



JURISPRUDENCE OF CONSTITUTIONAL COURTS IN SOUTH AFRICA AND AUSTRALIA ON SAME SEX MARRIAGE

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ABSTRACT

This paper examines the evolution and current legal status of same-sex marriage in South Africa and Australia, highlighting key judicial decisions, legislative developments and their implications for LGBTQ+ rights. It provides a comparative analysis of the constitutional and legal frameworks in these countries, focusing on how their respective judiciaries have navigated issues of equality, dignity and non-discrimination. The paper discussed landmark cases such as Minister of Home Affairs v Fourie in South Africa and Commonwealth v Australian Capital Territory in Australia, which have significantly influenced the recognition and protection of same-sex relationships. It also explored the social and political dynamics surrounding same-sex marriage, including public opinion, advocacy, and the role of civil society. In doing these analyses, the paper adopted the doctrinal research methodology and analysed primary and secondary sources of law. Based on the analyses of these sources, the paper offered lessons and recommendations for Nigeria, considering its current stance on same-sex marriage and the potential pathways toward achieving greater inclusivity and human rights protection for LGBTQ+ individuals. The paper recommended that, Nigeria should consider amending its Constitution to explicitly prohibit discrimination based on sexual orientation, as is done in South Africa. The paper also shows that the interplay between judicial decisions and legislative reforms is crucial in achieving and solidifying these rights. For countries like Nigeria, these examples provide valuable lessons on the potential for constitutional reform, judicial independence, and public advocacy to drive progress.

Keywords: Jurisprudence, Constitution, Same-Sex, Constitutional Court, Marriage.

INTRODUCTION

The Constitution of South Africa and the Constitution of Australia share many basic structures and protections of human rights.¹ The constitution in South Africa is characterized by the Bill of Rights. The protections offered in the constitution of South Africa make it fall within the criteria of a modern democratic constitution. This is very much the same with the 1905 Act (the Australian Constitution), which was adopted locally through the Commonwealth of Australia Constitution Act in June 1900 by the British Parliament. Beyond the peculiarities of each country, that is,

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¹ D John, *Human rights and the South African legal order* (Princeton University Press, 2015) 402.



Australia followed the tradition of the Westminster form of government, and South Africa followed the American presidential form of government, one unique issue separates them. It is a historical fact that South Africa was part of the African resistance to colonialism, though politically not acknowledged by many African countries. Hence, it was granted a constitution with a bill of rights provision, which the Australian constitution did not have.² The rights conferred in the South African Constitution are through different interpretations, registered or social causes, progressive, innovative approaches, and or evolutionary. Meanwhile, the rights obtained in the Australian Constitution are traditional and conservative, while judicial deliberations are often made on issues of human equality so as to reflect public opinion– in the area of same-sex marriage jurisprudence. In both countries, the judiciary is expected to apply legal reasoning systematically and coherently; transcending moral claims, and understanding the need to eliminate barriers that prevent equal enjoyment of human dignity. The jurisprudential approach in the two countries gives functional and normative meaning within the same-sex marriage framework. The judiciary states that, it is the only body that can interpret what the constitution means, as they are ultimate arbitrators.

CONCEPTUAL FRAMEWORK

Marriage

The term marriage in recent times is amenable to several meaning as such it is defined differently, as related to the persuasion of such person, institution, and jurisdiction. According to Sheri Striot, marriage is a formal union, social and legal contract between two individuals that unites their life legally, economically and emotionally. In *Hyde v Hyde*,³ Lord Penzance defined marriage as ‘The voluntary union for life of one man and one woman to the exclusion of all others.’ This definition corroborates the definition of marriage by the South African Marriage Act of 25, 1961, which defined marriage as the legally recognized voluntary union of one man and one woman to the exclusion of others while it last. However, this definition no longer reflects present realities as there are many interpretations as to what amounts to marriage and as such marriage has been

² Ibid.

³ [1861-1873] All ER 175.



redefined with the legalization of same sex marriage in some states such as South Africa and a host of others.⁴ Comparatively, in some countries of the Western World, the definition of marriage in *Hyde v Hyde*⁵ can no longer apply today due to some changes in society. Monogamous marriage in some places in the world is no longer heterosexual in nature as same sex marriages are recognized, marriages between human and animals as well as marriage between humans and objects. This then suffices to say that the general meaning of marriage is no more ‘a contract by which a man and a woman express their consent to create the relationship of husband and wife’ as the Lesbians, gays, bisexual and transgender (LGBTQ) Community is now recognized in the western world and discrimination against them is criminalized. Marriage is now legally defined in the United States of America as ‘the legal union of a couple as spouses.’ The basic elements of a marriage in this jurisdiction are: (1) the parties’ legal ability to marry each other, (2) mutual consent of the parties, and (3) a marriage contract as required by law. Marriage is not to be viewed as heterosexual, as the requirement of opposite sex has now been taken away by virtue of recognizing same sex marriage.⁶

Same-Sex Union or Marriage

Same-sex Union or Marriage is the marriage between people of the same sex, either as a secular civil ceremony or in a religious setting. This could be between man-to-man or woman-to-woman. History posits that the first historical mention of the performance of same-sex marriage occurred during the early Roman Empire. The first Roman emperor to have married a man was Nero, who is reported to have married two other males on different occasions.⁷ In Africa, the best-known case of possible homosexuality in ancient Egypt is that of the two high officials Nyankh-Khnum and Khnum-hotep.⁸ Both men lived and served under Pharaoh Niuserre during the 5th Dynasty c.

