

# TOTALITARIANISM,<sup>\*</sup> (SAME-SEX) MARRIAGE AND DEMOCRATIC POLITICS IN POST-APARTHEID SOUTH AFRICA

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## ABSTRACT

This article interrogates what it considers to be several totalitarian moments in the process that led to the legislation that authorised same-sex marriage in South Africa. The interrogation proceeds from three platforms which also form the basis of any believable theory of democratic politics, namely church/state separation, plurality and common (shared) citizenship. My argument is that Parliament — by introducing (and defending) the first draft of the Civil Union Bill (which deliberately failed to introduce a marriage regime for same-sex life partnerships) in response to the *Fourie* judgment — failed properly to consider all three of these fundamental aspects of democracy. This failure was complemented by more overt totalitarian moves on the part of several fundamentalist religious groups in South Africa that (ironically so) vehemently opposed the first draft of the Bill even though it did not provide for same-sex marriage. I conclude that democratic activism coupled with the strength of and commitment to the South African Constitution and to the decisions of the Constitutional Court ensured the successful evasion of these totalitarian moments while emphasising that the struggle against totalitarianism in South Africa is far from over.

[T]he criticism of Heaven turns into the criticism of Earth, the criticism of religion into the criticism of law, and the criticism of theology into the criticism of politics...<sup>1</sup>

[E]ven the greatest forces of intimate life — the passions of the heart, the thoughts of the mind, the delights of the senses — lead an uncertain, shadowy existence unless and until they are transformed, deprivatized and deindividualized, as it were, into a shape to fit them for public appearance.<sup>2</sup>

## I PREFACE: HISTORY BY WAY OF SNAPSHOTS

Fragmented, unorganised, vulnerable and leaderless. These are the words with which early Christianity came to be described.<sup>3</sup> But this dis-organisation, we recall, existed within a highly organised and sophisticated state framework

\* Slavoj Žižek's book *Did Somebody Say Totalitarianism?* (2001) provokes a dialogue with this article that cannot be engaged with here, save for stating emphatically that this article makes it impossible to disagree enough with Žižek's basic premise, namely that the contemporary understanding of totalitarianism serves to stultify the possibility of a radical project that would respond authentically to liberal-democratic hegemony.

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1 K Marx 'A Contribution to the Critique of Hegel's Philosophy of Right: Introduction' in K Marx *Karl Marx Early Writings* (trans R Livingstone & G Benton, 1992) 243, 244-245.

2 H Arendt *The Human Condition* (1958, 1998) 50.

3 D Knowles 'Church and State in Christian History' (1967) 2(4) *J of Contemporary History* 3, 4.

— the renowned Roman Empire<sup>4</sup> — which at the time still swore allegiance to a host of polytheistic deities of which the pagan gods Janus and Minerva<sup>5</sup> were the most important. Seeing that the Christians' own highest authority decreed that the kingdom (state) of Christ was not of this world<sup>6</sup> and that one must give to Caesar what belongs to Caesar,<sup>7</sup> the Christians, under these circumstances, easily came to believe and accept that human authority derived from God — which led to a dispensation according to which the church had no *political* existence other than an uncritical obedience towards state policy and principle.<sup>8</sup> In fact, Christianity starts off with nothing less than a declaration of independence: defining itself as disinterested, indifferent and neutral with regard to politics.<sup>9</sup>

In 306, this pious dispensation changed radically when Constantine became the first Christian Roman emperor.<sup>10</sup> With this event, the Christian church and political rule became inseparably involved — consubstantial.<sup>11</sup> The emperor becomes the chosen man of God — the one who is not only to ensure political peace but also spiritual peace in men by bringing them to the service of God.<sup>12</sup> Because the church at the time had no unifying person or machinery, the emperor became the perfect fill for the void — both religious belief and state policy became embodied in the person of the head of state and with this a hopeless confusion took charge: The church becomes the state; the state becomes the church. Church-state. State-church.

At the time that Constantine came to power, rampant confusion reigned over the legal status of unions (*consortia omni vitae*) between slaves and free persons, which unions themselves — as a matter of frequency — were rampant.<sup>13</sup> One of the most characteristic elements of Constantine's rule was his re-criminalisation of mixed marriages between slaves and free persons according to which the offence became punishable by death.<sup>14</sup> Commentators have shown that this legislation was passed 'in an attempt to eradicate concubinage and to uphold a noble, 'Christian' ideal of marriage.'<sup>15</sup>

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4 Ibid.

5 Respectively, the Roman god of beginnings and the goddess of remembrance. See AD Lee 'Traditional Religions' in N Lenski (ed) *The Cambridge Companion to the Age of Constantine* 159, 165. Also see H Arendt 'What is Authority?' in H Arendt *Between Past and Future* (1969) 91-141.

6 *Holy Bible* (King James Version) John xviii 36.

7 Ibid Matthew xxii 21.

8 Knowles (note 3 above) 5 points out that individual Christians might have come into conflict with the state, but the church of early Christianity did not have (or perhaps could not afford) confrontation with the state.

9 W Hamacher 'The Right to Have Rights (Four-and-a-Half Remarks)' (2004) 103(2/3) *South Atlantic Quarterly* 343. Also see H Arendt *On Revolution* (1963, 1990) 280: 'freedom from politics, ... politically perhaps the most relevant part of our Christian heritage.'

10 IJ Davidson (ed) *The Birth of the Church* (2001) 343-346; Knowles (note 3 above) 5.

11 Knowles (note 3 above) 5.

12 Ibid.

13 J Evans-Grubbs "'Marriage More Shameful Than Adultery': Slave-Mistress Relationships, "Mixed Marriages", and Late Roman Law' (1993) 47(2) *Phoenix* 125, 137-138.

14 Ibid 140-141. Also see M de la Paz & RA Zone *Constantine the Great* (2006) 11.

15 Evans-Grubbs (note 13 above) 149.

In 1652 Jan van Riebeeck (a Dutch Christian) arrives at the southern tip of Africa and the Cape Colony is founded with a prayer — followed by the quick realisation that the establishment of a refreshment station requires a whole lot of labour.<sup>16</sup> Unfortunately for Van Riebeeck, the Dutch East Indian Company (VOC) forbade the enslavement of the Khoi as a free people.<sup>17</sup> The solution to this was to import slaves from Angola and Dahomey.<sup>18</sup> Shortly after his arrival, Van Riebeeck founded the South African Dutch Reformed Church<sup>19</sup> which remained — right up to the abolition of slavery — uncritical of it, save for pronouncing that Christians could not be enslaved and that converted slaves had to be set free.<sup>20</sup> As was the case in the Roman Empire, marriage between a slave and a free person was absolutely prohibited and attracted the gravest of legal sanctions.<sup>21</sup> The first slave to be set free at the Cape, Catharina Anthonis, was set free in 1656 because a free man, Jan Woutersz from Middelburg, wanted to marry her.<sup>22</sup>

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On 30 January 1933, Adolf Hitler (a Christian man heavily influenced by occultist Aryanism)<sup>23</sup> became the chancellor of the third German reich.<sup>24</sup> Two years later, on 15 September 1935, the Law for the Protection of German Blood and Honour was passed.<sup>25</sup> It absolutely prohibited the marriage of a Jew to a non-Jew. At the same time, the Reich Citizenship Law was passed which decreed that the Jews were no longer citizens of Germany.<sup>26</sup> With this move, Nazi totalitarianism received the stamp of legal authority, the force of law, total domination. The rest, as they say, is history.

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In 1948, Daniel Francois Malan (a Dutch Reformed minister) becomes the first prime minister of apartheid.<sup>27</sup> Soon after this, the Dutch Reformed Church actively propagates the ‘purist’ conception of apartheid according to which total segregation between white and black South Africans is culturally essential for the survival of white ‘civilization’ in South Africa and politically necessary for the continuation of white rule.<sup>28</sup> This became known as the ideol-

16 RCH Shell *Children of Bondage* (1994, 1997) 1-6.

17 K Tankard ‘Slavery at the Early Cape’ *knowledge4africa.com* available at <<http://www.knowledge4africa.co.za/worldhistory/slaves00.htm>>.

18 D Glaser *Politics and Society in South Africa* (2001).

19 <<http://www.ngkerk.org.za/inligting.asp?id=24&sinid=22>>.

20 Tankard (note 17 above).

21 EL Matthews ‘South African Legislation Relating to Marriage or Sexual Intercourse Between Europeans and Natives or Coloured Persons’ (1920) 2(1) *J of Comparative Legislation and Int Law* 117, 118; Evans-Grubbs (note 13 above) 127.

22 AM van Rensburg “‘Let them Speak’ Slave Stamouers of South Africa’ available at <<http://www.stamouers.com/Slave.htm>>.

23 V Clark *Hitler’s Persecution of Jews: The Influence of Christianity* (2006) 2.

24 J Toland *Adolf Hitler: The Definitive Biography* (1976, 1992) 290.

25 *Ibid* 379.

26 J Noakes & G Pridham *Documents on Nazism 1919-1945* (1974) 463-467.

27 R Ross ‘The fundamentalisation of Afrikaner Calvinism’ in H Diederiks & GC Quispel (eds) *Onderscheid en Minderheid Sociaal-Historische Opstellen over Discriminatie en Vooroordeel* (1987) 201.

