

To have & to
Hold

THE MAKING OF SAME-SEX MARRIAGE
IN SOUTH AFRICA



Fanele
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This is necessary book

EDITED BY MELANIE JUDGE,
ANTHONY MANION & SHAUN DE WAAL

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(Out, Que, Too) necessary.
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On rupture and rhyme: Perspectives on the past, present, and future of same-sex marriage

Ruthann Robson

'Finally, our Constitution represents a radical rupture with a past based on intolerance and exclusion ...' – Justice Albie Sachs in *Fourie*

'The past does not repeat itself, but it rhymes'
– widely attributed to American writer Mark Twain

Prologue

Circa 1979, same-sex marriage and South Africa were equally far on my horizons. I was living in North America, in the subtropical state of Florida in the United States, and had just graduated from law school. I filled my mind with concepts such as the 'rule against perpetuities', which I had needed to master for the Bar Examination and have never used since. To the extent I thought about same-sex marriage as a personal or political option, I reviled it as bourgeois and patriarchal, perspectives that I have not entirely abandoned.

Yet I marveled at the power of same-sex marriage in conservative rhetoric. Indeed, along with the spectre of unisex toilet facilities, same-sex marriage was successfully deployed to defeat the proposed Equal Rights Amendment to the US Constitution that would have provided that 'equality of rights' shall not be denied by the government 'on account of sex'. In Florida, not only did the state legislature refuse to ratify the Equal Rights Amendment, it passed a statute prohibiting 'homosexuals' from adopting children. The adoption ban and referenda repealing local anti-discrimination laws were a direct result of the efforts of Anita Bryant. Her political activism marked the rise of the conservative religious right throughout the US, as she spearheaded an anti-gay campaign called 'Save Our Children'. Previously, she had seemed a rather innocuous figure. As the spokeswoman for Florida orange juice, the former pop singer had been smiling on television advertisements accompanied by a cartoon bird and crooning 'breakfast without orange juice is like a day without sunshine'.

Boycotting Florida orange juice was one response of the queer community to Bryant's anti-gay campaign. Although it involved a bit of personal sacrifice (orange juice seemed a cheap and healthful drink, with the added bonus of mixing well with an assortment of liquors), it was effective as a collective effort. The Florida Citrus Commission let Bryant's contract lapse because of her controversial status.

In addition to her professional problems, Anita Bryant's personal life suffered. Soon, she divorced her husband. Her status as a divorced woman substantially decreased her popularity among fundamentalist Christians and conservatives.

Boycotts were a fact of political and daily life at that time. Complying with some was effortless, including boycotting diamonds and gold from South Africa in support of anti-apartheid efforts. Unlike the suggestion of a glass of orange juice, the advertisements proclaiming 'a diamond is forever' did not tempt me. The scenarios of heterosexual romance, in which the woman was presented with an expensive gift, seemed designed to be deconstructed in a women's studies class. Students in business classes meanwhile studied De Beers' long-standing and successful promotion of the relatively plentiful diamond as a symbol of love and eternity, creating demand for diamonds as a luxury yet necessary item, with the bonus of making the resale of diamonds seem tawdry. Personally, I had no plans or sufficient funds to buy a diamond for myself and certainly was not hoping for any man to offer up an engagement ring.

As for gold, I wasn't rushing to fill a safe with bullion, despite currency scares, and even when I wore jewellery, I preferred silver or string. Any affection I had for gold was sullied by a skit on the television show *Saturday Night Live*, specifically linking the purchase of the gold coin to supporting apartheid and white supremacy. I can still remember the scene, constructed as a mock advertisement for the Krugerrand that was renamed in an inflammatory manner.

Despite these recollections, in those days I was not always watching television or thinking about possible purchases. I recall commemorating the tenth anniversary of Stonewall, the watershed resistance of queer people in New York City to law-enforcement repression, in a bar in Florida. I remember studying the 'rule against perpetuities' and learning that I had passed the examination and thus gained admission to another type of bar in Florida, that which certified attorneys. I felt ready to use the law as an instrument of social change.

On most days, I was convinced that 'liberation' was right around the corner. I would admit that there was in lull in the counterculture, but rationalize that this was merely a bit of breathing space, until the women's movement and the gay movement and the black-power movement and the anti-poverty movement and lesbian-feminism and indigenous cultures gained ascendancy. There was a global movement toward liberation and it was unstoppable!

But if anyone would have asked me, circa 1979, about the future of same-sex marriage or South Africa, my wildest guesses would not have approximated the present state of affairs. Certainly, I would never have connected the two.

