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Taking Responsibility, Law and the Changing Family

Edited by Craig Lind, Heather Keating and Jo Bridgeman

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CRAIG LIND, HEATHER KEATING, JO BRIDGEMAN
University of Sussex, UK

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Notes on Contributors

Amel Alghrani is a research associate in the School of Law at the University of Manchester. Amel studied law as an undergraduate and went on to qualify as a barrister in 2003, having been awarded the Yarborough Anderson Benefactors and Scholarship Award. She previously worked in the General Medical Council, leaving to pursue her interest in medical law. She completed an MA in Healthcare Ethics & Law (University of Manchester) and a PhD under the supervision of Professors John Harris and Margaret Brazier. Her publications include 'The Human Fertilisation and Embryology Act 2008: A missed opportunity?' Editorial, *Journal of Medical Ethics*, 35 (2009), 718–719; 'Viability and abortion: Lessons from ectogenesis', *Expert Review of Obstetrics & Gynecology*, 4(6) (2009), 625–634; 'Regulating the reproductive revolution: Ectogenesis – A regulatory minefield', in M. Freeman (ed.), *Law and Bioethics: Current Legal Issues* (Oxford University Press, 2008); (with Margaret Brazier) 'Fatal medical malpractice and criminal liability', *Journal of Professional Negligence*, 25(2) (2009), 51–67; (with Sheelagh McGuinness) 'Gender and parenthood: The case for realignment?' *Medical Law Review*, 16 (2008), 261–283; (with John Harris) 'Should the foundation of families be regulated?', *Child and Family Law Quarterly*, 18 (2006), 191–210; and 'Deciding the fate of frozen embryos', *Medical Law Review*, 13 (2005), 244–256.

Anél Boshoff is a lecturer in law at the University of Aberystwyth. She was a clerk in the South African Constitutional Court and has taught at the University of Johannesburg. She teaches across a range of undergraduate courses, including Family Law, Civil Law, and Law and Society. Her research interests lie in legal theory and more particularly in gender theory within the law, law and language, semiotics and ethics.

Jo Bridgeman is a senior lecturer in the Sussex Law School, University of Sussex. She is a founder member of the Child and Family Research Group and the Centre for Responsibilities, Rights and the Law. Jo has researched and published in books and journals in the field of healthcare law and the law regulating the care of children. This includes work on the healthcare of teenagers, a range of publications analysing the issues arising from the Bristol Royal Infirmary Inquiry and a monograph which offers a critical analysis of moral, social and legal responsibilities for the healthcare of babies, infants and young children, *Parental Responsibility, Young Children and Healthcare Law* (2007). She has developed this work in a number of publications considering different aspects of the legal

regulation of the care of children, drawing upon the feminist ethic of care in order to develop a conceptual framework of relational responsibility. Her current work explores responsibilities to children in tort law.

Todd Brower is Director of Judicial Education for the Charles R. Williams Institute on Sexual Orientation Law and Public Policy at UCLA School of Law. He is a professor of Constitutional Law at Western State University College of Law in Fullerton, California. He has an LL.M from Yale Law School, a J.D. from Stanford Law School, an A.B. from Princeton University, and was a Fulbright scholar in France. Professor Brower serves on the California Judicial Council – Access and Fairness Advisory Committee and is the author of various law review articles, research studies and publications on the treatment of lesbian, gay, bisexual and transgendered persons in the courts of the United Kingdom and California.

Laura Byrne holds a first class honours B.C.L. (International) degree from University College Dublin and Osgoode Hall, Toronto, and the LLM (Cantab.) from Cambridge. She is a PhD candidate at Trinity College Dublin. Her thesis is considering the extent of the right to procreative autonomy in accessing and affording legal recognition to those utilizing assisted reproductive technologies. She has taught seminars in contract law, company law, constitutional law and land law at both Trinity College Dublin and University College Dublin.