⁴ Equatorial Guinea, Gabon, Madagascar etc.

⁵ (n3).

⁶ Cornell Law School, ‘Marriage’ <[https:// www. Law.cornell.edu](https://www.law.cornell.edu)> accessed 20 September, 2024.

⁷ The first was with one of Nero's own freedmen, Pythagoras, with whom Nero took the role of the bride. Later, as a groom, Nero married Sporus, a young boy, to replace the teenage female concubine he had killed and married him in a very public ceremony with all the solemnities of matrimony.

⁸ Richard Parkinson, ‘Homosexual desire and middle kingdom Literature’ [1995] (81) *Journal of Egyptian Archaeology*, 57.



2494–2345 BC. Each had families of their own with children and wives, but when they died their families apparently decided to bury them together in the same mastaba tomb, it means ‘house for eternity’ or ‘eternal house’. In ancient Egypt, it is a type of ancient tomb in the form of a flat-roofed rectangular structure with inwards sloping sides constructed out of mud-bricks from the Nile River or stone. In this mastaba, several paintings depict both men embracing each other and touching their faces nose-on- nose.⁹ Egyptologists and Historians disagree about how to interpret the paintings of Nyankh-khnum and Khnum-hotep. Some scholars believe that the paintings reflect an example of homosexuality between two married men and prove that the Ancient Egyptians accepted same-sex relationships. Other scholars disagree and interpret the scenes as evidence that Nyankh-khnum and Khnum-hotep were twins, even possibly conjoined twins. No matter what interpretation is correct, the paintings show at the very least that Nyankh-khnum and Khnum-hotep must have been very close to each other in life as in death. Statistics have shown that globally as of 2024, marriage between same-sex couples is legally performed and recognized in 36 countries, with a total population of 1.3 billion people (17% of the world's population),¹⁰ with Greece being the recent country to legalize same sex marriage in her country, recognizing LGBTQ rights in same sex union with all rights accrued to such marriage.

COUNTRIES WITH SAME-SEX MARRIAGE¹¹

The table below provides a list of countries that have legalized same-sex marriage, as well as selected countries that offer some other legal status for same-sex couples.

Country	Year Effective	Argentina
2010 Australia 2018 Austria 2019 Belgium 2003 Brazil 2013 Canada 2005 Colombia 2016 Costa Rica 2020 Denmark 2012 ¹² Ecuador 2019 Finland 2017 France 2013 Germany 2017 Iceland 2010 Ireland 2015 Luxembourg 2015 Malta 2017 Netherlands 2001 New Zealand 2013 Norway 2009 Portugal 2010 South Africa 2006 Spain 2005 Sweden 2009 United Kingdom		

⁹ Ibid.

¹⁰ n8.

¹¹ HRC, ‘Marriage equality around the world’ <<http://www.hrc.org>> accessed 28 January, 2025.

¹² Although Greenland is part of the Kingdom of Denmark, it was not subject to Denmark's legislation on the matter; it passed its own legislation to recognize same-sex marriage in 2015.



2020 United States 2015 Uruguay
2013

Selected countries with other legal status for same sex couples¹³

Country	Status	Year effective	Andorra	civil
union	2014 Chile	civil union	2015 Croatia	
life partnership	2014 Cyprus	civil partnership	2015 Czech	
Republic	registered partnership	2006 Estonia	registered partnership	
2016 Greece	civil partnership	2015 Hungary	registered	
partnership	2009 Italy	civil union	2016 Liechtenstein	
registered partnership	2011 Slovenia	registered same sex partnership		
2006				
Switzerland	registered partnership	2007		

LGBTQ+

LGBTQ+ refers to a group of people with diverse sexual orientations and gender identities. Here is a breakdown of what each letter represents:

L: Lesbian (women who are attracted to women)

G: Gay (men who are attracted to men)

B: Bisexual (people who are attracted to both men and women)

T: Transgender (people whose gender identity differs from the sex they were assigned at birth)

Q: Queer or Questioning (people who are still exploring their sexual orientation or gender identity)

+ Plus: representing other identities within the community, such as:

i. Intersex (people born with reproductive or sexual anatomy that does not fit typical male or female classifications)

¹³ Brian Duignan, 'Respect for Marriage Act' <<https://www.britannica.com/topic/same-sex-marriage/....>> accessed on 21 September, 2024.