The South African Constitution, Fourie, and the Civil Union Act

It is late 2005, and I am jetting from North America to South Africa for a conference on comparative constitutionalism in Durban. Only a few days before, the

Constitutional Court had rendered its decision declaring the limitation of marriage to opposite-sex couples unconstitutional. On the long flight, I try to revise the paper I had intended to present. My analysis of judicial power to promote sexual freedom in constitutional democracies needs to include this new development. But I am tired and soon fall asleep on my lover's shoulder. When the flight attendant serves orange juice for breakfast, I notice that she sports what looks like a diamond ring.

Upon hearing about the *Fourie* decision, many people in the US envied my travel plans. It seemed that South Africa was definitely at the apex of 'gay liberation'. For sexual minorities in other nations, including the US, the Constitution of the Republic of South Africa has become an inspiration. The prohibition of unfair discrimination by the government and private actors on a numerous grounds, including sexual orientation, remains unique. This constitutional provision provided the clear basis for the Constitutional Court to declare the criminalization of sodomy unconstitutional, which did not occur in the US until 2003, when the Court reversed a case decided 17 years earlier. The South African constitutional text also provided firm grounding for the Constitutional Court to recognize rights for sexual minorities in same-sex partner relationships, including immigration, government pensions, joint legal parent status through adoption, joint-parent status for children born through alternative insemination, and later, intestate succession. This jurisprudence has a special resonance for queer legal advocates in other constitutional democracies, but is certainly the object of global craving.

Yet there is something about marriage that still rankles with me. At the conference, full of legal progressives, heterosexuals almost unerringly assumed that my lover and I were thrilled with the prospect of our impending marriage. At times, it could feel rude to engage in a conversation that, at bottom, informed the well-meaning heterosexual that I had absolutely no desire to emulate him or her. Colleagues whom I had believed knew me better – or had read my work – gaily imagined the ceremony and the party and even the honeymoon. 'You two have lived together for years and years,' a friend said to us, laughing. 'Don't you think it's high time you got married?' The unarticulated assumption was that surely we did not want to remain in what Justice Albie Sachs in *Fourie* described as a 'state of legal blankness', in which our union would remain 'unmarked by the showering of presents and the commemoration of anniversaries so celebrated in our culture'. Sachs did acknowledge that a same-sex couple might 'abjure mimicking or subordinating themselves to heterosexual norms', but concluded that what was important was 'not the decision to be taken, but the choice that is available'. Nevertheless, surrounded by well-meaning heterosexuals, I felt distinctly that there was a correct choice and a less-correct (if not entirely wrong) choice.

My discomfort was complicated by the fact that if the Constitutional Court had decided differently, I would be distressed. In the US, heirs to Anita Bryant had been busily promoting anti-same-sex-marriage laws and even constitutional

amendments to circumvent or forestall 'judicial activism' protecting queer rights. The Massachusetts Supreme Judicial Court, under the leadership of South African native Margaret Marshall, had declared same-sex marriage as constitutionally mandated. At that moment (and still), Massachusetts was the only state in the US where same-sex marriage was lawful. A handful of other states had what some named a 'separate but equal' regime of relationship recognition for same-sex couples, usually denominated as 'civil union'. The large majority of states, however, had laws preventing the courts from ruling same-sex marriage constitutionally required, or even recognizing same-sex unions from other states. These laws were often passed through direct ballot measures. This was the same strategy that Bryant had so successfully employed years earlier, and the contemporary electoral rhetoric was similarly ugly.

Meanwhile, in the cafés and on the streets of Durban and later in our travels throughout KwaZulu-Natal, my lover and I were repeatedly asked if we were 'sisters'. We speculated on various cultural customs to explain this question, which we had only been asked a few times previously, all of them in hospital. After a while, it was tempting to answer 'yes'. After all, sisterhood was powerful, as we had learned in those women's studies classes decades ago.

In addition to my personal qualms, and despite its status as an object of envy, the achievement of the *Fourie* decision is not as untroubled as it first appears to casual international observers. Notably, the Court did not remedy the unconstitutional condition, but allowed Parliament 'to cure the defect within 12 months'. Writing for the Court, Sachs reasoned that Parliament might later choose a remedy other than a simply 'reading-in of the words "or spouse"' in legislation that was sex-specific, as the Court would do, and the Court's 'temporary remedial measure would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action compliant with the Constitution'.