Mary Anne Case is a graduate of Yale College and the Harvard Law School. She also studied at the University of Munich, litigated for Paul, Weiss, Rifkind, Wharton and Garrison in New York, and was the Class of 1966 Research Professor of Law at the University of Virginia before she joined the Law faculty at the University of Chicago. She was a Visiting Professor of Law at the Law School in autumn of 1998 and at NYU during the 1996–97 academic year and the spring of 1999. In the spring of 2004, she was Bosch Public Policy Fellow at the American Academy in Berlin. For the 2006–07 academic year she was the Crane Fellow in Law and Public Affairs at Princeton University. Among the subjects she teaches are feminist jurisprudence, constitutional law, European legal systems, marriage, and regulation of sexuality. While her diverse research interests include German contract law and the First Amendment, her scholarship to date has concentrated on the regulation of sex, gender, and sexuality, and on the early history of feminism.

Polona Curk is an associate research fellow in Psychosocial Studies at Birkbeck College, University of London. She has a background in psychoanalytic studies and works at the intersection of psychoanalysis, feminist philosophy and social theory. Her doctoral research examined intimacy and autonomy as two intrinsically linked processes through which the self lives relationally, and theorized intimate autonomy as something which may only be thought in conjunction with a continual attentiveness to the issues of dependency and conflict. She writes on the topics of attachment, destructiveness, intimacy, ambivalence, autonomy and

ethical responsibility. She has previously worked as a counsellor-volunteer in a non-governmental organization against domestic violence.

Martha Albertson Fineman is an internationally recognized law and society scholar working in family law and feminist jurisprudence. She graduated from University of Chicago Law School and began teaching at Columbia University and Cornell Law School, where she was the first endowed Chair in the United States in Feminist Jurisprudence. In 2004 she moved to Emory University as a Robert W. Woodruff Professor, the highest honour the university bestows on a faculty member. Her scholarly interest is in the legal regulation of intimacy. Fineman is Founder and Director of the Feminist and Legal Theory Project, which was inaugurated in 1984. Her major publications include *The Autonomy Myth: A Theory of Dependency* (2004); *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (1995); and *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991). She has received awards for her writing and teaching and has served on several government study commissions.

Educated at Cambridge, **Baroness Hale** went on to teach at the University of Manchester, where she was appointed Professor in 1986. She also practised for a short time at the Manchester bar. Baroness Hale was a Law Commissioner for nine years, from 1984, where she presided over recommendations for some of the most significant changes in family law of past century. Her judicial career in the Family Division started in 1994. She was elevated to the Court of Appeal in 1999, and to the House of Lords in 2004, where she became the first ever woman sitting in the UK's highest court. Apart from her judicial activities Baroness Hale continues to lecture and has published widely in the field of family law. She is the holder of several honorary degrees, including one awarded by the University of Sussex in 2009.

Caroline Jones is a senior lecturer at the School of Law, University of Southampton. Her primary research interests lie in assisted conception and the regulation of reproductive technologies, constructions of kinship and family, and public policy making; and in the fields of gender, family, tort and healthcare law generally. She is a founder member and the coordinator of the Health, Ethics and Law (HEAL) network at the University of Southampton, and the author of *Why Donor Insemination Requires Developments in Family Law* (Edwin Mellen, 2007).

Jackie Jones studied French and German literature and EU studies before turning to law. She has been a lecturer since 1994 in both Cardiff Law School and Bristol Law School. She has taught a number of subjects and now focuses on gender, society and the law, comparative constitutional law aspects of gender, discrimination and EU fundamental rights as well as aspects of family law and policy. She is currently Secretary General of the European Women Lawyers' Association (EWLA) and sits

as a representative on the EU Fundamental Rights Agency Platform and as legal expert on access to justice. In addition, she is very active with women's NGOs in Wales and lobbying on women's issues, in particular gender budgeting, human trafficking and violence against women. She has given numerous conference papers and guest lectures in the UK, Europe and North America. She has published in *Public Law*, *Child and Family Law Quarterly*, *Equal Opportunities International*, *European Law Review* and *Journal of Social Welfare and Family Law*. Her most recent publication is *Gender, Law and Sexualities* (co-editor, edited collection, Glasshouse, 2010).