28 S Terreblanche *A History of Inequality in South Africa* (2002) 314.

ogy of the 'swart gevaar'.<sup>29</sup> Shortly after Malan's election and at the *insistence* of the Dutch Reformed Church,<sup>30</sup> Parliament passed the Mixed Marriages Act 55 of 1949, according to which the law prohibited not only a marriage, but *any* form of co-habitation between white and black.

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During September and October of 1996 a fundamentalist Sunni Muslim and ethnic Pashtun movement, the Taliban, takes control of a divided and devastated Afghanistan.<sup>31</sup> While in control of Afghanistan, the Taliban accommodates the Al-Qaeda terrorist network believed to be responsible for the September 11, 2001 attacks on various targets in the United States, including, of course, the famous Twin Towers.<sup>32</sup> The signature aspect of the Taliban's reign in Afghanistan was its 'war on women'.<sup>33</sup> Marriage was the centre of this war, because it provides the locus for the control and subjugation of women under the Taliban's fundamentalist interpretation of the Islamic law according to which forced marriages and child marriages are legal.<sup>34</sup>

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On 24 February 2004, George W Bush — a staunch conservative Christian but also the leader of the most powerful political dispensation on Earth, famously responsible for the disastrous invasion of Iraq — calls for a constitutional amendment to ban same-sex marriage in the United States.<sup>35</sup> This call came after the United States government (under Bill Clinton) had already passed a Defense of Marriage Act<sup>36</sup> that came under scrutiny in the courts. Commentators believe that Bush honed in on same-sex marriage in order to distract attention from the devastation his 'war on terror' caused in Iraq. In announcing the call for a constitutional amendment Bush said: 'Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society.'<sup>37</sup> On 6 June 2006, Bush repeated this call emphasising that 'I believe those two words, "gay marriage" are a prostitution against the sacred word "marriage"'.<sup>38</sup> 'Those who cannot learn from history are doomed to repeat it.'<sup>39</sup>

29 Ibid.

30 'NG Church Admits to Having Insisted on Mixed Marriages Act' *SAPA* (5 August 1997).

31 CJ Dolan *In War We Trust: The Bush Doctrine and the Pursuit of Just War* (2005) 132.

32 Ibid 1.

33 See Physicians for Human Rights *The Taliban's War on Women* (1998).

34 Ibid 30-31. Also see H Ahmed-Gosh 'A History of Women in Afghanistan: Lessons Learnt for the Future or Yesterday and Tomorrow: Women in Afghanistan' (2003) 4(3) *J of Int Women's Studies* 1-15 and A Gerlin 'Young Wives Often Face Abuse in Forced Marriages' *The Milwaukee Journal Sentinel* (9 December 2001).

35 Anon 'Bush Calls for Ban on Same-Sex Marriages' available at <<http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage>>.

36 D Westervelt 'National Identity and the Defense of Marriage' (2001) 8(1) *Constellations* 106.

37 'President Calls for Constitutional Amendment Protecting Marriage' available at <<http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>>.

38 See <<http://biblia.com/bushbush4.htm>>. The call was rejected by Congress twice. See <<http://news.bbc.co.uk/2/hi/americas/5193136.stm>>.

39 G Santayana *The Life of Reason Vol I* (1905, 1995) available at <<http://www.gutenberg.org/etext/15000>>.

## II INTRODUCTION: TOTALITARIANISM AND MARRIAGE

At the end of her monumental work, *The Origins of Totalitarianism*,<sup>40</sup> Hannah Arendt emphasises the aspect of totalitarian domination as a form of government that distinguishes it from all others: Totalitarianism is never content with the destruction of political life — it seeks the destruction of private life above and beyond all else.<sup>41</sup> For Arendt, the success of totalitarianism depends fundamentally on the concept of isolation, because it is isolation that serves as the precursor to loneliness and it is loneliness that provides the fertile breeding ground for terror.<sup>42</sup> Totalitarian domination ‘bases itself ... on the experience of not belonging to the world at all, which is among the most radical and desperate experiences of man.’<sup>43</sup>

Indeed, totalitarianism can always be exposed by examining the continuous, debilitating and terrifying interference by the state in the private, social aspects of citizens’ lives as well as state regulation of non-state social institutions<sup>44</sup> so as to compromise the freedom to act which will ensure (and promote) the loneliness of human beings. This loneliness is different from solitude in that the one who is lonely is subjected to the torture of being amongst others with whom she may not establish contact or to whose hostility she is exposed.<sup>45</sup> In South Africa, the Constitutional Court has in fact recognised the promotion of loneliness as an aspect of past totalitarian rule. In abolishing the legal provisions that criminalised consensual, anal penetrative sex between two men Sachs J held that with the abolition of this crime, ‘a section of the community can feel the equal concern and regard of the Constitution and enjoy lives less threatened, *less lonely* and more dignified’<sup>46</sup> than they were under the apartheid order.

Johan van der Vyfer points out that the ‘distinct bias for (a certain brand of) Christianity’ was one of the aspects that denoted the fabric of the apartheid regime as totalitarian.<sup>47</sup> This religious bias was in fact an essential ingredient of the apartheid government’s totalitarian recipe. As is the case with all the examples cited in the preface, the church-state consubstantiality (in different permutations that are all the while more and more similar) provides a religious reason for the political perpetration of isolation and eventually loneliness that is required for terror to thrive. This particular brand of totalitarianism — one in which the church and the state remain literally inseparable and the church

40 H Arendt *The Origins of Totalitarianism* (1966, 1985) 474.

41 *Ibid* 475.

42 *Ibid* 474-475.

43 *Ibid* 475.

44 *Ibid* 474.

45 *Ibid* 476.

46 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 130 (my emphasis).

47 JD van der Vyfer ‘Constitutional Perspective of Church-State Relations in South Africa’ (1991) 1 *Brigham Young Univ LR* 635. Also see LM du Plessis ‘Religion, Law and State in South Africa’ (1997) 4 *European J for Church and State Research* 221, 223.

at the behest of the state in the perpetration of human loneliness — is the totalitarianism par excellence.<sup>48</sup>

It is thus also no coincidence, as well as being a recurring motif of history (as the preface also aims to show), that a state wishing to institutionalise totalitarian domination will always have some form of prohibitive, hegemonic or coercive marriage law on its agenda, be it the prohibition of slave/free marriage, Jew/non-Jew marriage, black/white marriage or the forced marriage of the Taliban which effectively prohibits a woman from exercising the choice to marry or not. All of these practices are totalitarian aims at isolation; aims to instil the sense that one no longer belongs to the world of the ‘human being’<sup>49</sup> because one is not *considered* human because of who and what one immutably is. It is precisely because Arendt realised that totalitarianism’s affinity for loneliness is vividly exhibited in its prohibitive laws in relation to marriage, that she argued in her later essay, ‘Reflections on Little Rock’,<sup>50</sup> that the right to marry whoever one wishes<sup>51</sup> is an elementary human right — a right that derives from our shared human existence.

It would indeed be dangerously complacent to believe that the all-consuming fire of totalitarianism is extinguishable by the torrent of formal democratic rule. Such a belief would always be founded in a confusion of *totalitarianism* with *totalitarian rule*. Even in a country that harbours the most advanced and sophisticated institutions of democracy (and thus guards vehemently against totalitarian rule), totalitarianism will lurk, organise, even proliferate.<sup>52</sup>

In this article, I will critique the totalitarian aspects (totalitarianism) of the process that led to the enactment of same-sex marriage in South Africa. I will do this with reference to specifically three focus points which also happen to form essential parts of the core of any believable theory of democracy, namely church/state separation,<sup>53</sup> plurality and equal

48 See RF Miller ‘Church-State Relations and Civil Society in Former Communist Countries’ available at <<http://law.anu.edu.au/nissl/rmiller.pdf>>.

49 See the discussion of plurality, dignity and equality below. The ‘human being’ as I use it here bears all the plural dimensions and the dimensions of plurality described by Jean-Luc Nancy in his *Being Singular Plural* (2000).

50 H Arendt ‘Reflections on Little Rock’ (1959) 6 (1) *Dissent* 45, 49.

51 Which of course also includes the right not to marry anyone and the right to be joined with another person in a union which does not carry the ‘marriage’ appellation.

52 See E Young-Bruehl *Why Arendt Matters* (2006) 46: ‘the elements of totalitarianism *have* continued to be with us, even in the most secure democracies, but they no longer take their mid-twentieth century forms.’