- ii. Asexual (people who don't experience sexual attraction)
- iii. Pansexual (people who are attracted to others regardless of gender)
- iv. Gender queers (people whose gender identity is a combination of male and female, or neither).

HISTORICAL BACKGROUND OF SAME SEX RECOGNITION IN SOUTH AFRICA

South Africa is the fifth country in the world to legalize same sex marriage and the first in Africa, thereby deviating from the central African belief, custom, and norm that consider same sex unions as taboo and un-African. South Africa's path to same-sex marriage began with its post-apartheid Constitution, which came into effect on February 4, 1997.¹⁴ This groundbreaking document was the first in the world to explicitly protect sexual orientation as a human right. The Constitution's equality clause forbade discrimination based on sex, gender, or sexual orientation, laying the crucial legal foundation for future advancements in LGBTQ+ rights. The Constitution of the Republic of South Africa, 1996, section 9 provides as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth...¹⁵

Following the constitutional protections, a series of court decisions gradually extended specific rights to same-sex couples. These rulings systematically dismantled discriminatory laws and practices: In 1998, the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*¹⁶ decriminalized consensual sexual activities between men. The same year, *Langemaat v*

¹⁴ J Barnard, 'Totalitarianism, (same-sex) marriage and democratic politics in post-apartheid South Africa' [2007] (23)(3) *South African Journal on Human Rights*, 500-525.

¹⁵ Constitution of the Republic of South Africa, 1996, s 9 ss (1-3).

¹⁶ [1998] ZACC 15.



*Minister of Safety and Security*¹⁷ recognized the reciprocal duty of support between same-sex partners and extended health insurance benefits to them. Subsequent cases further expanded rights for same-sex couples. The early 2000s saw rulings that allowed same-sex couples to adopt children jointly, recognized both partners as parents in cases of artificial insemination, and granted inheritance rights when a partner died intestate.¹⁸

The culmination of these judicial advancements came with the Civil Union Act of 2006. This landmark legislation legalized same-sex marriage in South Africa, making it the fifth country in the world and the first in Africa to do so. The Act came into force on November 30, 2006, allowing same-sex couples to enter into legally recognized marriages or civil partnerships.¹⁹ The legalization of same-sex marriage had significant social implications. The first same-sex couples to wed under the new law did so on December 1, 2006 in George. In 2013, South Africa witnessed its first traditional same-sex wedding, blending legal recognition with cultural practices. Despite these advancements, the journey towards full equality continues. In 2020, the Department of Home Affairs announced plans to introduce a new draft marriage policy to reconcile diverse marriage laws into a single piece of legislation. This ongoing process aims to further streamline and equalize marriage rights for all South Africans, regardless of sexual orientation or cultural background.

It is important to note that the path to same-sex marriage in South Africa has not been without opposition. The country's history of apartheid and the influence of conservative religious views created initial resistance to LGBTQ+ rights. The apartheid government was hostile to the human rights of South African LGBT.²⁰ Homosexuality was a crime punishable by up to seven years in prison. This law was used to harass and outlaw South African gay community events and political activists. Sexual intercourse between men was historically prohibited in South Africa as the common law crimes of sodomy and unnatural sexual offences, inherited from the Roman-Dutch law.²¹ A 1969 amendment to the Immorality Act prohibited men from engaging in any erotic

¹⁷ [1998] (3) SA 312.

¹⁸ Ibid.

¹⁹ De Vos P and Barnard J, 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' [2007] (124) (4) *South African Law Journal*, 795-826.

²⁰ I Taylor & F Francis, 'Rights and Privileges of LGTB persons' [2023] (2) *Journal of Sexual Rights*, 20-25.

²¹ J Milton, *South African Criminal Law and Procedure: Common Law Crimes* (3rd edn, Kenwyn, South Africa).223-228



conduct when there were more than two people present.²² Even after legalization, some political figures have expressed opposition.²³ For instance, in January 2024, former president Jacob Zuma stated that his newly-formed party would seek to overturn same-sex marriage laws if elected. The historical development of same-sex marriage in South Africa represents a profound shift from a society that once criminalized homosexuality to one that constitutionally protects LGBTQ+ rights. This transformation, driven by constitutional principles, judicial activism, and legislative action, has positioned South Africa as a leader in LGBTQ+ rights on the African continent.