Heather Keating is Senior Lecturer in Law at the Sussex Law School, University of Sussex and a founder member of the Child and Family Research Group and the Centre for Responsibilities, Rights and the Law. She is co-author (with Chris Clarkson and Sally Cunningham) of *Criminal Law: Text and Materials* (7th ed., 2010). She has also written widely on issues relating to criminal law and child law and her research now focuses upon children and the criminal law. She was co-editor (with Craig Lind) of a special issue of the *Journal of Law and Society*, 'Children, Family Responsibilities and the State', published in March 2008 which was simultaneously published by Blackwell as a book. She was editor and contributor to *Responsibility, Law and the Family*, published by Ashgate in 2009. Her current project is a monograph on children, responsibility and the criminal law.

Aileen Kennedy is an associate lecturer at the University of New England, Australia. Her research focuses on concepts of embodiment and consent, looking at legal regulation of various forms of bodily transformation. Working on the thesis that law is a discursive site through which normative concepts of the relationship between body and mind are fixed, her research has been dedicated to interrogating the contribution and response of law to a normalized construction of embodiment. Significant developments in biotechnology over the past three decades, such as assisted reproductive technology, genetic manipulation, organ transplantation and stem cell research, generate wide interest and raise important bioethical questions. Legal regulation of technological intervention in the body must respond to such questions in a measured and ethical manner. One manifestation of law's engagement with biotechnological developments is the increasing emphasis on biological kinship within family law. Underlying these differing strands of research is an interest in deconstructing the mind/body dichotomy, which is a prominent framework for approaching issues of embodiment.

Shani King is an associate professor of Law at the University of Florida College of Law. He received his BA from Brown University and his JD from Harvard Law School. Following law school, he was a Harvard Sheldon Knox Traveling Fellow with EDUCA, a not-for-profit organization in the Dominican Republic that was conducting an analysis of a major educational reform effort. After serving as a public interest fellow, he practised securities litigation and white-

collar criminal defence at Fried, Frank, Harris, Shriver & Jacobson in New York and then at Morvillo, Abramowitz, Grand, Iason & Silberberg in New York City. Just prior to joining the faculty at the College of Law, he practised law at Legal Services for Children, Inc. in San Francisco, California, where he litigated cases under the United Nations Convention Against Torture and represented children in immigration, dependency, guardianship and school discipline proceedings. He is currently the co-Director of the College of Law's Center on Children and Families and has lectured nationally and internationally on children's rights. His research and teaching interests include international human rights, family law, education law, children's rights, immigration, and the interplay of race, ethnicity, class, and citizenship status in various legal contexts. Much of his work is interdisciplinary. A common theme throughout his scholarly interests is the rights of children, especially those from traditionally underserved populations, and the public responsibility to protect those rights. His publications have appeared in the *Columbia Human Rights Law Review*, the *Michigan Journal of International Law*, the *Cornell Journal of Law and Public Policy* and the *Clearinghouse Review Journal of Poverty Law and Policy*.

Craig Lind holds law degrees from the University of the Witwatersrand (in Johannesburg) and the London School of Economics. He has taught at the University of the Witwatersrand, the University of Wales in Aberystwyth and is now a senior lecturer in Law at the University of Sussex in Brighton. He teaches (amongst other subjects) Family Law and Constitutional Law. He has also taught courses in Family and Child Law on Masters programmes aimed at exploring the legal regulation of family responsibility. His major research interests lie in the areas of Family Law and Sexuality and have a strong cultural focus and a comparative slant. He is currently completing a book in which he explores the relationship between culture, sexuality and the legal regulation of the family.

Hannah Robert, MA, is a Lecturer in the School of Law at Latrobe University, Melbourne, Australia. Prior to her appointment at Latrobe, she was a Lecturer at the University of Newcastle, and enjoyed practising in the University Legal Centre on a range of civil matters. Outside of academia, she has also practised in two Sydney commercial law firms, and served on the board of Marrickville Community Legal Centre. Her Master's thesis was in legal history and concerned the notions of property and indigenous rights in land used by colonizers in Victoria and South Australia in the early nineteenth century. She is currently working on a PhD at Sydney University Law School on paternity deceit claims. She is interested in what these claims reveal about our legal notions of parentage and parental responsibilities – and whether these legal notions are determined by biology, consent, social parenting or reliance.