53 To clarify, ‘church’ and ‘state’ as I use the words here are intended to have a broad meaning. With ‘church/state separation’ I intend to indicate not only the state’s separation from the Christian church but also a distancing from *any* particular religion in a way that leads to the state’s tolerance for religion but without any particular religious bias. The phrase ‘church-state’ would thus serve as a signifier referring to religious belief (intolerance?) practised as politics in the body of, for instance, the head of state (as is the case with President George Bush). I should stress from the outset that church/state separation as I use it here does not necessarily or inevitably preclude the even-handed treatment by the state of religions in a democracy — as is enjoined by the Constitution of the Republic of South Africa, 1996 (hereinafter the ‘Constitution’).

moral citizenship.<sup>54</sup> My primary argument will be that *Parliament* continuously failed properly to heed all three of these fundamentals in the course of affording comprehensive legal protection — in the form of marriage — to same-sex couples. I regard these failures properly to heed the fundamentals of democracy not merely as negations of the political. Rather, I will suggest that these failures are in fact positive attempts grounded in totalitarianism. The configuration that emerges on this account cannot but confront the totalitarian moments — *as totalitarian moments* — that is to say not just as anti-democratic or politically vacuous moments — within the overtly democratic process that led to the recognition of same-sex marriage in South Africa.<sup>55</sup> As part of plausibly making this argument it will be necessary to enquire not only into the South African character of the three fundamental democratic concepts identified below but also into the way in which they have been employed and developed by the Constitutional Court to undo the legacy of our totalitarian past. It will then become necessary to interrogate the role these fundamentals of democracy played on different political sides during the LGBTI (Lesbian, Gay, Bisexual, Transgendered and Intersexed) liberation process in South Africa.

As is probably already clear, the theoretical framework that I propose (and support) here is heavily influenced by the political philosophy of Hannah Arendt. I will argue (as Arendt did) that the right to choose to marry whoever one pleases (or not to *marry* at all)<sup>56</sup> is not only fundamental to a person's life — it is also an essential ingredient in all struggles against the fundamentalist extremism that ceaselessly seeks the establishment of a totalitarian world order. However, (and for this fact there will be no apology), the voices that speak here are also those of Jean-Luc Nancy, Jacques Rancière and Jacques Derrida for the reason that it is their thinking (in the wake of totalitarianism) that demands a radicalisation of the democratic thought of the Left in a way that recognises and creatively resists the totalitarian potential of every new democratic day. It is because of my concern — in the context and in the course of the same-sex marriage debate in South Africa — *with and for* what Jacques Rancière has called the 'hatred of democracy'<sup>57</sup> that I believe it to be indispensable, as a matter of resistance, to link this debate to the conditions of politics and the nature of the South African democracy as not any democracy

54 To be sure, these are of course not the only fundamentals of democracy. The Rule of Law, for instance, constitutes a widely considered fundamental of democracy that I will not directly discuss here. The reason for this relates primarily to the nature and consequences of the church/state separation that will be discussed here. Briefly, this discourse holds that the separation of the heteronomous (religious) order from the autonomous (political) order that is implied in the phrase 'church/state separation' leads to a political order that is, as a matter of its constitution and right from that moment, ruled by law — its own law. This is the original meaning of autonomy and the political as autonomous. In this way, church/state separation precedes the rule of law and on this understanding the rule of law is not an independent fundamental of democracy.

55 The Civil Union Act 17 of 2006 s 1 read with s 2(a).

56 See note 51 above.

57 J Rancière *Hatred of Democracy* (2006).

amongst many, but specifically, as a *post-totalitarian order* founded on the rule of law.

### III CHURCH/STATE SEPARATION AND THE ‘POLITICS’ OF SAME-SEX MARRIAGE IN SOUTH AFRICA

According to Jean-Luc Nancy, the separation of church and state is not one political possibility amongst others — it is the constitutive element of politics as such.<sup>58</sup> The politics that Nancy speaks of is politics in the ancient sense — politics that bears an intimate relation with democracy.<sup>59</sup> Today, the assertion that ‘the separation of church and state is a cornerstone of democracy’ is almost as trite as asserting that the sky is blue. As Nancy contends, the separation is so fundamental to the very concept of democracy<sup>60</sup> that it has become a given.<sup>61</sup> It is this ‘obviousness’ of the separation between church and state for democracy that often leaves the nature of the separation itself uninterrogated.

Given the oppressive history of the apartheid government, its promotion of, exclusively, ‘a Christian way of life’<sup>62</sup> and its cosy relationship with the three Afrikaans ‘sister’ churches, it was imperative for the South African Constitution explicitly to arrange a separation of church and state that would not only ensure the legitimacy of the Constitution but would also put in place what Sachs J called in the *Fourie*<sup>63</sup> judgment, the ‘mutual co-existence of the sacred and the secular’.<sup>64</sup> This particular dispensation (as opposed to a strict church/state separation) was also required because of the high incidence of religious affiliation in South Africa.<sup>65</sup>

In accordance with a notion that could be termed ‘tolerant separation’, the vision of the new constitutional order (as a secular democratic order) holds that the state will never again employ the mechanisms of religion to indoctrinate political ideology. The obvious implication, of course, necessitates a commitment that the South African state would never again show a distinct bias for any particular religious conviction, denomination or brand. Because of the high incidence of religious affiliation in South Africa, the drafters of the Constitution wanted, however, to avoid the problems of too strict a church/state separation. These problems often exist around objections that too strict a separation of church and state leads to the increasing marginali-

58 JL Nancy ‘Church, State, Resistance’ (2007) 34(1) *J of Law and Society* 4.

59 Aristotle *The Politics* (trans TJ Saunderson) 54. Also see J Derrida *Rogues: Two Essays on Reason* (trans PA Brault & M Naas, 2005) 44 who speaks of ‘democracy and the political, these two regimes of the possible’; J Rancière *On the Shores of Politics* (2004) 97; and J Rancière (note 57 above) 23: ‘politics as the Ancients had defined it was an art of living together and a search for the common good.’

60 Literally, the rule (-cracy) of the people (demos) (as opposed to God).

61 Nancy (note 58 above) 3.

62 Van der Vyfer (note 47 above) 636-637 mentions the many Acts that the apartheid Parliament passed in order to establish totalitarianism by interfering in the private sphere of citizens’ lives.

63 *Minister of Home Affairs and Another v Fourie and Others* 2006 (1) SA 524 (CC).

64 *Ibid* para 94.

65 See Du Plessis (note 47 above) 221.

sation of religion in society so that the right to freedom of religion becomes a right to freedom *from* religion.<sup>66</sup> Read together with ss 9(3),<sup>67</sup> 18<sup>68</sup> and 31(1)<sup>69</sup> of the Constitution, the freedom of religion regime in South Africa thus entails that everyone has the right to the free exercise of religion, belief and opinion and that no one has the right unfairly to discriminate against a person on the grounds of religion. Moreover, the state is enjoined to treat religions even-handedly, refraining from any particular religious bias.

South Africa's freedom of religion regime (read with the right to freedom of expression<sup>70</sup> which prohibits hate speech) of course also entails that the religious beliefs of some cannot be used to silence the expression of religious beliefs (or beliefs about religion) held by others — to the extent that the expression of religious beliefs of one religion (or the beliefs about religion of some) cannot reasonably be construed as advocacy of hate speech based on religion in terms of s 16(2)(c).<sup>71</sup> But perhaps more importantly for current purposes, as Sachs J held in the *Fourie* matter, the religious beliefs of some cannot be used to determine the *constitutional rights* of others.<sup>72</sup> This must be so not *merely* because the constitutional rights of persons are created by the political, secular order (the state) but also because of the more foundational notion that relates to the very nature of the political as *autonomous*<sup>73</sup> — ruled by the laws that come from itself. As Nancy emphasises, the only religion that is proper to a democracy is religion without theocracy.<sup>74</sup>

But many (and certainly not all) of the religions *of* democracy (in the sense of them being *in* democracy) are never fully able to accept this castration.

66 I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 289. Also see LM du Plessis 'Freedom of or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in "the New South Africa"' (2001) 2 *Brigham Young Univ LR* 439.

67 '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.'

68 'Everyone has the right to freedom of association.'

69 'Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.'

70 Constitution s 16(1): 'Everyone has the right to freedom of expression, which includes-

(a) freedom of the press and other media;  
 (b) freedom to receive or impart information or ideas;  
 (c) freedom of artistic creativity; and  
 (d) academic freedom and freedom of scientific research.'

71 'The right in subsection (1) does not extend to- ... (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

72 *Fourie* (note 63 above) para 92.

73 Nancy (note 58 above) 5 makes the point that the political gives itself its own laws. It is thus autonomous (from the Greek auto (self) and nomos (law)) or self-legislative. On the other hand, religion is by definition heteronomous: God (the one who is wholly heteros/other) gives the law. Nancy's strict distinction is perhaps too idealistic and is perhaps also open to ethical charges rooted in Derrida's work on messianism without a messiah or the heteronomy of the Other. This is a matter that I cannot address here save for pointing out that the very autonomy of the political necessarily already points to an ethic beyond it and thus, in a certain sense, emphasises the aporetic relation of the ethical to the political.

