundamental rights. Such changes are the province of the legislature.[232] The argument points to a fundamental problem caused by the fiction that the common law is only discovered and not made by judges. If common-law rules giving effect to the fundamental rights have always existed then there is no logical difference between 'finding' a supplementary common-law rule which has not yet been articulated and 'discovering' that the way in which a particular rule has always been articulated is wrong and should be re-articulated in accordance with the Constitution. Other courts developing the common law do not refer to this fiction. The SCA in the *Amod* case found that the interim Constitution was retrospectively applicable to the case on the basis that the ethos of tolerance and respect for diversity which it embodied, had already been ushered in when the cause of action arose.[233]

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[234] the Constitutional Court was careful to indicate that a common-law rule should only be struck down in so far as this was necessary.[235] In determining this, the court had to look to the purpose of the rule and its interaction with other common-law and statutory rules in order to establish the effect of changing a rule upon the coherence and adequacy of the system as a whole.[236] Although some family-law judgments develop the common law by arguing that existing rules contain gaps which need to be filled, or through the operation of general policy or discretionary concepts,[237] others indicate simply that existing common-law authority is wrong in light of the Constitution and should be

[231] High Court decision supra note 113 at 1722A–C.

[232] At 1723D–J. The court relied on the dictum in *Du Plessis v De Klerk* supra note 7 at 855 which dealt with the direct horizontal application of the interim Constitution. It is generally accepted that the issue of direct horizontal application in relation to the final Constitution is not to be decided on the same basis as that of the interim Constitution.

[233] Paragraph 20.

[234] Supra note 29.

[235] Paragraph 67.

[236] Paragraphs 69–71.

[237] The SCA in *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* supra note 58 indicated both that the ambit of the duty of support in Roman-Dutch law was uncertain and that it depended on the articulation of public policy. See paras 10, 12 and 23.

changed.[238] The effect of changing one specific common-law rule upon the other rules of family law is not taken into account at all.

What emerges from a closer look at the way in which courts deal with the common law, then, is the marked difference between the careful, comprehensive analysis of the Constitutional Court and the way in which some High Courts either avoid constitutional issues or nonchalantly change common-law rules. The Constitution requires that declarations by High Courts that legislation is unconstitutional should be confirmed by the Constitutional Court,[239] but no similar requirement exists in relation to the common law. This may very well save the Constitutional Court's valuable time and prevent duplication of decisions, but in light of the High Courts' evident discomfort with matters constitutional, it also means that developments of the common law may be less thorough and nuanced than matters which deal with the constitutionality of legislation. It also means that the Constitutional Court does not have many opportunities to provide High Courts with guidance on the proper way to develop the common law. This could eventually lead to problems when the SCA may need to re-integrate the various High Court pronouncements upon common-law rules.

3.2 *Judicial minimalism*

According to De Waal et al, the principle of judicial minimalism entails that courts should leave scope for Parliament to amend laws.[240] Furthermore, the possibility of the indirect application of the Bill of Rights by the development of the common law should be considered before that of direct application. Constitutional issues should not be anticipated unless it is necessary and, when it becomes necessary, constitutional rules should be formulated as narrowly as possible. This should mean that constitutional jurisprudence develops gradually and, hopefully, harmoniously.

Examining family-law jurisprudence in this respect provides interesting insights about the kinds of issues which courts are hesitant to face. The central problem in all the gay and lesbian cases, the cases about Muslim marriage, and some customary marriage cases is the common-law definition of marriage. Although courts have been very eager to extend the consequences of family life to gay and lesbian partners, they have studiously avoided the fundamental reason for the lack of common-law protection of such families to the extent of not even mentioning the common law definition of marriage. The judgment in the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[241] to the effect that gay and lesbian couples are capable of

[238] See *Langemaat* supra note 52; *Ryland v Edros* supra note 104; *V v V* supra note 47; and *Heystek v Heystek* supra note 196.

[239] Section 167(5).

[240] Op cit note 3 at 66–70. See also Iain Currie 'Judicious avoidance' (1999) 15 *SAJHR* 138 and Christopher J Roederer 'Judicious engagement: Theory, attitude and community' (1999) 15 *SAJHR* 486 for an opposing view. This is linked to the issue of the separation of powers, which does not form part of this article.