Albie Sachs was actively involved in the struggle for a free and democratic South Africa from an early age. He obtained a BA and then an LLB at the University of

Cape Town, practised as an advocate at the Cape Town Bar working mainly in the civil rights sphere until he was detained without trial by the Security Police. In 1966 he went into exile in England where he completed a PhD at the University of Sussex and taught in the Law Faculty of the University of Southampton. He became the first Nuffield Fellow of Socio-Legal Studies at Bedford College, London, and went on to Wolfson College, Cambridge. In 1977 he was appointed Professor of Law at the Eduardo Mondlane University in Maputo, Mozambique. From 1983 he was the Director of Research in the Mozambican Ministry of Justice. An assassination attempt by South African Security Police in 1988 saw his return to the UK. He returned to South Africa when Nelson Mandela was released in 1990 and became the founding Director of the South Africa Constitution Studies Centre at the University of the Western Cape (where he was made Professor Extraordinary). He was also an Honorary Professor in Law at the University of Cape Town. He was a member of the Constitutional Committee of the ANC until his appointment, in 1994, to the newly established Constitutional Court. Justice Sachs has written extensively on culture, gender rights and the environment. In his long career he has taught family law and has a long-standing interest in issues of gender justice. While he was teaching at the University of Southampton he wrote *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (with Joan Wilson, 1979). He is also the author of *Soft Vengeance of a Freedom Fighter* (1991).

Foreword: Unfamiliar Families – The Strange Alchemy of Life and Law[1]

Albie Sachs

I was delighted to give the closing keynote address at the international and interdisciplinary conference on *Gender, Family Responsibility and Legal Change* at the University of Sussex, where I enjoyed listening to papers and discussions on a range of fascinating issues surrounding responsibilities in families in all their varied forms. Some of those papers – fully revised, updated, and refined – appear in this volume; others will appear in its companion volume, *Regulating Family Responsibilities*, forthcoming. My focus in this foreword will be on an encounter I had with a particular shift in the law's recognition of family responsibilities.

I have twice had my photograph in the *New York Times*. The first time I was swathed in white bandages, sitting up in a hospital bed in London after the bomb attack that took my arm in 1988 (Sachs, A. 1990. *The Soft Vengeance of a Freedom Fighter*. London: Grafton Books). The second time I was wearing a green robe, a judge in the Constitutional Court of South Africa, about to give judgment in what is commonly known as the same-sex marriages case (*Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC), *Fourie v Minister of Home Affairs* 2005 (3) BCLR 241 (SCA), 2005 (3) SA 429 (SCA)). As you can imagine there was enormous international interest in the case. This photograph subsequently appeared on the cover of my book (written whilst a Ford Foundation's Scholar in Residence) *The Strange Alchemy of Life and Law* (2009, Oxford: Oxford University Press). The subject of that book, my focus in this Foreword, and what many of the participants in this conference, *Gender, Family Responsibility and Legal Change*, have been considering, is the transforming effect of law upon life, and upon family life, in particular.

You have to imagine the court jam-packed with journalists from all over South Africa, indeed from all over the world. Sitting on one side were the representatives of the applicants (a lesbian couple who sought to marry), *The Equality Project* (an organization committed to the pursuit of equality for minority sexualities) and their supporters. Sitting on the other side were the representatives of the state, who had admitted that there was a gap in the law to the extent that same-sex

1 This foreword is a revised and edited version of 'Unfamiliar Families', the closing address delivered by Justice Albie Sachs to the *Gender, Family Responsibility and Legal Change* conference at the University of Sussex, July 2008 (transcribed by Karen Stewart).

couples could not regulate the property dimensions of their relationships in the same way that heterosexual couples could do. But they had argued that the couple were not entitled to a declaration that they could marry. In addition, there were representatives of the *amici* (friends of the court): the Catholic Church and a body called *Doctors for Life*. Their advocates had argued that marriage was something that had, historically, been constituted in a particular phase of human development. It was very much associated with the Church and with the notion of procreation and, whatever remedy the court might give to people such as the couple who wanted to regulate their legal affairs, it should not be called marriage.