The process of Parliamentary approval, including what some have called a 'roadshow' that provided a vehicle for 'homophobic hate speech', resulted in the Civil Union Act of 2006. Returning to South Africa in 2007, I was lucky to be able to spend a month in Johannesburg at Wits Law School and have amazing opportunities to speak to advocates, academics, activists, and judges from all over the nation about the *Fourie* decision and Civil Union Act. As to be expected, there were various views. Those expressing doubts about the institution of marriage expressed the same conundrum I did, and many others believed the Act fell short of equality. There were critiques, satisfactions, pride, and wonder. Despite these differences, almost everyone agreed that there was more work to be done on queer liberation. The subsequent murder of Sizakele Sigasa and Salome Masooa served as a chilling reminder that no judicial decision or legislative act will cure homophobia.

Backlash, including violent backlash, to advances in queer liberation is a worldwide phenomenon. Also common are troublesome compromises, such as

the Constitutional Court's deferral to Parliament and Parliament's inclusion of the opt-out conscience clause, and our often ambiguous and inconsistent reactions to legal reforms. Trying to imagine the future under such circumstances is a fraught endeavour.

And yet, conceptualizing the future is a temptation that is almost impossible to resist.

The Permanent Partners Judgment of 2027

I imagine myself at a party for the 'diamond anniversary' of Stonewall, in a rather well-appointed apartment, overlooking an ocean that may be a bit warmer than it once was but still tumbles a beautiful blue. My imagination includes my lover and I – I refuse to say 'spouse' although we had to get married years ago in order to benefit from our pension accounts – drinking orange juice with a splash of champagne. My imagination tends towards the pleasant, in part because I believe it should; and in part because I believe that one has a duty to hope for the best. Yet my imagination also veers toward my fears, a less controllable response. Even as I can visualize myself in a festive mood, I can anticipate my celebratory humour being ruptured.

As detailed as a dream, in this imagined future, I read from this hypothetical decision rendered by the South Africa Constitutional Court:

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 117/2027

RIGHTS OF SINGLES TASKFORCE

First Applicant

CORINNA ZAZO SMITH

Second Applicant

And others

versus

MINISTER OF HOME AFFAIRS

First Respondent

THE PRESIDENT OF

THE REPUBLIC OF SOUTH AFRICA

Second Respondent

Heard on: 10 February 2027

Decided on: 27 June 2027

JUDGMENT

Mori, J:

Introduction

[1] This case raises the vital issue of the importance of marriage in our society. The Applicants challenge the Permanent Partners Act, Act 17 of 2025, also known as the 'Rule in Favour of Perpetuities', which eliminates divorce or other dissolution of marriage except in cases in which one of the partners is confined by court order to a mental institution for at least five years or who has left the country and not returned for at least ten years. Parliament passed this Act after extensive hearings regarding the rate of divorce and the destruction of families, including but not limited to families with children. Amongst the findings of Parliament is a rise in the incidence of divorce, so that more than fifty percent of the adults in our nation are no longer in a marriage because the marriage was terminated by legal processes rather than death. Parliament also found that children are more apt to thrive when they are raised by two persons who remain married to each other.

[2] The Applicants argue a deprivation of their constitutional rights to be free from unfair discrimination on the basis of marital status, sexual orientation, and gender, and their right to dignity, as well as raising an 'ex post facto' argument. We reject each of their arguments and will treat them briefly in turn.

Marital Status

[3] The Permanent Partners Act does not discriminate unfairly on the basis of marital status. The Act apportions neither private nor public goods on the basis of a person's marital status. What the Act does provide is that once a person chooses to marry that choice is a permanent one, except in certain circumstances.

Sexual Orientation

[4] Applicant Smith, now in a marital relationship with a woman with whom she set up house and duly married, argues that the Permanent Partners Act indirectly discriminates on the basis of sexual orientation. She relies on studies that purport to show that persons with a same-sex sexual orientation have an inherently different understanding of 'permanent' than do persons with an opposite-sex sexual orientation. Without deciding on the legitimacy of such studies, we find them inapposite. Whatever the subjective understandings of particular persons, marriage is a life-long commitment.

[5] In *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC), the landmark same-sex marriage case decided over twenty years ago, we began by describing what same-sex couples routinely did: 'Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up a home together.' At the time of that opinion, the couple was not allowed to enter into the marital commitment, a constitutional deficiency that has long since been remedied. Now, the parties cannot be heard to complain that they must be released

from their commitment. Assuming that the parties entered into the marital commitment willingly, the legislature certainly has the power to enforce that commitment. Moreover, in *Fourie*, the Court specifically based its decision on the principle that same-sex couples should have the same rights and responsibilities as heterosexual married couples should their relationship threaten to rupture (paragraph 73).