[241] Supra note 37.

founding all the elements of the consortium omnis vitae,[242] however, would strengthen challenges to the common-law definition. The judgment is also notable for the way in which it expressly refuses to extend its findings in relation to the rights of gay and lesbian partners to other family groups, like Muslim families and cohabitants, who may also have an interest in the demise of the common-law definition of marriage.[243] The SCA judgment in the *Amod* case[244] is similarly cautious to limit its finding of a duty of support from a Muslim marriage to monogamous marriages.[245]

At the same time, however, where courts are willing to grant relief, the principle of minimalism is not applied over-rigorously. In *Amod*, for instance, the SCA held that the fact that the legislature could amend the common law of maintenance does not preclude courts from doing so.[246] It added that 'this is not a case which involves difficult policy and political choices which should appropriately be left to the Legislature'.[247] This is questionable. In a society where monogamous Christian marriages have hitherto been favoured at the expense of customary and Muslim marriages, extending legal consequences to Muslim marriages cannot be described as anything other than political. Family law is replete with political problems, particularly relating to religion and race. Classifying a particular problem as political should not shield courts from having to deal with it. The Constitution is a profoundly political document and courts should not use the label of politics to screen certain problems from its influence.

By way of contrast, in cases involving competing rights to culture and gender discrimination, courts are unwilling to develop customary law. In the second *Mthembu* case[248] the court held that developing the customary rule of succession would affect other rules of customary law, was the subject of a Law Commission investigation and was best left to the legislature.[249] This issue is not inherently more political or less contentious than extending the right to family life to gay and lesbian couples and a court would be ideally situated to pronounce on the relationship between the competing fundamental rights to culture and gender equality. On the other hand, some cases, particularly *Langemaat*, where the court was required to consider the constitutionality of legislation, appear only too eager to develop the common law on the basis of very little authority or reasoning.

[242] Paragraph 46.

[243] Paragraphs 60 and 87.

[244] Supra note 58.

[245] Paragraph 24. See also *Ryland v Edros* supra note 104 at 707F and 709D.

[246] See also the CC judgment in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* supra note 37, paras 73–6, where the court sets out the principles relating to 'reading in' but points out that where courts read words into legislation, Parliament can subsequently change the effect of a judgment by way of legislation.

[247] Paragraph 28.

[248] Supra note 70.

[249] At 686H–687C. See also *Prior v Battle* supra note 82 at 1020I–J for similar reasoning and *Lebeloane v Lebeloane* supra note 212 for a complete refusal to entertain constitutional arguments.

4 CONTENT: WHAT DO COURTS DO WITH THE RIGHTS IN THE BILL OF RIGHTS IN THE FAMILY-LAW CONTEXT?

4.1 *Understanding discrimination and equality*

When the constitutionality of a legal rule is challenged on the basis of unfair discrimination, a court should perform an equality analysis to determine the validity of the rule. The Constitutional Court jurisprudence in the lesbian and gay cases provides a yardstick for the adequacy of such analyses. It requires a substantive vision of equality to which the impact of the legal rule on the dignity of the applicant and other members of her group should be central. The challenged rules should not be viewed in isolation, but in the legal, social and economic context which affect the lives of the applicants and other group members. Courts should therefore be able to take judicial notice not only of the ways in which different legal rules interact, but also of people's social and economic circumstances and particularly the historical reality of oppression. In analysing existing and historical patterns of discrimination, courts should attempt to place themselves in the position of the applicants. It is unnecessary to identify a single ground upon which a particular rule discriminates, since legal rules can simultaneously discriminate on more than one basis and these intersecting grounds of discrimination can in turn create different contexts for different members of particular groups.

Unfortunately this detailed analysis is absent from many High Court cases which deal with equality. Overlapping discrimination on the bases of gender, culture, religion and race in the Muslim marriage and customary-law cases remains unexplored, and courts seem unable to place themselves in the position of Muslim and African women who are subject to customary law.