In considering our decision in relation to same-sex marriages I was fully aware that at least two communities felt passionately about it. One community felt that their dignity was directly invested, that this was the symbolic touchstone of equality in our society. However, another community (probably a much larger one) believed that marriage, whatever it might be, whoever it might include, was intrinsically, historically, biologically, theologically, and in every other way, heterosexual. How could I speak to both of them? This was the core of the problem and I will come back to it later.

The decision, in *Minister of Home Affairs v Fourie*, starts by rooting itself very much in South African judicial precedent (2006 (1) SA 524 (CC)). Although we found that the same arguments surrounding same-sex marriage migrated around the world, we did not find it helpful to refer to the debates and litigation in Canada or the United States; we wanted to root the decision in South African reality and South African precedent. And South African reality, as we said in the certification case, was of the greatest variety of family formations that one could almost imagine (*Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC)). There were traditional African families, of a very diverse character, and people who came from Europe, who imposed a hegemonic or, at least, a privileged Christian-type family. There were people who came from the Indian subcontinent, Muslim and Hindu, who found their family formations were not recognized because they were potentially polygamous. The diversity of family forms and the unfair relationships between them formed part of the context of our consideration of the particular issues in the case. That was our past and it was a very racist past and it was a past in which the idea held sway that a small group of 'civilized' people were entitled to establish their norms and their standards for the 'benighted' people of the world. This was the past which has been reflected in the constitutional order and in the law of South Africa up to this point.

The certification case was rather extraordinary. The Constitutional Court of South Africa declared the constitution of South Africa to be unconstitutional. It was 1996. A two-stage process of constitution making had been created: the unelected negotiators established an interim constitution in 1993 (Constitution of the Republic of South Africa Act, No. 200 of 1993). This was then developed into a final constitution by a democratically elected constitutional assembly; a new democratically inscribed constitution had been created (Constitution of the Republic of South Africa, Act No. 108 of 1996). But to protect the rights of

minority groups who felt that they would be overwhelmed by majority rule, the negotiators who saw to the dismantling of apartheid in the interim constitution agreed to certain fundamental principles that were to be satisfied in the final constitution; the Constitutional Court would have to certify the final constitution before it could become effective. Thirty-four of these principles were negotiated in advance. It was then up to the Constitutional Court to ensure that those 34 principles were complied with. In the certification case we decided that several defects were discernible in the draft final constitution which would have to be remedied before the constitution could be brought into effect.

One of the challenges to the draft final constitution is of interest to us here. A conservative pro-family group challenged the draft constitutional text on that basis that it made no provision for the *right* to form families. One of the fundamental principles had stated that there would be an entrenched Bill of Rights which enshrined all universally recognized fundamental rights. The group argued that the right to form a family was one such fundamental right which was universally recognized; it appeared in the UN Universal Declaration of Human Rights and in many other international human rights instruments. The Court was asked to refuse certification because the new constitution would not protect the right of every man and woman to form a family.

The Court accepted that the right to form families was universally recognized. But after examining other countries' constitutions we concluded that it was not necessarily a constitutional right to be entrenched: there were as many constitutions across the world that did not include such a right as those that did include it: Pakistan's constitution, for example, included the right to form a family whilst India's did not. India was a country where the family played an extremely important role, culturally it was profound and yet the right to form a family was not constitutional. One could speculate that the underlying reason for this lacuna had something to do with the fact that as soon as one entrenched the concept of a family in a constitution it would take on an almost 'original intent' quality. People would, into a potentially very long future, be asking what the drafters of the constitution had meant to inscribe as a right in 1996. Was it a particular type of family that was being entrenched? Perhaps one that was dominant in that era?

After some deliberation the Court unanimously decided that the right to form a family would be protected by freedom of association, by the right to human dignity and by the prohibition of discrimination. Any potential impediments to the free formation of families could be dealt with by other sections of the Bill of Rights. Clearly this is material to the decision we were going to have to make in the same-sex marriage case. But before I get to it there are some other examples of transformations in family life and law in South Africa that I wish to discuss.