74 Nancy (note 58 above) 5.

Melancholically obsessed with the loss of their rule over the demos (others), some of these religions (of democracy) often continue to *tout* theocracy. The other side of the coin all too often becomes Rancière's notion of the hatred of democracy. As Rancière argues, democracy is synonymous with abomination for those who still believe that revelations of divine law constitute 'the sole legitimate foundation on which to organise human communities'.<sup>75</sup> Such religions become political as well as religious, or, to put it differently, their practice becomes religion *as a politics*.<sup>76</sup> For Arendt, these religions are not authentic because authentic religions are religions that are not of the political world but part of the private world and, although the free world should permit and even encourage them plurally, religious belief should not be allowed to be adapted for the purposes of political ideology.<sup>77</sup> As she notes in her 1953 essay on religion and politics:

If we try to inspire public-political life once more with 'religious passion' or to use religion as a means of political distinctions, the result may very well be the transformation and perversion of religion into an ideology and the corruption of our fight against totalitarianism by a fanaticism which is utterly alien to the very essence of freedom.<sup>78</sup>

The desire for theocracy (or perhaps more accurately, the primordial tension between theocracy and democracy — which is always already the fundamental tension between the heteronomous and the autonomous) is sure to present itself forcefully during the process by which a secular order purports to change the heterosexual definition of marriage as the lifelong union between a man and a woman. With the sincerely held but hopelessly confused belief that marriage is *fundamentally* a religious (theocratic) institution (rather than a secular, civil arrangement),<sup>79</sup> an overwhelming majority of religious institutions right from the beginning of the struggle for same-sex marriage in South Africa (and elsewhere) vehemently opposed it.<sup>80</sup> This opposition sowed the seeds of totalitarianism in that it constituted an attempt not only to deny certain humans their dignity or to curtail a basic freedom of human beings — it also attempted (once again) politically to delegitimise the sexuality of

75 Rancière (note 57 above) 2.

76 Ibid.

77 H Arendt 'Religion and Politics' in H Arendt *Essays in Understanding 1930-1954* (1994, 2005) 368. Also see Young-Bruehl (note 52 above) 49-50.

78 Ibid 384.

79 See the incisive judgment of Farlam JA in *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA), paras 68-80, particularly at para 80: 'the law is concerned only with marriage as a secular institution. It is true that it is seen by many to have a religious dimension also, but that is something with which the law is not concerned.' Also see generally PL Reynolds *Marriage in the Western Church: The Christianisation of Marriage During the Patristic and Early Medieval Periods* (2001).

80 See the various submissions filed on behalf of the following religious institutions during the public participation hearings on the Civil Union Bill 26 of 2006 available at <<http://www.pmg.org.za/viewminute.php?id=8331>> and <<http://www.pmg.org.za/viewminute.php?id=8350>>: Doctors for Life and John Smythe personally, His People Christian Ministries, Southern African Bishops' Conference, Muslim Judicial Council, Christian Lawyers Association, Christian Brethren Church, Christian Action Network, Defense for Marriage, Christian View Network, Couples for Christ, Marriage Alliance of South Africa and the Consultation of Christian Churches which claimed to represent 37 denominations in South Africa.

some so that they would once more be driven into the darkness of invisibility and would once again be successfully isolated and thus susceptible to the debilitation on which terror insists.

The presumptuousness of the religious opposition to same-sex marriage specifically in South Africa — one could even go so far as to say the fanatical desire for theocracy or absolute heteronomy — completely ignored the fact that our Constitution (the source of our political order and thus also the source of the autonomy of such an order) prohibits unfair discrimination on the grounds of sexual orientation.<sup>81</sup> This political practice (politicisation) of religion led to an abuse of the generous rights afforded to religious groupings by the Constitution. The tolerance and even-handed treatment of religion envisaged by the Constitution turned into the permission of religious groupings to espouse hate speech against those who do not share their religious views about love, sexuality and sexual orientation.<sup>82</sup> But perhaps most importantly, the presumptuousness of this practice of religion as hegemonic politics was founded in a disdainful intolerance all too characteristic of radical totalitarianism, namely the disdainful intolerance for that which is constitutive of distinctively *human*<sup>83</sup> life — plurality.<sup>84</sup>

#### IV PLURALITY, EQUALITY, DIGNITY ... AND FREEDOM

##### (a) Plurality, equality and dignity

In *The Human Condition* Arendt writes that plurality is ‘*the condition — ... — of all political life*’.<sup>85</sup> For her, plurality is both the *conditio sine qua non* and *per quam* of political life and as such it is what guards most successfully against the success of totalitarianism,<sup>86</sup> primarily because plurality does not politically conceive the concept of the human being in a monistic way. Human being is for Arendt politically conceivable only as the plurality of human beings. There are many places in her work where she emphasises that men (*different* people and peoples) (not *man*)<sup>87</sup> inhabit the world and that the preparation for totalitarianism has begun when people (through terror and tyranny) lose contact with their fellow men.<sup>88</sup> For Arendt plurality is fundamental to

81 See Constitution s 9(3) (note 67 above).

82 See the discussion of these aspects in more detail below.

83 Hamacher (note 9 above) 343 indicates that for the ancient Greeks political society is constitutive of the human.

84 What Sachs J called in the first *National Coalition* judgment (note 46 above) para 138, ‘the variability of the human kind.’

85 Arendt (note 2 above) 7 (emphasis in the original).

86 Arendt (note 40 above) 466: ‘the iron band of terror, which destroys the plurality of men and makes out of many the One ...’ and 467: ‘In a perfect totalitarian government, where all men have become One Man ...’

87 See JR Lupton ‘Hannah Arendt’s Renaissance: Remarks on Natalty’ (2006) 7(2) *J for Cultural and Religious Theory* 10 who shows convincingly that by shadowing the classical scene of interaction among male citizens with the Hebrew creation story in the opening paragraphs of *The Human Condition*, Arendt implicitly merges both sexual difference and religious difference into founding aspects of plurality.

88 See, for instance, Arendt (note 40 above) 476 and Arendt (note 2 above) 4.

human life because it is plurality (the existence of other, different people in the world) that validates our experiences as reality. Even more importantly, it is plurality that enables us to think,<sup>89</sup> which thus distinguishes us as human. And tyrannical forms of government destroy absolutely the plurality of peoples amongst others and amongst themselves.

In the course of its jurisprudence on freedom of religion, our Constitutional Court has touched on plurality as a cornerstone of democratic politics. In the *Christian Education*<sup>90</sup> case, the Court held that the provisions of the Constitution that protect the rights of members of communities (specifically s 12) ‘underline the constitutional value of acknowledging diversity and pluralism in our society.’<sup>91</sup> These provisions affirm

the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called ‘the right to be different’.<sup>92</sup>

The Court went on to affirm the right to depart from a general norm and celebrated the ‘rich tapestry constituted by civil society’.<sup>93</sup> It continued to deal explicitly with the importance of protecting members of minority groups in society and acknowledged that minorities might well be ‘specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening.’<sup>94</sup> In the *Prince*<sup>95</sup> matter, Sachs J further held that ‘[t]he test of tolerance as envisaged by the Bill of Rights comes not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is “unusual, bizarre or even threatening”’.<sup>96</sup> As part of the respect for and maintenance of plurality, held the Court, it is particularly important to be conscious of past practices that abused the notion of plurality ‘to achieve exclusivity, privilege and domination.’<sup>97</sup>

Outside its limited freedom of religion jurisprudence, the Constitutional Court has, on a number of occasions, confirmed the importance of plurality for the transformation of South African civil society.<sup>98</sup> In *National Coalition*

89 Arendt (note 40 above) 476. See the conclusion below.

90 *Christian Education of South Africa v The Minister of Education* 2000 (4) SA 757 (CC).

91 *Ibid* para 24.

92 *Ibid*. See also P Longo ‘Revisiting the Equality/Difference Debate: Redefining Citizenship for the New Millennium’ (2001) 5(3) *Citizenship Studies* 269, 270: ‘The accent placed on “difference” evokes the aspiration to effect a social change more radical than that arising from the ideology of equal opportunity prevailing in most capitalist countries in the last decade.’

93 *Christian Education of South Africa* (note 90 above) para 24.

94 *Ibid* para 25.

95 *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC).

96 *Ibid* para 172.

97 *Christian Education of South Africa* (note 90 above) para 26.

98 See for example *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 20: ‘Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the arrival of the new constitutional order.’

for *Gay and Lesbian Equality and Others v Minister of Justice and Others*<sup>99</sup> Ackermann J explicitly linked plurality with the constitutional guarantee of equality and opposed it to the totalitarian South African past: ‘The desire for equality is not a hope for the elimination of all differences. “The experience of subordination — of personal subordination, above all — lies behind the vision of equality.”’<sup>100</sup>

The linking of plurality with equality in a way that affirms difference is markedly Arendtian (although seldom attributed to her). In *The Human Condition* she writes that ‘[p]lurality is the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives or will live.’<sup>101</sup> The first *National Coalition* judgment marks the Court’s strongest,<sup>102</sup> unequivocal affirmation that plurality fundamentally depends on difference, that equal respect for difference is at the heart of equality<sup>103</sup> and that equality depends, in great part, on the protection of minorities:

It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet as soon as we say any ... group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of ... society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.<sup>104</sup>

Per Sachs J the Court also emphasised that

the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times.<sup>105</sup>

The Court also considered that social minorities (in this case the South African LGBTI community) constitute *political* minorities, meaning that they cannot depend on political power to secure favourable legislation. Accordingly, they are almost exclusively dependant on the Bill of Rights for protection.<sup>106</sup> This is a point that Arendt emphasised already in a 1954 essay in which she attempted to come to terms with totalitarianism; namely that a

99 Note 46 above.

100 *Prinsloo* (note 98 above) para 22 (footnote omitted).

101 Arendt (note 2 above) 8.

102 See the earlier judgment in *The President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 41: ‘At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.’

103 *National Coalition* (note 46 above) para 112.

104 *Ibid* para 22.