In the gay and lesbian cases the argument that the disputed legal rules do not prevent lesbian and gay people from marrying partners of the opposite sex (and thus obtaining the rights and privileges open to heterosexual spouses) in effect contends that the rules are neutral and apply equally to heterosexual and homosexual people. This argument was rejected on the basis that it confuses substance with form. Homosexual and heterosexual people are differently situated in relation to the legal rules and the constitutionality of the ostensibly neutral rule should be measured by the impact which it has on the different groups.[250] The same emphasis on impact and the realization that groups of people may occupy different positions also drives the decisions which deal with gender-neutral rules allocating parental responsibilities and rights.[251] Thus, clearly, substantive equality is preferred over formal equality.[252]

[250] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (CC) supra note 37, paras 34 and 35; *Satchwell v President of the RSA* supra note 56, para 17.

[251] See *President of the Republic of South Africa v Hugo* supra note 175; *Fraser v Children's Court, Pretoria North* (CC) supra note 136.

[252] While formal equality would be concerned merely with the existence of different treatment, substantive equality focuses on the effect of different treatment given the positions which different groups occupy in society. See generally Janet Kentridge 'Sexual equality and discrimination: A reply to Meyerson' (1994) 10 *SAJHR* 298.

It is, however, not always clear that High Courts dealing with the right to equality comprehend this distinction. Cases like *Cary v Cary*,[253] *Prior v Battle*,[254] *Kalla v The Master*[255] and *Van der Linde v Van der Linde*[256] that refer to the need for equality without discussing it more fully, sometimes create the impression that equality refers to sameness of treatment, unrelated to context. On the other hand, some cases assume differential treatment to be justified without an analysis of its impact on advancing substantive equality.[257]

4.2 *Culture, religion and human rights*

The customary-law judgments generally fail to notice the fact that African women have historically been discriminated against on the intersecting bases of race, class, gender and culture. This is not limited to the civil-law rules which failed, for a long time, to recognize customary marriage, but also in the customary law of marriage and succession. Cases like *Mthembu v Letsela*[258] which hold that customary law should be screened from constitutional analysis because people (presumably women) choose to marry according to this system fail completely to take account of the social circumstances which operate to limit the choices of women in this regard. Nor do assumptions that customary law operates in contemporary urban areas exactly like it did in rural pre-colonial villages[259] reflect a judicial awareness of the concrete social and economic circumstances of urban African women or a stance of judicial empathy. A substantive equality analysis would have avoided these failures in reasoning.

At the same time, however, members of African communities have rights to practice their culture. *Hlope v Mahlalela*[260] focuses on the best interests standard in a way which assumes that African child-raising practices are based on the sale of children and that the customary legal rules should be replaced by civil-law norms.[261] The right to culture and its interaction with the best interests of children is simply ignored. Similarly, in *Prior v Battle*[262] and *Metiso v Padongelukfonds*[263] it seems to be assumed and accepted that patriarchy is central to the continued existence of customary law in a way which would be questioned in civil law.

The issues around the recognition of customary family law, its development in the interests of children and of gender equality are nowhere properly examined.[264] Instead, courts seem to avoid the issue as far as possible. This is

[253] Supra note 200.
[254] Supra note 82.
[255] Supra note 99.
[256] Supra note 178.
[257] See for instance *Mthembu v Letsela* supra note 67.
[258] Ibid at 945J–946A.
[259] Ibid at 946C–D.
[260] Supra note 74.
[261] At 458F–459D.
[262] Supra note 82.
[263] Supra note 87.
[264] Even *Mabena v Letsoalo* supra note 77 does not contain a detailed constitutional analysis.

also the case when the same issues surface in relation to Muslim marriages. In the *Amod* case the SCA had an excellent opportunity to embark upon a judicial analysis of the ways in which non-recognition of Muslim marriages in the civil law, gender inequality in Muslim private law and the right to practise one's religion impact on the position of the complainant and other Muslim wives. Instead, it failed to pay any attention to the concrete circumstances of these women's lives and chose to focus narrowly on the common-law duty of support.[265]

4.3 *Developing the concept of family*

The immigration cases have extended the right to dignity to incorporate the right to family life while the gay and lesbian cases use the right to equality and an extended notion of the right to privacy to extend the elements of the consortium omnis vitae to these families. These cases contrast strongly with the formulation of the rights to family life and parental care in *Jooste v Botha*[266] to reflect the pre-constitutional common-law position. Its limited interpretation of the right to privacy as encompassing the father's right not to be disturbed by his extra-marital child also contrasts with interpretations of privacy rights as establishing relationships and communities in the gay and lesbian cases. The court in *Jooste* failed to consider the extent to which the common law and statutory extension of rights to biological fathers infringe upon the rights of mothers of extra-marital children and the children themselves to be free from interference by biological fathers and to choose to form relationships with biological fathers or not. The wholesale extension of family rights in the gay and lesbian cases also contrasts with the caution which courts show in extending rights to family life to Muslim spouses and children and to cohabitants.