Not very long afterwards, in the Dawood Case, the Court had to consider the constitutionality of rules which restricted spouses of South Africans and spouses of people living and working in South Africa under work permit arrangements (*Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC)). At issue was the fact that marriage

did not command any special status in immigration law. The judge in that case, Justice Kate O'Regan, concluded for the Court that the constitution did protect the right of people to constitute families and to have those families recognized for the purposes of immigration. She based her decision on the concept of human dignity and emphasized the dual significance dignity has in our constitutional order: first, it is a value that is used in relation to measuring all governmental practices and all claims to entitlements and rights; and second, dignity is expressly protected in the constitution: everyone has the right to human dignity. It is, thus, a very powerful foundational element of the constitutional order. And to deny people the right to live together, to split up families or to force the spouse to go back to the country of origin would be a denial of a fundamental right.

Subsequently, the Court heard two cases dealing with the meaning of the word 'spouse' in two pieces of legislation on inheritance. The Intestate Succession Act 81 of 1987 provided that one spouse would inherit from the other if she or he died intestate. The Maintenance of Surviving Spouses Act 27 of 1990 went further. It allowed a surviving spouse who had been disinherited by her deceased spouse to make a claim against the estate. Although both pieces of legislation were gender neutral, in reality the wives were almost always the ones to suffer detrimental consequences as a result of their implementation.

In the first case Mrs Daniels, who had been married by Muslim rights, was threatened with eviction from her husband's home when he died intestate (*Daniels v Campbell NO* 2004 (5) SA 331 (CC)). She claimed that she was a surviving spouse (a claim which was supported by her friends and family and by the Women's Law Centre, a body active in bringing such cases to court). At first instance the court found that Muslim marriages were not marriages recognized by South African law (which had adopted the definition of marriage established in *Hyde v Hyde* (1866) LR 1 P. & D. 130 and excluded potentially polygamous marriages). However, it also found that this interpretation of law contravened the constitutional rights protected by the applicant (to religion and culture). The remedy it proposed was to read a definitions section into the statute which would create a broader definition of 'spouse'; that term would be read to include *de facto* monogamous Muslim marriages.

Although the result was clearly just, for me the effect of this ruling was demeaning. It suggested that 'spouse' would apply easily to one religion and one culture but not to another. For it to apply to the marriage relationships of another culture it would need a specific redefinition. The issue was controversial: it had a colour dimension and it had a religious dimension. It was not simply a question of family law, but of family law superimposed upon race, superimposed upon the marginalization of a whole community.

In giving judgment for the majority of the Court I concluded that the word 'spouse' would include claimants such as Mrs Daniels without having to read into the statute a definition of spouse that specifically drew her into its ambit. She had referred to Mr Daniels as 'my husband', he had spoken of her as his wife and the community accepted them as husband and wife. So it was only the hegemonic

appropriation of the term 'spouse' by certain judges from a particular community in an earlier era that had excluded her. We did not have to strike down the law, or re-craft its terms: we simply had to free the word 'spouse' from an earlier limiting appropriation of the term.

The next case I wish to discuss is *Volks v Robinson* (2005 (5) BCLR 446 (CC)). In this case Mrs Robinson was an unmarried cohabitant whose partner had died after they had lived together for some 14 years. Both parties had been married before and there was a good deal of acrimony between her and the husband's children from his first marriage. When he died Mrs Robinson had been willed a third of her partner's estate; the facts were not such as to demand, most strenuously, a remedy in her favour. Nevertheless, the case raised a key issue: was it unfair discrimination, contrary to the terms of the equality clause in the constitution, to treat unmarried cohabitants differently than spouses under the Maintenance of Surviving Spouses Act 27 of 1990? It is worth remembering that the equality clause prohibits discrimination on the grounds of marital status.

The judge who had been asked to prepare the judgment for the court in this case – Justice Skweyiya – formed the view that while it might create hardship in certain circumstances, as a matter of legal logic one could see why only a legally married survivor, who had been entitled under law to support during the maintenance of the marriage, would be entitled to a continuation of that support afterwards. I profoundly disagreed. It was one of those cases that brought home the importance of the legal landscape, of how you frame the question. If the issue was seen as a question of matrimonial law his logic was impeccable. If it was perceived as a question of family law his logic was entirely wrong. Matrimonial law is the law of marriage: you are protecting marriage as an institution and people who opt into marriage, its benefits and responsibilities. My concern was not so much for Mrs Robinson herself, but for the thousands and thousands of African families testified to in many commission reports and surveys where women live with the man (who might have a legal wife in the countryside somewhere) as his second family. They have numerous children together, they spend four or five decades together and she nurses him through the last years of his life. She looks after the home and the family enabling him to participate in the labour market, but she earns nothing herself. If the rationale for the law is to defend family relationships and secure equity, particularly for vulnerable parties in family relationships, then what matters must be the intensity of the relationship, not the existence of the legal certificate. Two of my colleagues on the bench agreed with me, although they accepted as appropriate an emphasis on the importance of marriage. Still, they also agreed that there should be circumstances in which an unmarried person should be entitled to the protection of the law in question. However, we were the minority, dissenting judges in this case.