105 *Ibid* para 117.

106 *Ibid* para 25.

democracy ruled by majority decisions but unchecked by the rule of law is as despotic as an autocracy.<sup>107</sup>

In the instant judgment, the Court went so far as to hold that the success of the entire constitutional endeavour will be measured by how successfully it reconciles sameness and differences,<sup>108</sup> which I read as a different way of saying that the success of the entire constitutional endeavour will depend on how successfully it nurtures plurality.<sup>109</sup> In an obiter statement Sachs J also highlighted that the protection of dignity under s 10 ‘offers protection to persons in their multiple identities and capacities.’<sup>110</sup> Plurality thus sits at the heart of the constitutional endeavour: ‘[w]hat the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are.’<sup>111</sup>

The Court was careful to point out that plurality as a condition of politics certainly does not entail that anything goes.<sup>112</sup> It pointed out that the Bill of Rights is a document of deep political morality and its enforcement itself is an enforcement of morality.<sup>113</sup> The Court, however, affirmed that the morality that the state enforces through the Bill of Rights is a secular morality: ‘the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.’<sup>114</sup> Above everything, the first *National Coalition* judgment is, in the end, a judgment that celebrates plurality as the heart of the political.<sup>115</sup> For this reason it is fundamentally a judgment about the nature of and conditions for democratic politics, which is the only politics worthy of the name.

### **(b) Plurality, marriage and family formation in South Africa**

From the outset of the constitutional endeavour, the Constitutional Court has acknowledged the plurality that inheres in modern South African family formations. In the *First Certification* case<sup>116</sup> the Court acknowledged that families are constituted, function and are dissolved in a variety of ways, and that laws or executive action resulting in enforced marriages, or oppressive prohibitions on marriage or the choice of spouses, would not survive constitutional

107 ‘On the Nature of Totalitarianism: An Essay in Understanding’ in H Arendt *Essays in Understanding 1930-1954* (1994, 2005) 328, 331.

108 *National Coalition* (note 46 above) para 131.

109 In light of the Court’s statement that it is plurality that brings life to any society (ibid para 132).

110 Ibid para 124.

111 Ibid para 134.

112 Ibid para 136.

113 Ibid.

114 Ibid.

115 See JWG van der Walt *Law and Sacrifice* (2005) 6-12, 20-25. This is not the occasion to engage with the arguments that insist on the impossibility of plurality and the evacuation of the political in Van der Walt’s inspiring and thoughtful book, save for indicating that I believe Van der Walt’s arguments in this regard illustrate precisely and perhaps devastatingly the totalitarian tendencies of everyday political life under late global capitalism (what Van der Walt calls international feudalism).

116 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 99.

challenge.<sup>117</sup> This sentiment was repeated in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others*,<sup>118</sup> where the Court also affirmed that ‘it is not for the state to choose or to arrange the choice of [marriage] partner, but for the partners to choose themselves.’ Underlying this proscription is, of course, a very well-developed concern with plurality; an acknowledgment that marriage partners come in all shapes and sizes and that the choice to marry a particular person is a highly personal one. Later, in the *Du Toit* case,<sup>119</sup> Skweyiya J emphasised that family life as contemplated by the Constitution could be provided in a variety of different ways all worthy of constitutional protection.

In *Fourie* the Court explicitly acknowledged that the extension of marriage to permanent same-sex life partnerships was a matter of the protection of equality and dignity and thus of plurality.<sup>120</sup> The opening of the institution of marriage was thus also a distinctively democratic political gesture that affirmed the rule of law and celebrated secularity.

The reasons for the extension of specifically ‘marriage’ to the LGBTI community — as a matter of plurality — relate primarily to the importance (centrality) attributed to marriage in South African civil society. Throughout its jurisprudence on marriage, the Court has acknowledged the argument that marriage is central to the distribution of benefits in politics and that it is only because marriage is one of the central territories of cultural privilege that it becomes an important site of exclusion.<sup>121</sup> In *Dawood*<sup>122</sup> O’Regan J held that marriage and the family are social institutions of vital importance not only because of their personal significance but also because ‘human beings are social beings whose humanity is expressed through their relationships with others’.<sup>123</sup>

As emphasised in *Fourie*, the words ‘I do’ have both an intensely private and an overtly public (political in the ancient sense) dimension to them.<sup>124</sup> The public dimension prescribes certain formalities for the marriage in order to ensure the publication of the marriage to the broader community — ‘marriage’ is thus taken seriously not only by the parties, their families and society, but [also] by the State.<sup>125</sup> And it is taken seriously by the state because, as Derrida affirms, ‘the concept of politics rarely announces itself without some sort of adherence of

117 Ibid para 100.

118 2000 (2) SA 1 (CC) para 55.

119 *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC).

120 In *Fourie* (note 79 above) para 113 Farlam JA followed the same route by holding that ‘the concepts of marriage and the family have to be seen against the background of the numerous strands making up the variegated tapestry of life in South Africa.’

121 Westervelt (note 36 above) 106-107.

122 *Dawood and Another v Minister Of Home Affairs And Others; Shalabi and Another v Minister Of Home Affairs and Others; Thomas and Another v Minister Of Home Affairs and Others* 2000 (3) SA 936 (CC).

123 Ibid para 30. This approach to marriage was endorsed in *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC) and *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

124 *Fourie* (note 63 above) para 63.

125 Ibid para 64.

the State to the family.<sup>126</sup> And, under a Constitution that recognises plurality as one of its political foundations, the politics of the family will have to announce itself constrained (or perhaps informed) by this very notion of plurality.

The exclusion of same-sex couples from marriage as a pillar of civil society is thus 'not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew.'<sup>127</sup> It represents a harsh statement that same-sex unions are not worthy of the same protection because they do not conform to the heterosexual norm.

However, the Constitutional Court has been careful to point out that the opening-up of marriage does not constitute a hegemonic attempt to make same-sex couples conform to the heterosexual norm.<sup>128</sup> This would invariably reduce the plurality that the Constitution aims to protect. What was in issue was both the legitimacy of families constituted in ways different from the heterosexual norm as well as the choice that was available to such families. In short: Given the centrality of marriage in our society, '[i]f heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples,'<sup>129</sup> because there is no rational justification that could form the basis of their exclusion from the institution that carries this appellation. Any different outcome would have resulted in a denial of equality, difference and thus of plurality.

The *Fourie* judgment deferred the opening-up of marriage to include same-sex life partnerships to the legislature for a period of one year from the date of the judgment.<sup>130</sup> This deferral stood in sharp contrast to the Constitutional Court's overt counter-totalitarian acknowledgment of the secular, inclusive and plural dimensions throughout its jurisprudence on sexual freedom and the institution of marriage. For when all was said and done, South Africa's LGBTI society had to live for up to another year with the denial of their dignity, equality and freedom. The realisation that this was the practical effect of the majority's judgment lay at the heart of O'Regan J's dissent, which recognised that the majority's order not only deviated from the important constitutional principle that successful litigants must generally be afforded the relief they seek.<sup>131</sup> As O'Regan J frankly noted, the real practical effect of the majority's decision, after all, was that gay and lesbian couples would not be permitted to marry during the period of suspension of the order.<sup>132</sup> This order was also particularly problematic in that it failed to confront the historical fact that the state had opposed all the cases in which constitutional relief was sought for the LGBTI community.<sup>133</sup> In addition, given the Constitutional Court's explicit confrontation with the religious views of the majority of the population, a hiatus in the judgment suggests a failure to come to terms with the possible

126 J Derrida *Politics of Friendship* (1997) viii.

127 *Fourie* (note 63 above) para 71.

128 *Ibid* paras 72 and 107.

129 *Ibid* para 72.

130 *Ibid* para 162.

131 *Ibid* paras 165 and 170.

132 *Ibid* para 167.

133 This fact alone was in itself totalitarian.

consequences of deferring to the legislative process within this political context, namely that it is precisely the judgment that created the space for the expression of these religious views during public participation. To be sure, the Constitutional Court cannot be blamed for the fact that Parliament allowed the expression of homophobic religious views during public participation. This, however, does not absolve the Court's responsibility to consider the probable consequences — the fact that it is probable that more unjustifiable harm could come to the LGBTI community — which result from the suspension of the order.

Given the history of the state's role in the preceding litigation, it was perhaps not surprising that Parliament's response to the *Fourie* judgment bore the distinct characteristics of totalitarianism in the making. Why is this not a far-fetched contention? Let us recall that in *Fourie* the Court expressly stated that any remedy that would lead to a 'separate but equal' marriage regime for same-sex couples would not only hark back to the tactics of the totalitarian apartheid government, it would for this very reason be 'unthinkable'<sup>134</sup> in our constitutional order.<sup>135</sup> Yet this is precisely the regime that Parliament proposed in the first draft of the Civil Union Bill.<sup>136</sup> This Bill did not provide marriage to same-sex life partnerships but instead sought to enact a second-class institution called a 'civil partnership' regime exclusively for same-sex couples.<sup>137</sup> With the proposal of this Bill the writing was on the wall that the political will was (at best) reluctant to grant equal rights of marriage to same-sex couples. A further implication of this move was that the legislature itself (albeit tacitly and perhaps even unconsciously) expressed an intolerance for the plurality of South African society so celebrated by the Constitutional Court. It is for this reason that the Bill was met with the outrage it deserved from the South African LGBTI society.<sup>138</sup>

But coming back to where the previous section left off, what was even more alarming was the intolerance for plurality expressed by the members of numerous religious groups.<sup>139</sup> While the LGBTI society regarded the Bill as an insult in that it did not go far enough, religious groups regarded it as a moral

134 *Fourie* (note 63 above) para 151.