Judgments and Decisions of Court on Same Sex Marriage in South Africa

In South Africa, marriage is regulated by three main Acts:

- i. The Marriage Act, 1961: This Act governs the solemnization and registration of civil and religious marriages between a man and a woman. It outlines the requirements for a valid marriage, including the age of consent, prohibited relationships, and the marriage procedure.
- ii. The Recognition of Customary Marriages Act, 1998: This Act recognizes marriages under African customary law as valid marriages. It allows for polygamous marriages, subject to certain conditions, and regulates the financial consequences of such marriages.
- iii. The Civil Union Act, 2006: This Act allows for same-sex marriages and civil partnerships, providing the same legal consequences as marriages under the Marriage Act.²⁴

These statutes ensure that marriages in South Africa are legally recognized and protected, regardless of the type of marriage or the couples' cultural background. It is worthy to state that under South African Law, statutory marriage is referred to as either marriage celebrated in compliance with the Marriage Act 25 of 1991, or the Civil Union Act 17 of 2006 now 8 of 2020 as amended.²⁵ Hence, heterosexual couples can choose to marry in terms of the Marriage Act or Civil Union Act while homosexual couples can only marry in terms of the Civil Union Act. In

²² O. A. Kingsley 'A Paradigm Shift: Nigeria and South Africa on same-sex Marriage: Contending Human Rights Issues' [2022] (2) (1) *Nasarawa State University Journal*, 239 – 252.

²³ Vos and Barnard (n19).

²⁴ SAFLII, Civil Union Act 2006 <<https://www.saflii.org>> accessed 3 February, 2025.

²⁵ Bertus Preller, *Formalities for Marriage and Civil Union in South Africa, Family law* <<http://www.divorcelaw.co.za>> accessed 21 September, 2024.



both legislation, the requirements for marriage are similar and the marital regime remains unchanged affording parties the same right and responsibilities. In spite of the above assertion, whether a marriage is conducted under the marriage Act or Civil Union Act, it is between two persons to the exclusion of third parties.²⁶

Minister of Home Affairs and Another v Fourie: In the case *Minister of Home Affairs and Another v Fourie*,²⁷ the Constitutional Court of South Africa ruled unanimously that same-sex couples have a constitutional right to marry. Justice Albie Sachs delivered the judgment on December 1, 2005, granting Parliament one year to enact legislation to legalize same-sex marriage. This ruling led to the passage of the Civil Union Act on November 30, 2006, making South Africa the fifth nation globally to recognize same-sex marriage. The hearing involved an application for leave to appeal and cross-appeal against a Supreme Court of Appeal decision, alongside a direct access application to the Constitutional Court. The legal background of the case draws from South African common law, rooted in RomanDutch law, which traditionally defined marriage as a union between a man and a woman.²⁸ This definition excluded same-sex marriages and other unions such as polygamous marriages. The Marriage Act, which outlines the formalities of marriage, did not explicitly mention the gender of spouses but used terms like ‘wife’ and ‘husband’, implying that marriages should only be between men and women. South Africa's Interim Constitution of 1994 and the final Constitution of 1997 prohibit unfair discrimination, including on the basis of sexual orientation. Section 9 of the Constitution guarantees equality before the law, while Section 10 emphasizes the right to dignity for everyone. The facts of the case involved a lesbian couple, Ms. MariéAdriaana Fourie and Ms. Cecelia Johanna Bonthuys, who wished to marry. Various applications for amicus curiae were submitted by organizations such as Doctors for Life International and the Marriage Alliance of South Africa. The court, in its judgment, found that the common-law definition of marriage and Section 30(1) of the Marriage Act were unconstitutional as they failed to allow same-

²⁶ Ibid.

²⁷ [2005] ZACC 19.

²⁸ T W Bennett, ‘Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform’ [2011](25)(2) EILRJ.



sex couples to marry. This failure violated the rights to equality and dignity guaranteed under the Constitution. The court ruled that these legal definitions discriminated unfairly against same-sex couples by denying them the legal status, benefits, and responsibilities associated with marriage. The Constitutional Court emphasized that the Constitution, particularly section 9, protects against unfair discrimination and guarantees equal protection under the law.²⁹ The judgment noted that denying same-sex couples the ability to marry amounted to unfair discrimination, violating their rights to equality and dignity. Justice Sachs; argued that while acknowledging the importance of religion in public life, religious beliefs should not influence constitutional interpretation regarding the rights of others. The Constitution upholds diversity, pluralism, and the right to be different, affirming that no one should be forced to conform to the cultural or religious norms of others.³⁰

In Fourie's case, the court recognized the evolving nature of family structures in South Africa and the necessity of accommodating diverse family formations. The ruling underscored the imperative to move away from past practices of intolerance and exclusion, and towards building, a society founded on equality, respect and tolerance for all individuals, regardless of sexual orientation. The decision represented a significant step forward in ensuring that the rights of same-sex couples were recognized and protected under South African law.

*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others:*³¹ The case was a landmark decision by the Constitutional Court of South Africa, which extended immigration benefits typically reserved for spouses to same-sex partners. This was the first Constitutional Court case in South Africa to address the recognition of same-sex partnerships and to utilize the legal remedy of 'reading in' to correct unconstitutional legislation. The ruling holds significant implications for civil procedure, immigration law, and constitutional litigation.

²⁹ J H Wilkinson III, 'The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality'. [1975] Virginia Law Review 945-1018.