In the light of these cases we can now return to the same-sex marriages case. I had been asked to write the judgment for the court, and there was considerable interest in what I would now have to say about marriage. In *Volks v Robinson* I had emphasized that I did not think the marriage certificate should make any difference

to the question of whether or not the claimant would be entitled to succeed. What mattered was the nature of the relationship. Should it make any difference in this case? In the end the case was really about 'marriage' as a legal concept. Should same-sex couples be able to regulate their domestic affairs using legal institutions and concepts? And should those be exactly those of different-sex couples? Or should there be parallel legal regulation? In other words, should same-sex adult family relations be called marriage, or not?

In coming to the decision I reflected on the fact that at the time of *Volks v Robinson* I had been living with my partner. At the time of the same-sex marriage case I was still living with her; we were not formally married until later. This made me think about why in the one case I should decide that marriage should be far less relevant than my colleagues felt it was, while in this case I should decide that marriage was extremely important. In the end I concluded that one of the principal things that I have learnt in my years on our court is the importance of context. If, in a particular instance, marriage is being used as an impediment to people gaining their rights, that impediment should be scrutinized very carefully to determine if there are formalistic reasons for excluding people from rights. In the other case, if people are told that the realm of marriage is not available to them because they are who they are, then marriage becomes a blockage that impedes human dignity and denies equal moral citizenship for everybody. So that very same symbolism, the intangibles, and the practical consequences are very different and the ultimate question is not whether you are for marriage or against marriage in principle. The argument is over what will promote human dignity, equality and freedom, which are the touchstones of our Bill of Rights.

I will conclude with some thoughts on how, in the same-sex marriage case, I addressed the issue of how one could speak to both communities who cared so passionately about our decision. I was a judge on the bench of the most important court in South Africa and the constitution was – and is – for everybody. The simple way forward was to take sides: I could identify myself with the enlightenment, the progressive emancipation of human beings and the extension of notions of dignity without any difficulty. But just to stop there, to my mind, would be to limit the constitutional function. It would be to divide the nation into the enlightened and the benighted and just hope that somehow the benighted would either forget about it, or that their children would grow up to be a little bit more enlightened. I would not be addressing them nor including them. That leads to terrible divisions in society and can sometimes intensify the very marginalization and exclusion that is at the foundation of the claims in the first place.

So what the court of eleven judges, with myself writing the judgment, agreed upon was not necessarily accepted by everybody as perfect, not by any means. Indeed, one looks forward to critiques because that is the way the law grows and develops. The first part of the judgment lays down absolutely and unequivocally that people cannot be excluded from acquiring the same status; they cannot be excluded from enjoying the same status, rights and responsibilities that heterosexual couples have through the marriage law simply because they are of the same sex. This has

to be spelt out very clearly and our constitution does not make it difficult because it refers to sexual orientation as one of the forbidden grounds of discrimination. We already had substantial precedent moving in that direction to build upon. Our rationale was managing difference in society and what we understand by the right to equality. The right to equality does not mean that if you assimilate and become like the others then there will be no discrimination against you. The right to equality means you come in as you are with your characteristics, your personality, your culture, your beliefs, and you are treated equally across difference. And difference at the very least is acknowledged, and at best it is celebrated as giving vitality to the society. This is a fundamental principle of South Africa's democracy. And those themes are highlighted in the judgment; it is not just a technical judgment based on narrow equal protection language. It is a judgment that goes to the meaning of citizenship and the meaning of equality. And a declaration had to be made to that effect and a remedy had to be given unequivocally.