This again raises the question about the validity of the common-law definition of marriage. The courts could, on the basis of the trend in the gay and lesbian cases, decide that the common-law definition is inadequate in failing to encompass same-sex relationships. On the other hand, it could also hold that the extension of full family rights to Muslim families and cohabitants calls for legislative intervention. Of course extending the common-law definition to cover both gay and lesbian and heterosexual Muslim and cohabiting couples would be logically preferable. On the other hand, heterosexual families have the option to marry in terms of the civil law and thus to acquire the rights attached to civil marriage while gay and lesbian couples are precluded by the common-law definition of marriage from doing so.

4.4 *The role of the best interests of the child*

The constitutional principle that the best interests of children should be of paramount importance in matters which affect them is already reflected in

[265] See also the decision in *Allsop v McCann* supra note 182.
[266] Supra note 16.

the common law and for this reason courts usually assume that the contents of common-law rules are perfectly satisfactory. What remains uncertain is whether the inclusion of the best interests principle in the Constitution would require courts to take account of other constitutional rights and duties like gender equality, rights of parents and children to privacy and rights to culture and religion in interpreting the best interests of the child. I would argue that such a line of reasoning may be useful in areas where common-law rules are unclear, like the relocation cases or disputed, as in relation to gender-specific custody rules.

The issue is complicated by the assertion in *Jooste* that the constitutional best interests principle does not amount to a legal rule, but merely a general guideline. The reason is that '[i]ts wide formulation is ostensibly so all-embracing that the interests of the child would override all other legitimate interests of parents, siblings and third parties. It would prevent conscription or imprisonment or transfer or dismissal by the employer of the parent where that is not in the child's interest.'[267] This is clearly an overstatement. The fundamental problem both in this case and generally in custody and access cases is probably that the best interests of the child is usually equated with the legal rights of parents. No constitutional right is immune from interpretation by the courts and there is no single right which would trump all other rights at stake. The essence of Bill of Rights jurisprudence is the balancing of various competing rights and interests and I see no reason why the best interests principle should be an exception. The inclusion of the best interests principle in the Constitution would merely strengthen the argument that where the rights of other persons are affected by a decision, as they often are in custody and other child-related matters, courts should interpret this right with reference to the other fundamental rights.

The argument in *Jooste* that children's rights to parental care are not directly enforceable against parents simply does not reflect the state of the common law.[268] The right to be maintained is enforceable against both parents. Children's rights to education are enforceable against parents who have a legal duty to send them to school and to pay for their basic education. Rights to parental care and attention are indirectly enforceable in the sense that parents who neglect or ill-treat children will be punished in terms of the Child Care Act 74 of 1983. The court's distinction between legal rights and moral entitlements which cannot be legally enforced may be valid as far as parental affection is concerned. However, the right to have contact with a child in order to develop or maintain ties of affection is one which is regularly upheld where parents, including unmarried fathers, claim access. Why this right should be enforceable by parents but not by children is unclear.

[267] At 210C–E.

[268] The Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) held specifically that children's rights to adequate housing are primarily enforceable against their parents and not against the state. The provision of parental care in the form of maintenance, education and the provision of the daily needs of children are therefore directly horizontally applicable and have been so in the common law.

5 CONCLUSION

Cockrell[269] expresses the opinion that the indirect horizontal application of the Bill of Rights would lead to a substantive style of reasoning in which courts 'engage with normative issues rather than rely on "authority reasons" ' when dealing with private law and specifically the common law. Constitutional values and moral, economic, political and institutional reasons should therefore underpin these decisions. In his review of the Constitutional Court's first judgments he finds that such substantive reasoning has been relatively scarce and points out that High Court judges seem to fear that substantive reasoning would deprive them of the certainty associated with formal reasoning.[270] In their application of the Bill of Rights to family law, it seems that judges are driven by these fears to avoid undertaking extensive constitutional analysis of the common law. The Constitutional Court seems to have a clear idea of the method which should be followed and the issues which should be canvassed. The High Court judgments, however, are seldom extensively or properly reasoned. Some courts adhere closely to the safety provided by the shores of Constitutional Court judgments, some pretend that the sea of constitutional interpretation does not exist and play happily on the beach, while yet others venture enthusiastically into the deep of the Bill of Rights, there to splash and splutter and grasp for the lifelines of bold assertions of fundamental rights.[271]