³⁰ Ibid.

³¹ (1999) ZACC 17.



The court's analysis focused on its authority to declare a law or provision inconsistent with the Constitution.³² It determined that when constitutional invalidity stems from a legislative omission, the defect could not be remedied by simply severing parts of the law. Instead, the remedy of 'reading in' is appropriate, a form of relief under section 38 of the Constitution. Whether through reading in or striking out words, the emphasis should be on finding the suitable remedy rather than the method used. The case background involves the Aliens Control Act, which governed South African immigration law. Section 25(5) of this Act allowed the Department of Home Affairs to issue immigration permits to the spouses of South African citizens or permanent residents, regardless of their eligibility otherwise.³³ However, this benefit was not extended to same-sex partners. After the Interim Constitution came into force in 1994, prohibiting unfair discrimination based on sexual orientation, the National Coalition for Gay and Lesbian Equality (NCGLE) negotiated with the Department of Home Affairs to recognize same-sex relationships for immigration. Although initially successful, with several exemptions granted, the policy changed in 1998, excluding same-sex partners from qualifying under 'special circumstances.'

In response, the NCGLE, alongside six same-sex couples and the Commission for Gender Equality, challenged the constitutionality of Section 25(5) in the Cape Provincial Division of the High Court.³⁴ The High Court ruled the section unconstitutional, suspended its order for twelve months to allow Parliament to amend the law, and provided interim relief by recognizing same-sex partners as qualifying under 'special circumstances'. The government appealed, leading to the Constitutional Court's involvement. The Constitutional Court, hearing arguments in August 1999 and delivering its judgment in December, held that limiting immigration benefits to opposite-sex spouses constituted unfair discrimination based on sexual orientation and marital status, both prohibited under Section 9(3) of the Constitution. The government argued that the case was not 'ripe' and suggested the term 'spouse' could include same-sex partners, which the court rejected. The government further contended that immigration policy was at its discretion and foreign

³² M J Perry, *The constitution in the courts: Law or politics?*(Oxford University Press 1996).

³³ Ibid.

³⁴ E C Christiansen, 'Substantive Equality and Sexual Orientation: Twenty Years of Gay and Lesbian Rights Adjudication under the South African Constitution. [2016] (49) *Cornell Int'l L*, 565.



nationals had no right to equality in this context, which the court also dismissed as irrelevant, noting the impact on South African partners.³⁵ The court directly addressed the discrimination, rejecting the government's arguments that it was not based on sexual orientation and that same-sex partners could marry opposite-sex individuals to gain benefits. Justice Ackermann emphasized that same-sex couples are equally capable of forming loving, committed, and enduring relationships as heterosexual couples, sharing affection, support, and responsibilities. The discrimination against same-sex partners reinforced harmful stereotypes and violated their rights to equality and dignity. The government's final defense was that the discrimination protected the institution of marriage, which the court found to lack a rational connection to the denial of benefits to same-sex couples. The court declared Section 25(5) unconstitutional for infringing on the rights to equality and dignity. The Constitutional Court opted to use 'reading in' to rectify the unconstitutional omission, inserting the words 'partner', in a permanent same-sex life partnership after 'spouse' thus extending immigration benefits to same-sex partners.

The judgment set a precedent for subsequent cases and legislation. The new Immigration Act in 2002 included a broader definition of 'spouse' encompassing permanent same-sex and opposite-sex relationships. The *National Coalition* decision paved the way for further legal recognition of same-sex couples in South Africa, including rights related to adoption, medical benefits, and inheritance, culminating in the Constitutional Court's 2005 ruling in *Minister of Home Affairs v Fourie*, which mandated legal recognition of same-sex marriages, ultimately realized through the Civil Union Act of 2006.

Satchwell v President of the Republic of South Africa:³⁶In this case, the Constitutional Court of South Africa held that the same-sex life partner of a judge was entitled to receive the same financial benefits as those granted to the opposite-sex spouse of a judge. The case was brought forward by Kathy Satchwell, a judge of the Transvaal Provincial Division of the High Court, who was openly lesbian. Satchwell challenged the Judges' Remuneration and Conditions of Employment Act of

³⁵ Ibid.

³⁶ [2002] ZACC 18.



1989, arguing that it discriminated against same-sex partners by denying them spousal benefits. The court unanimously found that the act violated the equality clause of the Bill of Rights, which prohibits unfair discrimination based on sexual orientation. As a result, the judgment amended the law to extend spousal benefits to same-sex partners who have mutual duties of support. While the ruling specifically applied to judges and their partners, it was considered a broader advancement in the legal recognition of same-sex relationships. The director of the Lesbian and Gay Equality Project noted that the decision marked another step towards formalizing the legal status of same-sex partnerships. In 2003, it became known that a newer version of the law, the Judges' Remuneration and Conditions of Employment Act of 2001, had been enacted, but due to a drafting oversight, it retained the discriminatory language from the previous act. The Constitutional Court issued an order extending the reasoning from its earlier decision to the new legislation, thereby ensuring consistency in protecting the rights of same-sex partners under the revised act.