At the same time there is a section in the judgment that deals with the importance of religion in the public life of our society; you do not divide the constitutional world into a completely secular world in which people are permitted in the privacy of their faiths and confessions to have their consciences and to worship as they wish. Religion is part of almost every facet of the public life of our country. We needed, therefore, to find ways of managing the relationship between the secular and the sacred in keeping with constitutional principles. Thus, the judgment speaks about the importance of religion for millions and millions of people – certainly the majority in our country – but it does not allow religion to dictate fundamental citizenship rights for anybody else. That distinction has to be made. Scripture was quoted to us in court but we had to make it clear that judges cannot interpret scripture to decide what the fundamental constitutional rights of people can be. And for the believers the impositions of the constitutional order must not undermine their ability to organize their family life according to their religious beliefs. The state cannot compel marriage officers in religious faith communities to perform same-sex marriages. More than that, these communities have the right to have their marriages recognized in law and by the state: when you are married in a Catholic Church, or you are married in a Synagogue, or you are married in a Presbyterian Church, or in an Anglican Church, automatically your marriage becomes a state marriage. That is protected in the law and it will be protected under the constitution. We had to spell out very, very clearly that granting fundamental rights of citizenship and human dignity to same-sex couples did not mean imposing that vision on faith communities.

Second, there was the question of engagement with the broad community. Should this be simply a court decision, creating what would be looked upon as a Constitutional Court exemption, or privilege, or entitlement or, in order to get full equality, should the gay and lesbian community have a proper law? Should there be legislation that has the imprimatur of Parliament, of the elected body? The court strongly believed that this was an issue where Parliament had to become engaged; it had to speak for the nation, not just through the constitution but as

the legislature, albeit within clearly prescribed constitutional limits. Parliament could not choose whether or not to honour the promise made not to discriminate on grounds of sexual orientation because that protection was in the constitution. But Parliament could choose the best way of doing it and that meant going out to the people. There was a risk involved in this. There could have been revolts; there could have been attacks on Parliament; there could have been a population inflamed. But those are risks you take with democracy. Ultimately, through engaging with the people, through putting the issues out on the table defining the principles that are involved very clearly, you get something more secure and more profound. The passage of the Civil Union Act 2006 took a long time, but it enables parties to say, 'I am joining you in a union' or 'I am marrying you' – the choice was given to them. It is not part of the Marriage Act 1961 – to that extent there is some separation – but it is not separate but equal; Parliament overwhelmingly supported the idea that same-sex couples can use the word 'marriage'. To my mind the status of same-sex marriages is far more secure now than it would have been if there had just been a decision from the Court, which people could challenge on the basis that 11 unelected judges should not have the right to decide such a matter.

I will end just with a little *coda*. Parliament had had one year after our decision to pass the law to fill the legal lacuna. If they had not done so then automatically the Marriage Act 1961 would have been amended to include same-sex couples; we – the South African Constitutional Court – have the power to read words into statutes to make them comply with constitutional prescriptions. We could have incorporated the word 'spouse' into the Marriage Act 1961 so that the words 'I AB take you CD to be my lawful husband/wife/*spouse*' became the new formula. And I might add that one judge, Justice O'Regan, was of the view that we should do just that; that we should not have waited a year to allow Parliament to react, thereby delaying the rights of same-sex couples to marry.

On 30 November 2006 Parliament passed the legislation – just within the year it was given by the court to do so. A few weeks later I was driving to a wedding in Kirstenbosch in Cape Town; Kirstenbosch is home to the country's magnificent botanical gardens; it is in an affluent, comfortable, beautiful Cape Town suburb, nestled on the side of Table Mountain. On my way there I saw a sign that said simply, 'To Amy and Jean's wedding'. I was so moved by that; that banal little sign in this bourgeois place touched me. Jean told me afterwards that she had booked the place a couple of weeks before, just saying, 'Can I have Kirstenbosch Gardens tearoom for a wedding reception?' And the manager had said, 'Sure.' Jean then thought she ought to tell the manager the whole story so she had phoned and said, 'I ought to tell you that, in fact, we are two women.' And the manager said, 'How wonderful! I am so glad that you chose our restaurant for that reception.'