135 Y Merin *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (2002) 279 links separate-but-equal doctrine with second-class citizenship: 'The fact that the [separate but equal] models are self-consciously separate from marriage renders them inherently unequal to opposite-sex marriage; "separate but equal" in this context instantiates the same constitutional evil that led the US Supreme Court to condemn this doctrine in the racial domain. This is yet another reason why marriage substitutes constitute second-class marriage. The only remedy for the existing discrimination against same-sex couples would be their inclusion in the institution of marriage.'

136 Bill 26 of 2006.

137 Ibid s 1: "'civil partnership" means the voluntary union of two adult persons of the same sex that is solemnized and registered in accordance with the procedures prescribed in this Act to the exclusion, while it lasts, of all others'.

138 Anon 'Separate Law on Marriage is Apartheid' *Cape Argus* (7 September 2006); J du Plessis 'Gay Activists See Red over Civil Union Bill' *Pretoria News* (18 October 2006); WJ da Costa 'Activists Slam Hearings on Same-Sex Unions' *Pretoria News* (11 October 2006).

139 For a taste of this intolerance see I Kuppam & A Quintal 'Churches Speak out Against New Marriage Bill' *Daily News* (25 August 2006) and L Daniels 'Civil Union Law Elicits Strong Emotions' *The Star* (24 November 2006).

disaster because, in their opinion, it went too far.<sup>140</sup> While it was clear that the Bill was not allowing same-sex marriage, religious groups argued that even granting civil partnerships to same-sex couples would defile the institution of marriage, which they believed to be sacred.<sup>141</sup> Instead of informing these groups that (1) the Constitutional Court had already dealt with and dismissed — as a constitutional or political matter — the religious arguments against same-sex marriage; and (2) the Bill was in fact not providing marriage to same-sex couples, Parliament instead provided these religious groupings (as part of the *legislative process*) with a platform from which to express some of the most ludicrous, hurtful and unfounded opinions about same-sex love that have ever been conceived — all based on naked and irrational hatred (yes, hatred, not benign naiveté based on the reading of religious text and belief in its authority) of those who wish to act out their homosexuality.<sup>142</sup>

Arendt suggests that when hatred starts playing a central role in public affairs (as it did in this case), democratic politics is under threat and totalitarianism is at the political door.<sup>143</sup> The religious groupings that decided to voice their opposition in the form of hate speech neither cared for, nor did they value or even come to accept, the equal respect for plurality that lies at the heart of this constitutional order. Moreover, they failed to appreciate the simple fact that they are religions of democracy — tolerated, even encouraged, but never licensed to determine the constitutional rights of others.

## V CITIZENSHIP: THE RIGHT TO HAVE RIGHTS

Arendt famously argued that only the concrete rights of citizens carried weight.<sup>144</sup> She believed that the danger in describing human rights as inalienable exists in basing them in an abstract individual who exists nowhere.<sup>145</sup> Her unease with such a description of human rights must be viewed in the context of her discussion of totalitarianism. The isolation required for the success of totalitarianism cannot be fully implemented without the annihilation of the common citizenship of the polity. Taking away a political subject's citizenship serves as a shortcut by way of which the subject's other human rights are alienated (save to the extent that these rights are retained in the abstract sense) because those rights largely depend on (and are grounded in) citizenship for their enforcement.

Because of her concern with the protection of plurality as the condition of all true politics, Arendt insisted that the equal granting of the status of

140 A march was in fact organised to protest against this first draft. See Anon 'March Aims to Protect "Traditional Marriage"' *Independent Online* available at <<http://www.iol.co.za>>; T Nthite 'Hundreds Protest Against Same-Sex Marriages' *Pretoria News* (9 October 2006); SAPA 'Marchers Protest Against Same-Sex Marriages' available at <[http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=qw1160209980970B216](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1160209980970B216)>.

141 See note 80 above. On the secularity of marriage also see BH Bix 'State Interest and Marriage — The Theoretical Perspective' (2004) 32 *Hofstra LR* 93.

142 See WJ da Costa 'Hearings "A Platform for Hate Speech"' *Cape Times* (11 October 2006) and WJ da Costa 'Gays Protest Tone of Civil Union Bill Debate' *Cape Times* (16 October 2006).

143 Arendt (note 40 above) 268.

144 *Ibid.*

145 *Ibid.* 291.

citizenship is the very condition for the protection of such plurality. To put it differently, according to Arendt's formulation, I need to have citizenship like everyone else in order to protect my individual status as one who is 'like' no one.<sup>146</sup> Thus, the very fact that we are all human entitles us to the citizenship with which we are ensured of our human rights.<sup>147</sup> Without it, our human rights are literally and ceaselessly exposed to alienation.

Arendt notes that the totalitarianism of the twentieth century brutally indicated exactly how alienable the so-called inalienable rights are when they are not grounded in citizenship.<sup>148</sup> This is what Hitler realised in Nazi Germany when he decreed that all Jews were no longer German citizens. This is also what the apartheid government realised with the Bantu Homelands Citizenship Act 26 of 1970 which decreed the removal of the South African citizenship of black people and compelled them to become citizens of the homeland that responded to their ethnic group, regardless of whether they had ever lived there or not.<sup>149</sup> Of course, the so-called 'independent' homelands remained under the practical control of the apartheid government and thus served primarily as the loci to which black South Africans were relegated after the apartheid government divested them of their South African citizenship and the rights (particularly in terms of politics and civility) that such a citizenship would attract.

The premise upon which the exclusion from citizenship — as a denial of human rights — of Jews and black people was based under totalitarianism generally, consisted in the general belief of the members of the totalitarian movement/s that these human beings were (at best) less human than them and thus not entitled to the same *common (shared)*<sup>150</sup> citizenship. This belief in the 'less human', for its part, was founded on the idea that the Jews in the case of Germany and the black people in the case of South Africa did not possess the same moral and ethical capacity that the oppressors believed themselves to have been born with. In short, the citizenship of these people was excluded because of the belief that they were *morally* inferior and thus not deserving of the same citizenship as those who were supposedly 'superior'. For this reason, the oppressors in South Africa, for instance, thought it necessary to segregate society along racial lines.

From a purely formal (and immensely important) point of view, the South African Constitution ensured that it would never again be possible (after the disintegration of apartheid) legally to conceive of the exclusion of some South Africans from South African citizenship. There is now a common South African citizenship affirmed by the Constitution.<sup>151</sup> Because the right to citizenship is linked with equality, there can be no classes of citizenship in South Africa.<sup>152</sup>

146 Arendt (note 107 above) 333.

147 See E Balibar 'Outlines of a Topography of Cruelty: Citizenship and Civility in the Era of Global Violence' (2001) 8(1) *Constellations* 15, 17-18.

148 Arendt (note 107 above) 293.

149 See J Klaaren 'Post-Apartheid Citizenship in South Africa' in T Aleinikoff & DB Klusmeyer (ed) *From Migrants to Citizens: Membership in a Changing World* (2000) 221.

150 See the argument relating to the partage below.

151 Constitution ss 3 & 20.

152 See s 9(1) of the Constitution. Also see Currie & De Waal (note 66 above) 367.

This was acknowledged by the Constitutional Court in *Hugo* where it held that “‘distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity’” cannot be tolerated.<sup>153</sup> Currie and De Waal correctly indicate that only citizens enjoy the political rights of the Constitution. Thus if South African people did not formally have the right to claim equal status as citizens, it would be impossible for them to negotiate the required agency that is needed to play their equal roles in the political realm.<sup>154</sup>

Out of the importance Arendt placed on common citizenship (as shared, equal citizenship) she discerned her notion of civic friendship which affirms the two dimensions of her conception of the public sphere, namely the space of appearance and the enormity of the idea of sharing a common world.<sup>155</sup> The space of appearance endorses, gives ontological significance to plurality.<sup>156</sup> The common world provides some permanence to the always precarious space of appearance; it is the backdrop: ‘a shared and public world of human artefacts, institutions and settings which separates us from nature and which provides a relatively permanent and durable context for our activities.’<sup>157</sup> The denial of equal citizenship thus threatens the very possibility of politics and a public sphere *as such* because it renders the recovery of a common, shared world impossible.

Arendt’s conception of citizenship as sharing a common world is perhaps best captured by Nancy’s notion of the *partage* — that which indicates sharing at the same time as it indicates division or separation,<sup>158</sup> or as Derrida puts it, ‘at once partition and participation, something possible only on the basis of an irreducible spacing.’<sup>159</sup> Arendt herself compares the common world to sitting around a table with others — ‘the world, like any in-between, relates and separates men at the same time’.<sup>160</sup> For Arendt totalitarianism destroys the space between people and thereby destroys the very heart of civic friendship. Under totalitarianism, sharing (the *partage*) is no longer a possibility. It is also when this sharing is destroyed that freedom lies in ruins, because freedom (as that which ‘throws the subject into the space of the sharing of being’) cannot be experienced without this space between men.<sup>161</sup> Moreover, because equality is integral to freedom in that the equal sharing of freedom is its unconditional condition, the destruction of the

153 *Hugo* (note 102 above) para 41. Repeated in *Volks* (note 123 above) para 79.

