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# The Sacred and the Secular: South Africa's Constitutional Court Rules on Same-Sex Marriages

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## The Sacred and the Secular: South Africa's Constitutional Court Rules on Same-Sex Marriages

*Justice Albie Sachs<sup>1</sup>*

It was November 1991. I'm driving towards the center of Cape Town—and I'm sweating. I'm sweating because it's summer and hot in Cape Town. I'm sweating because I'm driving with my left arm, a couple of years after my right arm was blown off by a bomb put in my car by South African security agents while I was in exile in Mozambique.<sup>2</sup> I'm sweating because I've been in exile for twenty-four years and I'm not really sure of the roads. But above all, I'm sweating because I'm going to go, for the first time, on a gay pride march.

And I'm thinking, *Oh, if only, if only, we could have a poster that says "Straights for Gays."* Then I feel ashamed a bit for even thinking that. If you're going to go, you go. I'm late and so I'm also thinking, *Oh, you know he promised to join us, but he'll find some way to not make it happen. He'll send his excuses afterwards.* And then I see them marching towards me near the center of Cape Town. The first poster I see says "Suck, Don't Swallow," and I think, *Oh my God, that'll be in the newspaper tomorrow with me in it for sure.*

I park the car and get out. I was a bit weaker then than I am now and I hobbled along to join the other marchers. I take up my place next to Professor Edwin Cameron, who is now on the Constitutional Court, which is like the Supreme Court of South Africa. And I feel terrific. I feel so proud. I feel proud of the marchers, proud of myself. I have broken through the awkwardness, the embarrassment, the uncertainty. I've joined a group of people who are marching for their rights!

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<sup>1</sup> Justice Sachs was appointed to the Constitutional Court of South Africa by Nelson Mandela in 1994, shortly after the country's first democratic election, and served on the Court until 2009. Justice Sachs began his legal career as an advocate for those facing charges under the racist laws of South Africa's apartheid government, in the course of which he was twice placed in solitary confinement without trial, until he went into exile in 1966. He returned to South Africa in 1990 and worked toward the constitutional democracy as a member of the Constitutional Committee and the National Executive of the African National Congress. He now travels the world sharing his experiences. *Albie Sachs*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutional-court.org.za/site/judges/justicealbiesachs/index1.html> (last visited July 25, 2013). Justice Sachs gave the College of Law's Ray Distinguished Lecture at the University of Kentucky on April 12, 2013.

<sup>2</sup> ALBIE SACHS, *THE SOFT VENGEANCE OF A FREEDOM FIGHTER* (Univ. of Cal. Press 2nd ed. 2000).

We marched to de Waal Park, not far from where I used to play as a kid. They asked me to say a few words. I spoke of the signs that used to read “Whites Only”—it could have been “Straights Only.” People of the same sex couldn’t hold hands and snuggle up to each other. The police would have pounced. I tell the maybe hundred or hundred fifty people assembled there that non-discrimination on grounds of sexual orientation is important for a section of the community that’s been subject to very, very gross marginalization and punishment. But its importance goes beyond the question of preventing unfair treatment of our gay brothers and sisters. Because if we can’t manage difference in South Africa, we’re finished in South Africa. Difference was used—difference of appearance, of language, of origin, of ancestry—it was used as the foundation of apartheid, to keep people apart. Instead of celebrating difference within equality, difference became an instrument of oppression. If we can’t find a way to embrace the great diversity in the people who make up the South African nation, we’re not going to reach true democracy—it’s not possible. Those were my words in 1991.

In 2005, I am a Judge of the Constitutional Court. It is the highest court in the land for all constitutional matters. Chief Justice Pius Langa says he has received a request from a body called Christian Lawyers of Africa. They are having a conference near Johannesburg in April and asked if he would attend on behalf of the Court during the Court’s recess. Pius says he’s got international work to do so he won’t be able to attend, but is there anybody else who will be able? I’m on recess duty. I put up my hand and say, “Pius, you know, I’ll be here, but I don’t think I’m the right person.” He says, “Albie, you’re just the right person.” And I understood what he meant. Pius is a Christian, a lawyer, and an African. If he goes, it would look like he’s going in a sectarian capacity. If I go, a secular Jew and a lawyer from Africa, it can’t be seen as personal adherence to a particular faith, but simply as a representative of the Court extending our greetings.