To a great extent the impression that family law has undergone radical changes as a result of its interaction with the Bill of Rights is created by the changes in relation to gay and lesbian couples. In this respect the role of the Coalition in driving reform not just for gays and lesbians, but in family law in general should be acknowledged. However, it should be clear from my analysis above that the ultimate aim of developing a coherent jurisprudence in relation to the interaction between the Bill of Rights and private law has not yet materialized. Developments within the particular areas are not necessary complementary or harmonious. Instead, different trends within different areas contradict one another and the progressive jurisprudence in the area of lesbian and gay family life has largely failed to spill over into other areas.

Given this uneven development of human rights in family law, one could argue that it would have been better to have included a right to family life in the Constitution, rather than allowing courts to develop this right on a piecemeal basis. Contrary to the assertion in the *Certification* judgment[272] that the inclusion of such a right would encourage litigation about the definition and formation of families, the lack thereof has lead to various such disputes. Had the right to family life been included in the Constitution, the Constitutional Court would have had to deal with its extent and ambit, and current contradictory judgments could possibly have been avoided.

[269] Op cit note 5 para 3A1 and 3A2.
[270] Cockrell 'Rainbow jurisprudence' op cit note 18 at 11 and 36.
[271] See for instance the *Satchwell* case supra note 56, as compared to the *Langemaat* case supra note 52.
[272] Supra note 19.

Ultimately the measure of the successful incorporation of a jurisprudence of fundamental rights into the area of family law should be the extent to which it has lead to improvements in the legal rules which apply to the legally most neglected groups, namely African women and children and Muslim wives. The adequacy of the new legal rules should, if we take the notion of substantive equality seriously, be measured against the extent to which the social and material conditions of members of disadvantaged groups have been improved. It would seem that, although gay and lesbian families have benefited from constitutional developments in family law, the most disadvantaged groups of women and children cannot count on the courts to be as proactive on their behalf, but must await statutory intervention to ameliorate their position.

FREEDOM OF SPEECH AND TREASON THROUGH THE AGES

Tacitus relates the decision of Tiberius to resume prosecutions for treason, in the wake of verses critical of the emperor doing the rounds, thus:

'The title of "father of his country," which the people had so often thrust upon him, Tiberius refused, nor would he allow obedience to be sworn to his enactments . . . But he did not thereby create a belief in his patriotism, for he had revived the law of treason, the name of which indeed was known in ancient times, though other matters came under its jurisdiction, such as the betrayal of an army, or seditious stirring up of the people, or, in short, any corrupt act by which a man had impaired "the majesty of Rome." Deeds only were liable to accusation; words went unpunished.'

P Cornelius Tacitus *The Annals* translated by Alfred John Church & William Jackson Brodribb (University of Chicago / Encyclopaedia Britannica: The Great Books 1952) Book 1.72.

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'[Antonius Matthaeus II *De Criminibus ad libros 47 et 48 Digestorum Commentarius* (1644) 48.2.2] is no justification for making violence against the State an element of treason. On the contrary armed rebellion is one form of treason; initiating a political group or a faction against the State is another . . . In various cases through the years our Courts and, more specifically, the Appellate Division had occasion to deal with treason and sedition. In *R v Endemann* 1915 TPD 142, during a time of war, the accused was charged with sedition in that he intended to endanger public order and tranquillity and to resist and defy the lawful authority of the Government by wrongfully, unlawfully, maliciously and seditiously publishing and uttering certain statements. No violence against the State — actual or intended — was alleged. *Tielman Roos*, who appeared for the accused, submitted that to constitute the crime of sedition in our law there must be the element of violence and that the words charged could in no case be sedition, [but the court did not agree].'

Mr Justice Van der Walt in *S v Mayekiso* 1988 (4) 739 at 743 and 746, giving judgment in an application for the discharge of the accused after the state had closed its case in the trial of 'Moss' Mayekiso, then Chairperson of the Alexandra Action Committee.