J and B v Director General, Department of Home Affairs:³⁷This is a 2003 decision of the Constitutional Court of South Africa that dealt with the situation of children born via artificial insemination to a lesbian couple in a permanent life-partnership. The court ruled that the partner who was not the biological parent was to be regarded as a natural parent and guardian and that the children were legitimate in law, and ordered the Department of Home Affairs to register both partners as parents on the children's birth certificates.

HISTORICAL DEVELOPMENT OF SAME SEX RELATIONSHIPS IN AUSTRALIA

The historical development of same-sex marriage in Australia reflects a gradual progression towards equality, marked by significant legal and social milestones. Australia's journey towards same-sex marriage began with the Marriage Act of 1961, which initially did not define marriage explicitly. However, in 2004, the Howard Government amended the Act to specifically define marriage as 'the union of a man and a woman to the exclusion of all others'. This amendment effectively banned same-sex marriage and set the stage for future debates. While marriage remained restricted, various states and territories began recognizing same-sex relationships in

³⁷ (2003) ZACC 3.



other ways. For example, Tasmania allowed same-sex couples to register domestic partnerships in 2004. In 2008 and 2009, federal reforms provided equal entitlements and responsibilities for same-sex couples in areas such as social security, employment, taxation, and superannuation. The 43rd Parliament (2010-2013) saw increased focus on same-sex marriage, with multiple bills introduced to amend the Marriage Act. These efforts, while unsuccessful, sparked national debate and shifted political party attitudes.

The Labor Party amended its platform to support same-sex marriage in 2011, though allowing MPs a conscience vote on the issue. Public opinion gradually shifted in favor of same-sex marriage. Polls conducted between 2004 and 2010 suggested growing support. This trend continued, with a 2018 Essential poll finding 65% of Australians supporting same-sex marriage.³⁸ Developments overseas, particularly in countries like New Zealand and parts of the United Kingdom legalizing same-sex marriage, influenced the Australian debate.³⁹ By 2015, 19 countries had legalized same-sex marriage, putting pressure on Australia to follow suit. In 2017, the government conducted a non-compulsory postal survey on same-sex marriage. On November 15, 2017, it was announced that 61.6% of respondents voted in favor of legalizing same-sex marriage. This result led to the passage of the Marriage Amendment (Definition and Religious Freedoms) Act 2017, which came into effect on December 9, 2017. In 2018, the first full year after legalization, 6,538 same-sex marriages were registered, accounting for 5.5% of all marriages in Australia.⁴⁰ The legalization has been seen as a watershed moment for equal rights in Australia, with the then Prime Minister Malcolm Turnbull calling it a ‘day for love, for equality, for respect’. The journey to same-sex marriage in Australia spanned over a decade of advocacy, legislative attempts, and public debate. It culminated in a significant shift in both law and social attitudes, marking a major milestone in the country's progression towards LGBTQ+ equality.

Judgments and Decisions of Court on Same Sex Marriage in Australia

³⁸ The Commons, 'Marriage Equality Campaign Timeline and Reflections' <<https://commonslibrary.org/marriage-equality-campaign-timeline-and-reflections>> accessed September 21, 2024.

³⁹ Ibid.

⁴⁰ Ibid.



Commonwealth v Australian Capital Territory:⁴¹ The High Court of Australia held that the marriage power in Section 51 of the Constitution is broad enough to include same-sex marriage. This case clarified that the Commonwealth has the authority to legislate for same-sex marriage at the federal level and potentially to include marriage between individuals regardless of gender, such as intersex people who do not identify as male or female. The central issue in the judgment was the scope of the marriage power under Section 51 of the Australian Constitution (legislative powers of the parliament). Both the Commonwealth and the Australian Capital Territory (ACT), along with Australian Marriage Equality Inc., which appeared as amicus curiae, argued that the federal marriage power could encompass same-sex marriage. Although none of the parties specified the exact boundaries of this power, the Court had to decide if Section 51 allowed the Commonwealth to make laws about same-sex marriage. If it did not, the ACT might have the authority to provide for a type of union that the Commonwealth could not. The Court defined 'marriage' as a consensual union between natural persons, following legally prescribed requirements, intended to endure and be terminated only according to the law, and to which the law grants a status affecting and defining mutual rights and obligations. This definition was considered broad enough to include same-sex marriage and possibly marriages involving people of any gender identity. The Court emphasized that the marriage power grants Parliament authority over a social institution to which legal consequences are attached, and these have evolved over time. Therefore, the marriage power should not be restricted to the understanding of marriage at the time of federation.