The time for the conference arrives and we’re driving—I’m being driven this time. and I’m not sweating, because it is in the evening. But I’m feeling uncomfortable. *What should I say? What should I say?* I could mouth a polite welcome: “On behalf of the Constitutional Court of South Africa, we hope you have a very useful conference.” But I feel that can’t be right, not a perfunctory, formal, rote welcome such as that. These are people of conscience. Our judicial conscience is central to the work that we do. Surely I can say something that has some resonance, some meaning, that gives them a flavor of who we are and what we’re doing.

I’m one of the very first people on the platform to speak. I look out over the crowd and see the beautiful attire from all over Africa. It’s so diverse—different costumes from the north, the center, and the south. Somehow, that calmed me. I decide to tell them the story of the swearing-in of the Justices of the Constitutional Court.

On that very historical day Nelson Mandela stood up and said, “the last time I stood up in court it was to find out if I was going to be hanged. Today, I rise to inaugurate South Africa’s first Constitutional Court.”<sup>3</sup> And, one by one, we were sworn in. I was last. We were called alphabetically: Mokgoro, O’Regan, Sachs. Since then, we’ve had a Yacoob<sup>4</sup> and a Zondo<sup>5</sup> so I would have been third last, but that day I was last. I watched my colleagues and it was very wonderful; five official languages in South Africa were used.<sup>6</sup> There are two ways of being sworn in. You can raise your right arm and say, “so help me God.”<sup>7</sup> Or you can say, “I affirm to uphold without fear, favour, or prejudice—” or whatever the formula is.<sup>8</sup> I think two, maybe three, Judges affirm, and the others raise their right arm and say, “so help me God.”

I tell the Christian Lawyers that it comes to my turn and I want to give the most solemn oath that I can to uphold the Constitution and the law. The most solemn oath I can give is with my right arm. The arm of sacrifice. The arm that was blown up in Maputo. The arm that reminds me of my friend, my comrade, who didn’t survive the bombing. Ruth First who was killed while in exile. Looksmart Solwandle who was tortured to death. Joe Gqabi assassinated. Babla Salojee thrown to his death from a security headquarters building. I’m thinking of people like that and I tell the Christian Lawyers of Africa that I raised my right arm and said, “so help me God.” I thought they might be angry that I was using my arm for a secular purpose, invoking the name of the Lord to salute my comrades who had died. They stood up and cheered.

The next day, we do a tour of the Constitutional Courthouse that we built in the heart of the Old Fort Prison.<sup>9</sup> This is the prison in Johannesburg that was de-commissioned in the last years of apartheid. We South Africans boast we have the only prison in the world where both Gandhi and Mandela were locked up. No one else can make that claim. Where the old prison once stood we built our Court, showing that our Bill of Rights came out of pain and suffering, hope and endurance, and the ‘Never Again’ vision of a democratic society. So, when you go to the highest court in the land, the very location, the physical

3 Paul Taylor, *Mandela Swears in First Constitutional Court*, WASH. POST (Feb. 15, 1995), [http://www.washingtonpost.com/wp-srv/inatl/longterm/s\\_africa/stories/courto21595.htm](http://www.washingtonpost.com/wp-srv/inatl/longterm/s_africa/stories/courto21595.htm).

4 *Zak Yacoob*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/judges/justicezakYacoob/index.html> (last visited July 26, 2013).

5 *Raymond Zondo*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/judges/justicezondo/index.html> (last visited July 26, 2013).

6 Taylor, *supra* note 3.

7 S. AFR. CONST., 1996 sched. II § 6.

8 *Id.* “I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/ E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.”)

9 *About the Court: The building*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/thecourt/thebuilding.htm> (last visited July 26, 2013).

location of the Court is part of the story. You are traversing the history of how we created the Constitution. How we sought through constitutional justice to unite around common values and enable a country that belongs to all of us to emerge.

I took about seventy of the Christian Lawyers for Africa on a tour of the courthouse. I show them the beautiful artwork and explain the theme of “justice under a tree.” The traditional African way of resolving disputes was to gather under a tree. Everybody could see. It’s participatory; it’s transparent; it has a sense of community involvement in the project. That tradition was the philosophical underpinning of this very, very beautiful building replete with gorgeous artwork and craft.<sup>10</sup> The doors were designed through competitions. The steel gates, the front door, the chandeliers, the carpets—all the things that a building needs were imbued with the imagination, the touch, the eyes, and the dreams of South Africa’s artists.