Gender

[6] Generally, marriage 'stabilizes relationships by protecting the vulnerable partner and introducing equity and stability into the relationship', as we stated in *Fourie* (paragraph 69). However, although increasingly infrequent, violence against women remains a scourge in our society of equality, Parliament's choice to exclude an ability to terminate an otherwise valid marriage on these grounds presumably occurred after reasoned and deliberate consideration. We reject any link between the availability of divorce as necessary for women to avoid violence or that the instances of violence against women are attributable to the availability of divorce for women. On that assumption, we cannot usurp the power of Parliament and 'edit' the statute. We note that organizations exist representing women suffering from violence at the hands of their lawful spouses and trust that such organizations will pursue their arguments in Parliament.

Dignity

[7] Our constitutional concept of dignity imposes on our people the responsibility to comport themselves with dignity. As Sachs and O'Regan JJ stated in the landmark judgment of *S v Jordan* 2002 (6) SA 642 (CC), it was not the criminal prohibition against prostitution that diminished the dignity of prostitutes, but the 'very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body' (paragraph 77). Similarly, just as the prostitute chooses her regrettable lifestyle and must accept the consequences attendant thereto, so must the married person. With any luck, these consequences are of a much happier quality. However, even if they are not, the choice must be honoured and enforced.

'Ex Post Facto'

[8] The Applicants also raise an argument that the change in marriage laws constitutes an impermissible 'ex post facto' law, operating impermissibly retroactively in regard to persons who were married at the time Parliament passed the Permanent Partners Act of 2027. Our Constitution provides in Section 35, regarding 'arrested, detained, and accused persons', in Subsection 3, that every 'accused person' has certain rights, which include, in Subsection 1, 'not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'. As is obvious from the explicit language of the Constitutional text, this right accrues in the criminal context. Marriage, obviously, is not such a context. Instead, marriage is a civil contract, and as our native countrywoman Margaret Marshall asserted, in her landmark

decision declaring same-sex marriage constitutionally mandated for the people of the state of Massachusetts, where she had become the Chief Justice of the state's Supreme Judicial Court, there are three parties to any marriage: two willing spouses and the state - *Goodridge v Department of Public Health* 798 NE 2d 941, 954 (Mass. 2003). Parliament has altered the terms of the contract, as the parties were always aware that it could, and they cannot be heard to complain.

International Law

[9] Pursuant to Section 39 of our Constitution, requiring us, when interpreting the Bill of Rights, to consider international law, we again note that there is presently no extant body of law that qualifies as 'international law'. However, we also note that South Africa is not alone in passing legislation and in upholding such legislation against constitutional challenge, promoting the permanence of marriage. Amongst constitutional democracies, Australia, the United States, and the Consolidated Republic of South America, have passed and upheld similar laws. In Aortearoa (formerly known as New Zealand), East Timor, Iran, Iceland, and Israel, amongst others, the respective Parliaments have passed similar provisions deemed consistent with their national interests. The situations in the European Union and Asian Confederacy are understandably more complex given current conditions, but cannot be said to be inconsistent with our present opinion.

Conclusion and Order

[10] The Court finding that arguments of the Applicants challenging the Permanent Partners Act of 2027 are without merit, and the Court certifying that this Judgment complies with the 1 000-word limit for all judicial opinions, excluding this paragraph and the caption, as recommended by the Chief Justice, the appeal is dismissed.

Epilogue

I do not mean to suggest that the hypothetical Permanent Partners Act of 2027 and the hypothetical judgment upholding it are inevitable, predictable, or even likely outcomes, either globally or as a consequence of present South African Constitutional Court doctrine, the Civil Union Act, or social conditions. Nevertheless, this dystopian portrait is not unimaginable. The celebratory rhetoric marriage in *Fourie* might be extended to its perhaps illogical conclusion. Further, the reasoning in *S v Jordan* (the sex-workers case) about 'choice' might be extended to make the choice of marriage irrevocable. In the US, so-called 'covenant marriage', prohibiting no-fault divorce, has been adopted as an option in a few states.

Looking back on 1979 from the perspective of 2007, one can spot the scattered seeds of same-sex marriage and the South African democratic revolution. The energy directed at stamping out both possibilities by repressive forces is perhaps

one indication of the fertility of these seeds. And perhaps one can even discern how these seeds would combine and mutate to flower into the *Fourie* judgment. Yet I do not think I was alone in my inability to include such eventualities in my most adventuresome speculations.

Trying to gaze into 2027 is an equally fraught endeavour. However, I assume that the *Fourie* judgment and the Civil Union Act shelter many of the seeds of our queer future, in South Africa and globally. A pessimistic but rather simplistic prediction is that the gains that have been made will be rescinded. An optimistic forecast is that the realization of sexual liberation will only grow, with 'civil unions' being only one form of partnership and 'partnership' being only one type of sexual expression.

The reality will most likely be a tangle of rupture and rhyme with our present and past.