Regarding the inconsistency between the Marriage Equality Act and the federal Marriage Act, the Court held that the federal Marriage Act is a comprehensive and exhaustive statement of marriage law in Australia. Although the Commonwealth has the power to legislate for same-sex marriage, the current Marriage Act specifies that marriage is exclusively a union between a man and a woman. The 2004 amendments to the Marriage Act explicitly stated that marriage was 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life', which implied that no other forms of marriage could be recognized under Australian law. The Act sought

⁴¹ (2013) HCA 55.



to establish marriage equality for same-sex couples by creating a legal status similar to marriage as defined by the Marriage Act, involving a union of two people to the exclusion of all others, voluntarily entered into for life. The ACT argued that its legislation could co-exist with the Marriage Act because it pertained to same-sex couples, whereas the Marriage Act focused on opposite-sex couples. However, the Court rejected this argument, noting that the Marriage Act, while regulating only a part of what is possible under Section 51 of the Constitution, includes a negative implication that it is the sole form of marriage legally recognized. The Court concluded that while the Commonwealth could amend the Marriage Act to include same-sex marriage, the ACT could not validly legislate to create the status of 'marriage' for same-sex couples. The Court stated that when determining whether a law about a particular status conflicts with the Marriage Act, the legal content and consequences of that status must be considered, not just its description.

Toonen v Australia:⁴²This is a landmark 1994 case in which Nicholas Toonen, a gay activist from Tasmania, brought a human rights complaint before the United Nations Human Rights Committee (UNHRC). Toonen argued that Tasmania's laws criminalizing consensual sexual activities between adult men in private, violated his right to privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR).⁴³ He also claimed these laws discriminated based on sexual orientation, violating Article 26, and made gay men in Tasmania unequal before the law. Toonen's complaint led to his dismissal from the Tasmanian AIDS Council due to government pressure. The UNHRC found that Australia's sodomy laws violated the ICCPR, prompting the Commonwealth to pass legislation overriding Tasmania's criminalization of homosexual acts, effectively repealing Australia's last sodomy laws.

The case highlighted that the term 'privacy' in the ICCPR covers consensual adult sexual activity in private, and the continued existence of such discriminatory laws, even without active enforcement, amounted to an ongoing violation of privacy and a breach of Toonen's rights. The UNHRC noted that criminalizing homosexual behavior was not a reasonable or proportionate measure for public health concerns, such as preventing the spread of HIV/AIDS. The Committee

⁴² CCPR/C/50/D/488/1992 (1994).

⁴³ United Nations General Assembly 1966, art.25(b).



concluded that discrimination based on sexual orientation fell under the category of discrimination on the basis of ‘sex’ in Article 26 of the ICCPR. Despite arguments from the Tasmanian government justifying the laws on moral and public health grounds, the UNHRC determined that these justifications did not hold, as no other Australian state maintained such laws, and anti-discrimination protections were already in place in several regions. In response to the UNHRC’s decision, the Australian federal government enacted the Human Rights (Sexual Conduct) Act 1994, which decriminalized consensual homosexual acts throughout Australia and prevented the making of laws that arbitrarily interfere with private sexual conduct between adults.

The case of *Toonen v. Australia*⁴⁴ set a significant precedent for the inclusion of sexual orientation within the framework of international human rights protections. It was influential in promoting broader legal reforms and the acceptance of LGBTQ+ rights in Australia, transforming Tasmania into one of the most progressive Australian states regarding LGBTQ+ issues. This case has been referenced in subsequent international human rights discussions, including reports by the UN High Commissioner for Human Rights and initiatives such as the Declaration of Montreal, which focuses on the rights of LGBTQ+ individuals globally.

IMPACTS AND IMPLICATIONS OF COURT DECISIONS IN SOUTH AFRICA AND AUSTRALIA

The court decisions in South Africa and Australia regarding same-sex relationships have had profound implications for the recognition and protection of LGBTQ+ rights in these countries. In South Africa, landmark cases such as *Minister of Home Affairs v Fourie*⁴⁵ and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*⁴⁶ paved the way for the legal recognition of same-sex marriages. The South African Constitutional Court’s emphasis on equality, dignity, and non-discrimination under the Constitution has provided a robust legal framework that supports the rights of same-sex couples. These rulings have not only advanced LGBTQ+ rights but also

⁴⁴ CCPR/C/50/D/488/1992.

⁴⁵ [2005] ZACC 19.

⁴⁶ (1999) ZACC 17.



highlighted the judiciary's role in interpreting constitutional provisions to reflect evolving societal values.

The impact of these South African decisions is significant, as they demonstrate how constitutional protections can be extended to marginalized groups, fostering a more inclusive society. The judiciary's willingness to challenge traditional definitions of marriage and embrace diversity underscores the progressive nature of South Africa's legal landscape. These decisions have contributed to a broader acceptance of same-sex relationships and have encouraged legislative changes, such as the enactment of the Civil Union Act of 2006, which legalized same-sex marriage.