I take them on this tour, but I’m late to attend a meeting at the Commission for Gender Equality.<sup>11</sup> The Commission sits in a building constructed on top of the old women’s jail. I’m expected to speak there and I’m late. But as I’m about to rush off they say, “no, we need to say a prayer.”

Now some prayers are quick, short, and to the point, and some prayers go around the world a few times. This was one of the second. I’m not actually looking at my watch, although I can feel the time passing. But the prayer ends. I was happy to receive it. Not because I shared their worldview, their philosophy, or the existential underpinnings of their prayer. I shared the fact that they were giving me what they had to give. It was their gift to me, offered with love and received with love. I am about to rush off again when they say, “we must lay on hands.” Seventy pairs of believing hands on my secular body. I received it in the same way. It was a moving, poignant moment for me.

Now why do I tell you these stories? When some months later I was asked to write the first draft for the Court in the same-sex marriages case, I wasn’t consciously thinking of gay pride marches. I wasn’t consciously thinking of the Christian Lawyers of Africa. But these were experiences that I’d had. Experiences seep into you. They become reminders of your country and of who your people are. You think deeply about your decisions because you remember, even if only subliminally, that others will be affected by them.

The same-sex marriage case is now known as the *Fourie Case*.<sup>12</sup> Ms Marie Fourie and Ms Cecelia Bonthuys met. They dated. They enjoyed each other’s company. One moved in with the other and they went around as a couple for ten years, and decided to get married. They went to the marriage officer who said, “I can’t marry you. I can’t. The marriage vow in the Marriage Act says, ‘I,

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<sup>10</sup> *About the Court: The logo*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/thecourt/thelogo.htm> (last visited July 26, 2013).

<sup>11</sup> COMMISSION FOR GENDER EQUALITY, <http://www.cge.org.za/> (last visited July 26, 2013).

<sup>12</sup> *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

A.B., take you, C.D., to be my lawful husband/wife.”<sup>13</sup> The marriage officer did not actually say that the terms were “gendered,” but he indicated that they presupposed a heterosexual union, and said he didn’t have the power to marry a same-sex couple. So Fourie and Bonthuys go to court with a challenge. They point out that the Constitution specifies no discrimination on grounds of sexual orientation. They argue that equal treatment is their Constitutional right, and aren’t too concerned with the Marriage Act.

Meanwhile, a body called the Equality Project has gone to court to challenge the Act.<sup>14</sup> But the Equality Project soon realizes that it cannot overcome the impediment of the statute without challenging its constitutionality. So, that case too challenges the Act on constitutional grounds. The two cases reach us more or less at the same time and we put them together.

The Court’s public area is jam-packed: journalists from all over the world, South Africans of every background, are there. The application is made. The first person to speak, I think, was on behalf of the two women. He was an elderly white man from Pretoria. If you wanted to design the epitome of the old guard—people who grew up under apartheid, defended apartheid, spoke the language of apartheid, with the accent of apartheid—you would think of this man. But then he speaks. “Now the case, Justices, is very simple. My clients want to get married and they believe it’s unfair discrimination not to allow them to get married.” It was actually especially moving to hear it coming from him. I’m sure you could find equivalent people here. Imagine someone from the Deep South associating himself with a profoundly significant anti-racist project, but doing so with the harsh accent and body language we saw in those films about white police or politicians in the South during the Civil Rights campaigns. Then a more erudite argument to strike down the statute followed, concluding the challengers’ case.

Next came counsel for the State, arguing somewhat ambiguously in support of the Act as it stood. He accepted that same-sex couples were entitled to equal protection.<sup>15</sup> But the main assertion was that the protected relationship to which they were entitled should not be called a “marriage.” Protect the tenancy rights, inheritance rights, visitation rights, and all those other kinds of rights, but don’t call it marriage. Marriage, so the argument went, was something intrinsically heterosexual that had been created by the Church before the State got involved. The State could now be called upon to permit same-sex couples to have a civil union, a domestic partnership, but not to enable homosexuals to

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<sup>13</sup> See *id.* at 3 (citing Marriage Act 25 of 1961 §30(1) (S. Afr.)) (“The Marriage Act provides that a minister of religion who is designated as a marriage officer may follow the marriage formula usually observed by the religion concerned. In terms of section 30(1) other marriage officers must put to each of the parties the following question: ‘Do you, A.B., . . . take C.D. as your lawful wife (or husband)?’”).