154 Currie & De Waal (note 66 above) 364. The Constitution of course also affirms the most important of the fundamental rights of non-citizens and thus also points to a cosmopolitical notion of citizenship.

155 Arendt (note 40 above) 464.

156 See B Assy ‘Doxa: Dignifying the Public Space in Hannah Arendt’ (2004) 9 *theory@buffalo* 11.

157 Arendt (note 2 above) 199. See MP D’Entreves ‘Hannah Arendt’ in *Stanford Encyclopedia of Philosophy* available at <<http://plato.stanford.edu/entries/arendt>>.

158 JL Nancy *The Experience of Freedom* (1993) 66-80.

159 Derrida (note 59 above) 45.

160 Arendt (note 2 above) 52.

161 Arendt (note 40 above) 466: ‘for the space between men is the living space of freedom.’ Also see Nancy (note 158 above) 69-71; Derrida (note 59 above) 46-47. In order to justify the specific use of language in my choice of formulation as well as to acknowledge the debt of both Nancy, Derrida and perhaps (but only perhaps) even Arendt, it is necessary also to refer here to M Heidegger *Being and Time* (trans J Macquarrie & E Robinson, 1962) 174.

space between men also ruins equality<sup>162</sup> and, seeing that equality bears such an intimate relationship with human dignity in South Africa, the destruction of equality leads to the ruination of dignity. Under the crushing force of the iron band of terror the great emancipatory ideals collapse like dominoes.

Well aware of this domino effect, Arendt's notion of 'thick' citizenship pleads for more than the mere formal granting of equal (common) citizenship. It is Arendt's notion of citizenship as the acknowledgment of worth;<sup>163</sup> of the full and active (and thus equal right to) participation in the public sphere that has been developed by the Constitutional Court (primarily by Sachs J) and referred to as 'full moral citizenship'. Sachs J famously opened his judgment in the first *National Coalition* case with the following words:

Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.<sup>164</sup>

Sachs J went on to hold that '[i]n the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility'.<sup>165</sup> The judgment repeatedly acknowledges that the discrimination against the LGBTI community exists as an attempt to erase their space of appearance.<sup>166</sup> By casting this case as being about full moral citizenship, appearance and plurality (rather than just about privacy), Sachs J affirmed that the decriminalization of homosexual conduct and the granting of equal rights to the LGBTI community are fundamental ingredients for nurturing the profundity of full common citizenship for South African democracy and politics.

Sachs J's notion of moral citizenship also acknowledges that the *formal* extension and enjoyment of a common citizenship is but a precondition (albeit a very important one) of moral citizenship: 'The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people *as they are*.'<sup>167</sup> In *Fourie* Sachs J built on this notion of equal moral citizenship by holding that:

The strength of the nation envisaged by the Constitution comes from its capacity to embrace all its members with dignity and respect. In the words of the Preamble, South Africa belongs to all who live in it, united in diversity. What is at stake in this case, then, is how to respond to legal arrangements of great social significance under which same-sex couples are made to feel like outsiders who do not fully belong in the universe of equals.<sup>168</sup>

162 Derrida (note 59 above); Rancière (note 59 above) 84-91.

163 *National Coalition* (note 46 above) para 127. Sachs J specifically links the acknowledgment of full moral citizenship to the acknowledgment of the innate self-worth of human beings (dignity).

164 *Ibid* para 107.

165 *Ibid* para 127.

166 *Ibid* para 128: 'Gays constitute a distinct though invisible section of the community that has been treated not only with disrespect or condescension but with disapproval and revulsion; they are not generally obvious as a group, pressurised by society and the law to remain invisible.'

167 *Ibid* para 134 (author's emphasis).

168 *Fourie* (note 63 above) para 61.

Given the importance of marriage in South African society and the Court's acknowledgment of the centrality of marriage, its extension to same-sex permanent life partnerships thus became a matter of acknowledging not merely the unfairness of the discrimination. It was also an acknowledgment of the equal moral citizenship of the members of the South African LGBTI society. Furthermore, it was an affirmation by the Constitutional Court that a family constituted by a same-sex couple has the same potential and ability to produce good citizens as any heterosexual family.<sup>169</sup>

Unfortunately though, Parliament's first draft of the Civil Union Bill was less accommodating. With the Bill's civil partnership provisions, it blatantly attempted to introduce a second class (moral) citizenship.<sup>170</sup> The Bill reserved a civil partnership for same-sex life partnerships by defining it as 'the voluntary union of two adult persons of the same sex',<sup>171</sup> while simultaneously making it clear that the Marriage Act would be retained exclusively for heterosexual marriages.<sup>172</sup> This constituted an overt attempt to segregate same-sex couples from their heterosexual counterparts on no rational grounds whatsoever. The drafters themselves in fact implicitly acknowledged that civil partnerships are of a second class or inferior. This was evident from the provisions of s 11 of the Bill which allowed for the civil partnership to be called a marriage only upon the occasion of solemnization, thus indicating that a special 'indulgence' would be granted to call the inferior partnership a marriage at least once. From this deduction it followed that there was no room for an interpretation that civil partnerships are equal to marriage.

The illegitimacy of a civil partnership regime in South Africa (legislated in the absence of a choice to marry for same-sex partners) was already acknowledged by the South African Law Reform Commission at the time that the first draft of the Civil Union Bill was introduced.<sup>173</sup> The civil partnership provisions could thus not have been anything other than a deliberate and overt attempt to introduce a 'separate but equal' marriage regime in South Africa in direct contravention of what was said in *Fourie*.<sup>174</sup> These provisions would not and could not ensure that same-sex couples would be accorded the equal private and public status afforded by marriage.<sup>175</sup> Considering the provisions of this Bill together with the voting majority's religious outrage against *any* form of legal recognition for same-sex life partnerships, it became clear that the first draft of the Civil Union Bill desperately attempted to negotiate between the prevailing public sentiment on the one hand, and the tenor of the Constitutional Court's

169 Also see *Du Toit* (note 119 above).

170 See *In re Opinions of the Justices to the Senate* 440 Mass 1201, 802 NE 2d 565 (Mass, 2004) 570, where the Supreme Judicial Court of Massachusetts held that an appellation such as civil partnership or civil union without the choice of marriage 'is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.'

171 Civil Union Bill (note 136 above) s 1.

172 *Ibid* s 13(2).

173 SA Law Reform Commission *Report on Domestic Partnerships* (March 2006) 292 para 5.3.15, 296 para 5.4.11 and 305 para 5.6.2.

174 *Fourie* (note 63 above) para 150.

175 *Ibid* para 81.

judgment and the interests it vindicated on the other. Viewed from these sides respectively, in passing an Act in the form of the first draft of the Civil Union Bill Parliament would not be granting marriage but at least it would be giving 'full' legal protection to same-sex couples.

But the underlying ideology that inhered in *this* particular attempt at negotiation was that the members of the LGBTI society of South Africa could be deemed not to be equal citizens because they are morally inferior and thus do not deserve access to the special institution of marriage. In light of the effect of the *Du Toit* case, the knock-on effect of this denial of equal moral citizenship to same-sex couples would be that children adopted by such a couple would also be denied equal moral citizenship because they would belong to a family that the state regards as inferior. This would, of course, be constitutionally untenable.<sup>176</sup>

## VI THINKING / CONCLUSION

The fact that the first draft of the South African Civil Union Bill did not become legislation testifies to the strong commitment to constitutional democracy amongst a critical mass in South Africa. This commitment is in fact so strong that it successfully managed to weed out much of the overt totalitarianism that was visible for all to see during the legislative process. However, totalitarianism, like homophobia, does not evaporate like the morning dew — even where healthy institutions of democracy exist and strong commitment to them is undeniable. The ANC probably realised this when, as a matter of instrumental politics, it forced the vote of its members in Parliament in order to push the revised (and certainly not the ideal)<sup>177</sup> version of the Civil Union Bill through the legislature in order to meet the Constitutional Court's deadline.<sup>178</sup>

Without an ongoing commitment to the rule of law (and its constitutive elements discussed here) in the context of the transformation of family law in South Africa, the legacy of totalitarianism will not be fully eradicated. It is indeed remarkable that South Africa is the only country on the continent (and one of few in the world) that now provides for same-sex marriage. What is, however, also remarkable is the fact that the Marriage Act 25 of 1961 (and it is significant that this is an Act that carries such a distinct date) remains on the statute books even though the Constitutional Court declared the Act

176 See the Constitution s 28(2).

177 The Civil Union Act (note 55 above) harbours its fair share of problems too — the most important of which is the s 6 provision which allows the state's marriage officers to refuse solemnisation of a civil partnership or marriage between partners of the same sex.