In Australia, the decision in *Commonwealth v Australian Capital Territory* clarified the scope of the federal marriage power under Section 51 of the Constitution, affirming that the Commonwealth has the authority to legislate for same-sex marriage. This decision underscored the importance of a unified approach to marriage laws at the federal level, thereby preventing conflicting state and territory legislation. The ruling highlighted the dynamic nature of constitutional interpretation, allowing the definition of marriage to evolve in line with contemporary social values and the recognition of human rights. The implications of these Australian court rulings extend beyond same-sex marriage, influencing broader discussions on human rights and equality. The decisions set a precedent for the inclusion of sexual orientation within the scope of constitutional protections, influencing subsequent legal reforms and public policy. They also underscore the role of the judiciary in safeguarding minority rights against majority biases, thus promoting a legal environment that respects and upholds the dignity of all individuals, regardless of sexual orientation.

COMPARATIVE ANALYSIS AND LESSONS FOR NIGERIA

Both South Africa and Australia have made significant strides in recognizing and protecting the rights of same-sex couples through their judicial systems, albeit following different constitutional and legal pathways. The South African and Australian experiences highlight the transformative potential of constitutional adjudication in advancing LGBTQ+ rights and the role of judicial interpretation in fostering social change.



The experiences of South Africa and Australia provide valuable lessons for Nigeria as it grapples with issues of LGBTQ+ rights and same-sex relationships. Nigeria currently criminalizes same-sex relationships under the Same-Sex Marriage (Prohibition) Act of 2014, reflecting deep-seated cultural, religious, and social conservatism. However, Nigeria can draw several lessons from the jurisprudence of South Africa and Australia:

1. Nigeria could benefit from considering constitutional reforms that explicitly protect against discrimination based on sexual orientation and gender identity. South Africa's success in advancing LGBTQ+ rights is largely attributed to its constitutional Bill of Rights, which unequivocally prohibits discrimination. Establishing clear constitutional protections would provide a legal basis for challenging discriminatory laws and practices in Nigeria.
2. The role of the judiciary in interpreting constitutional principles to protect minority rights is crucial. The South African and Australian courts have demonstrated that judicial independence and progressive interpretation can lead to significant advancements in human rights. Strengthening judicial independence in Nigeria would be essential for any meaningful progress on LGBTQ+ rights.
3. Both South Africa and Australia benefited from strong advocacy groups and public campaigns that raised awareness about LGBTQ+ rights. In Nigeria, civil society organizations should continue to educate the public about human rights and work to change societal attitudes toward same-sex relationships. Advocacy can play a key role in creating an environment where legal reforms become more acceptable.
4. Nigeria might consider adopting an incremental approach to legal reforms, as seen in Australia. Recognizing civil partnerships or non-discrimination protections in specific areas (such as employment and housing) could be initial steps towards broader recognition of same-sex relationships. Gradual changes could help mitigate strong opposition and allow society to adjust progressively.



5. Addressing opposition from religious and cultural leaders is crucial for advancing LGBTQ+ rights in Nigeria. Engaging these leaders in dialogue and emphasizing the human rights framework could help reduce resistance and foster a more inclusive society. Drawing from South Africa's experience, where diverse cultural practices co-exist with legal recognition of same-sex marriages, Nigeria could seek a balanced approach that respects cultural values while upholding human rights.

CONCLUSION

The experiences of both South Africa and Australia on the subject matter discussed herein demonstrate that legal recognition of same-sex relationships can lead to broader societal acceptance and greater protection of LGBTQ+ rights. They also show that the interplay between judicial decisions and legislative reforms is crucial in achieving and solidifying these rights. For countries like Nigeria, these examples provide valuable lessons on the potential for constitutional reform, judicial independence, and public advocacy to drive progress. By ensuring constitutional protections explicitly safeguard against discrimination based on sexual orientation and by fostering a judiciary willing to uphold these rights, countries can move towards greater inclusivity and equality. As societal attitudes continue to evolve, the legal systems in these nations must reflect and support the human rights of all individuals, regardless of sexual orientation.

RECOMMENDATIONS

1. Nigeria should consider amending its Constitution to explicitly prohibit discrimination based on sexual orientation, as is done in South Africa. The inclusion of clear language in the Nigerian Constitution's anti-discrimination clauses would provide a solid legal foundation to challenge laws and practices that unfairly target LGBTQ+ individuals. This would align Nigeria with international human rights standards and ensure that all individuals, regardless of their sexual orientation, are guaranteed equality and protection under the law.
2. As an incremental step towards full marriage equality, Nigeria could introduce legislation that recognizes civil partnerships for same-sex couples. This approach, similar to steps taken in some Australian states before the national legalization of same-sex marriage, would provide same-sex couples with legal rights and responsibilities related to inheritance, healthcare, and property.



Recognizing civil partnerships would represent a progressive move towards equality, offering a compromise that respects cultural sensitivities while enhancing the legal protection of same-sex couples.