<sup>14</sup> *Lesbian and Gay Equality Project v. Ministers of Home Affairs* 2006 (3) BCLR 355 (CC) (S. Afr.).

<sup>15</sup> See *Minister of Home Affairs v. Fourie* 2006, (1) SA 524 (CC) at para. 32 (S. Afr.).

marry. The case was turning on the “M” word. Then the question was, well, *why not call it marriage?* In answer, the advocate speaking for a Catholic, family-oriented, body quoted passages from Scripture indicating that marriage is and must be heterosexual. Eloquently and with manifest sincerity, he contended that to tamper with marriage as a sacramental institution established by the Church would violate his rights to religious freedom.

When we’d heard all of the arguments we adjourned. Now we had to determine how to shape and deliver our response. On the Constitutional Court, we never, never, never discuss a case in advance of the hearing. We don’t want any one of us to be influenced by any other. It’s quite a tight discipline, maybe more sustainable when you don’t have a huge number of cases and can spend a lot of time on each one. After the hearing, we go around the table. It’s fairly clear that everybody feels we’re in the presence of unfair discrimination. The text of our Constitution makes it easier to declare the Act unconstitutional<sup>16</sup> than a generalized Equal Protection Clause might have done.<sup>17</sup> But that still doesn’t automatically answer the question of whether the Court should uphold the right to marry, not just the right to get some form of equal recognition or protection of the union. That had become the central issue, the ideological and jurisprudential focus.

The first question appeared to be relatively easy. Why *not* call it marriage? Why imply that enlarging the umbrella of marriage, spreading the embrace to include same-sex couples, would weaken, dilute, or undermine the institution of marriage in any way? There was no rational basis for this assertion, unless you have a conception of same-sex marriage as something odd, malicious, and unworthy. Yet the very idea of contamination is insulting to the love, and profoundly challenging to the dignity and self-worth, of the people concerned.

To achieve equal protection and avoid unfair discrimination, it would not be enough simply to protect the individual material consequences of marriage, such as property, tenancy, inheritance, and tax rights. In addition it was necessary to acknowledge the intangibles related to marriage. Marriage has a special status in our society. It grants public recognition of shared intimacy, of love, of concern, of the acceptance of mutual responsibilities, and of expressing the hope of happiness (and preparing for possible disappointments) that our culture invests in the institution.

But the second part—who is to make the actual decision and how—was more difficult. Justice Kate O’Regan said we couldn’t wait another day: same-sex couples had a right under our Constitution to celebrate their unions as of the next day. She would have issued an order that involved the Court

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<sup>16</sup> S. AFR. CONST., 1996 ch. II § 9(3). (“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”)

<sup>17</sup> See, e.g., U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

itself writing into the Marriage Act, “I, A.B., take you, C.D., to be my lawful husband/wife/spouse.” The word “spouse” was gender neutral and that would have been enough for the marriage officer in Pretoria to marry Ms. Fourie and Ms. Bonthuys. Kate, by the way, who advanced the more radical position, had been educated at a Catholic convent. Maybe some of the Sisters wondered where they had gone wrong.

The rest of us felt that Parliament must be involved in the project. The duty to uphold the rights of same-sex couples didn’t just lie with the courts. Parliament was bound by that same Constitution. Our feeling was that unions between same-sex couples would have greater entrenchment and meaning in our society if celebrated both in compliance with a court declaration of what the Constitution required, and an Act of Parliament providing for the appropriate modalities in keeping with that declaration. If the legislature fulfilled its responsibilities, then the right for same-sex couples to marry couldn’t be poo-hooped as not being real marriages, but only judge-invented simulations of marriage. If the right was acknowledged in an Act of Parliament, it would have much better resonance in our society, and the inclusionary character of the law would be far more profoundly affirmed.