178 *Fourie* (note 63 above), para 162, where the Court ordered that should Parliament not correct the unconstitutionality of both the common-law definition of marriage and the provisions reliant thereon in the Marriage Act within 12 months of the Court's order in *Fourie*, an automatic reading in of the words 'or spouse' after the words 'or husband' in s 30(1) of the Marriage Act would follow. Practically speaking, this meant that Parliament had to conclude the legislative process for the full and equal recognition of same-sex life partnerships by 30 November 2006. Also see A Quintal 'Civil Union Bill Approved in Historic Vote' *Cape Times* (15 November 2006) and Anon 'South Africa Approves Same-Sex Unions' *BBC News* (14 November 2006) available at <<http://news.bbc.co.uk/2/hi/africa/6147010.stm>>.

and the common-law definition upon which it relied, unconstitutional.<sup>179</sup> That this represents a compromise (and perhaps even a concession to totalitarian impulses) should remain an important item on the agenda (and thus a motivating force) of all who feel themselves concerned with democracy, the rule of law and constitutionalism as a secular ethical discourse.

In conclusion, I would like to return to a dimension of Arendt's thought to which I have only referred to obliquely up to now, although this dimension is what ultimately underlies every single aspect of her theory of politics. It is the human faculty of reflective judgement, the inverse of which consists in what she calls 'thoughtlessness'. In *The Human Condition* Arendt expresses the belief that thoughtlessness is one of the most outstanding characteristics of our time.<sup>180</sup> She defines thoughtlessness as 'the heedless recklessness or hopeless confusion or complacent repetition of "truths" that have become trivial and empty.'<sup>181</sup> From this definition we can discern that thoughtlessness manifests in at least three forms: as heedless recklessness, as hopeless confusion or as the complacent repetition of 'truths'.

Before we can fruitfully apply the elements of this definition to the same-sex marriage 'debate' in South Africa it is necessary to say two more things about thoughtlessness: one about what its political implications are and second, the specific meaning Arendt attributes to it in her report on the trial of Otto Adolf Eichmann.<sup>182</sup> On the political implications of thoughtlessness Arendt is clear. Thoughtlessness is what ultimately enables totalitarianism — it is what makes totalitarianism move forward in its crushing, all-encroaching fashion as the iron band of terror. Why is it particularly thoughtlessness that enables totalitarianism? Because thoughtlessness is that which renders evil banal<sup>183</sup> and thus unrecognisable, perhaps even unstoppable. By removing the ability to stop and think, totalitarianism camouflages its evil in such a way that it is performed in a banal, normalistic fashion and thus becomes less and less permeable, less and less interruptible, less and less recognisable as grotesque and abominable.<sup>184</sup> The specific meaning Arendt attributes to thoughtlessness in *Eichmann* testifies to its ability to enable totalitarianism. In her report of Eichmann's trial, Arendt describes thoughtlessness more precisely as the inability 'to think *from the standpoint of someone else*'<sup>185</sup> — a profound lack of the capacity to imagine.<sup>186</sup> Thoughtlessness is what is required to make

179 See *Fourie* (note 63 above) para 162.

180 Arendt (note 2 above) 5.

181 Ibid.

182 H Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963, 1985).

183 Ibid 252. Arendt describes the banality of evil literally as 'thought-defying'.

184 Arendt compares totalitarian rule to the structure of an onion: 'The great advantage of this system is that the movement provides for each of its layers, even under conditions of totalitarian rule, the fiction of a normal world along with a consciousness of being different from and more radical than it.' Arendt (note 5 above) 95.

185 Arendt (note 182 above) 49.

186 See LP Thiele 'Judging Hannah Arendt — A Reply to Zerilli' (2005) 33(5) *Political Theory* 706, 707: 'imagination ... allows us to engage in representative thinking. Herein we gain appreciation of the world of others, not so much the actual thoughts and feelings of others but their possible thoughts and feelings, given their respective standpoints.'

someone unaware of what it is that they are doing<sup>187</sup> — it is the ‘*most reliable of all safeguards against the words and the presence of others*’.<sup>188</sup>

During the course of the same-sex marriage debate in South Africa, thoughtlessness (in all its dimensions described above) — ‘something by no means identical with stupidity’<sup>189</sup> — permeated every stage of the process. As ‘heedless recklessness’ thoughtlessness transpired in the many submissions from concerned religious groups that opposed same-sex marriage by focusing on the ‘inability’ of homosexual couples to rear children. This was ‘heedless recklessness’ because, legally and politically speaking, it failed to take account of the fact that this argument had already been dismissed by the Constitutional Court six years earlier in the *Du Toit* case. ‘Heedless recklessness’ also transpired in the arguments that did not (could not) draw a distinction between the human and the non-human by sincerely arguing that affording marriage to same-sex couples would leave the door open for the recognition of marriage between a person and a corpse or between a human and an animal.<sup>190</sup> Needless to say, these arguments were also testimony to ‘hopeless confusion’ about the terms of the instant debate and the new definition of marriage which remains between humans.

Other instances of ‘hopeless confusion’ as thoughtlessness existed in the Deputy Minister of Justice’s assertion that a civil partnership is the same as a marriage<sup>191</sup> and the African Christian Democratic Party’s (truly thoughtless) call for a constitutional amendment to protect heterosexual marriage.<sup>192</sup> It was also evident in the arguments that homosexuality is un-African. The latter argument was obviously hopelessly confused about the extent of colonial imposition and its concomitant introduction of Western concepts (such as homosexuality) into the subaltern psyche. The smallest extension of (reflective) thought would have not only realised this but would also have been conscious of the many same-sex practices that exist in Africa today.

But the most vivid manifestation of thoughtlessness was ‘the complacent repetition of “truths” that have become trivial and empty’. These ranged from the argument that marriage is ‘inherently’ a union between a man and a woman to the argument that marriage was a religious concept instituted by God, from the argument that homosexuality is ‘unnatural’ to the argument that same-sex marriages are inherently more prone to domestic violence and dissolution; from the argument that the Bible condemns same-sex marriage to the argu-

187 Arendt (note 182 above) 287. This formulation is the negative of Arendt’s appeal at the beginning of the *The Human Condition*, namely to ‘think what we are doing’. See Arendt (note 2 above) 5.

188 Arendt (note 182 above) 49.

189 *Ibid* 288.

190 This argument was voiced in the public participation hearings by executive members of the Christian Action Network.

191 Home Affairs Portfolio Committee Minutes of a Meeting held on 6 September 2006: Civil Union Bill, Film and Publications Amendment Bill and Immigration Amendment Bill: Briefing By Minister available at <<http://www.pmg.org.za/viewminute.php?id=8187>>.

192 See J Evans ‘Government to Respect Gay Marriage Ruling’ *Mail and Guardian Online* (1 December 2005) available at <[http://www.mg.co.za/articlePage.aspx?articleid=258227&area=/breaking\\_news/breaking\\_news\\_national](http://www.mg.co.za/articlePage.aspx?articleid=258227&area=/breaking_news/breaking_news_national)>.

ment that homosexuality is a psychological disorder.<sup>193</sup> All these ‘truths’ have been exposed as fallacies, became ‘trivial and empty’ many years ago and yet they were arrogantly put on exhibit (and hosted) in/on stages of processes that smacked unpleasantly of vitriol and naked, undisguised hatred.

As this article has shown, these instances of thoughtlessness are always closely connected with a totalitarian impulse which denies the most basic elements of a democratic politics and a constitutional order founded on the rule of law. However, the opposition to same-sex marriage could not avoid the fact that the South African Constitution does not and will not enable totalitarianism, because it not only ‘requires that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are’<sup>194</sup> — it also demands of the South African people, at every turn, *to stop and think*. The fact that this demand is not always heard or obeyed does not take anything away from the fact that thinking (at the very least) from the standpoint of someone else remains the criterion by which conduct and process in South Africa will continue to be judged.

As a result of sheer intolerance (hatred (of democracy)), Arendt’s vision of civic friendship has not yet come to fruition in South Africa. All over the country the space of appearance is threatened, the sharing of a common world continuously at risk. But as Arendt also contended, perhaps too optimistically, totalitarianism bears the germs of its own destruction in that it represents an anti-social (and thus unsustainable) situation destructive of the very thing that makes people human — living together.<sup>195</sup> And as every end undeniably and necessarily also contains a new beginning, the new beginning to which the Civil Union Act bears witness also testifies to the supreme capacity of the human — the ability to begin something new.<sup>196</sup> Rancière argues that ‘the rights of man and of the citizen are the rights of those who make them a reality. They were won through democratic action and are only ever guaranteed through such action.’<sup>197</sup> Thus, while this joyous new beginning calls for much celebration, we need to remain at the wake of this time, for it must be thought of as a necessarily precarious time — a time that undeniably *leaves* us with what is perhaps the question of our age and thus a question that demands unbreachable responsibility: ‘*When will we be ready for an experience of freedom and equality that is capable of respectfully experiencing that friendship, which would at last be just, just beyond the law, and measured up against its measurelessness?*’ O my democratic friends ...<sup>198</sup>

193 See note 80 above. These arguments were contained in submission after submission, consumed with / by religious fundamentalist fantasy.

194 *National Coalition* (note 46 above) para 134.

195 Arendt (note 40 above) 478.

196 *Ibid* 473, 478–479. Rancière (note 57 above) 96.

197 Rancière (note 57 above) 74.

198 Derrida (note 126 above) 306.