It’s interesting to think of how to achieve equality when the law is not expressly discriminatory, but is under-inclusive in its ambit. The Marriage Act did not deliberately target homosexual people for exclusion, it simply rendered them invisible. I’ve noticed that in the U.S. Supreme Court, some of the Justices say you can only claim to be a victim of the violation of constitutional protection if the group you belong to is expressly targeted. So, in the smoking of peyote case, it was tough luck that your religion happened to be affected adversely by the generality of anti-hallucinogenic substance laws, because the law didn’t single you out for adverse treatment.<sup>18</sup> In those circumstances a majority of the Court refused to undertake a balancing test to see whether a religious exemption should be granted.<sup>19</sup> I read of a similar proposition coming from one of the Justices of the Court during its hearings on same-sex marriage, last week, or the week before, saying there was nothing expressly targeting same-sex couples such as, “thou shalt not get married.” But the effect of targeting is achieved when rules treat some people as if they don’t count.

Marriage is such a profound feature of our culture, our habits, our celebrations—we have anniversaries. A friend of mine who has a Ph.D. in comparative literature, told me after spending some time comparing English and French novels of the nineteenth century, that she had made only one interesting discovery: English novels ended in marriage while French novels began with them. To deny people access to an institution so central to the public mind is to impinge on their right to be full human beings like all others in their community.

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<sup>18</sup> Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

<sup>19</sup> *Id.* at 879.



But, accepting that the law is unfair because it is under-inclusive, how do you go ahead to achieve equal protection? There are two possible ways: you can equalize down, or you can equalize up. An American professor twenty years back gave us the phrase: "Equality of the graveyard. Equality of the vineyard."<sup>20</sup> You can equalize down. That was part of the risk of sending the matter to Parliament. The legislature might simply say, okay rather than allow same-sex couples to marry, we're not going to allow anybody to marry. Instead, we'll have a secular civil union recognized by the state, and if you want to marry, you go to the church, or the temple, or the synagogue, or the mosque. There's a strong logic to that, if you like neat arrangements and a bright-line separation of church and state. Quite a few very progressive people were arguing for that. But imagine the results. The straights would protest that they were getting on fine with their marriages until these pesky people came along to mess things up for everybody. Meanwhile, the gay and lesbian couples would lament the fact that just as they were about to reach the mountaintop, their prize was being whisked away. We would have had equality with a vengeance, equality of resentment.

What this American professor was arguing for was that the Constitution didn't simply require sameness, identity of treatment; it required equal access to the benefits of the law.<sup>21</sup> That's what equal protection really meant—not achieving sameness of treatment through equal denial to all of the benefits of the law, but by means of equalizing up. So in our judgment, because we knew it was going to Parliament, we emphasized the constitutional requirement of seeking to achieve equal enjoyment of benefits by all, rather than equal exclusion of all from enjoyment of benefits.

Another perspective raised during the oral argument in our Court came close to supporting the idea of separate but equal. What was wrong, it was asked, with leaving the institution of marriage untouched, but simply entitle same-sex couples to register domestic relationships and civil unions, and so secure for themselves the same benefits and treatment that heterosexual couples enjoyed? In the United States you had *Plessy v. Ferguson*, which exalted the doctrine of separate but equal.<sup>22</sup> But as *Brown v. Board of Education*<sup>23</sup> found, the very purpose of separating was to indicate that a portion of the nation didn't belong in the mainstream, even if the facilities were the same, you had the same number of books, Bunsen burners, and teachers (which they never were). Our country suffered for decades under the separate but equal doctrine.<sup>24</sup>

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20 Evan H. Caminker, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1186 (1985-86) ("Equality itself is as well pleased by graveyards as by vineyards." (quoting D. RAE, EQUALITIES 129 (1981))).

21 *Id.*

22 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

23 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

24 My first engagement in human rights activism was as a second year law student sitting on a post office bench marked Non-Whites Only during the Defiance of Unjust Laws Campaign in 1952, Nelson Mandela being the first volunteer to go to jail.

People remembered the separate queues in the post offices, the separate seats on the buses, reserving all the best facilities for the whites and saving them, heaven forbid, from mingling with blacks. What was wrong with our nation that we couldn't do things together in the same way? Let our children mingle and play sports together. Go to the cinema together. Go to beaches together. Why separate but equal?

In a sense, rejecting the separate but equal doctrine was central to the Court's opinion. It served to remind our people that it wasn't enough to say straights can marry, while gays and lesbians can have domestic partnerships and civil unions. Separation itself denied equality of status in the public mind: in South African parlance, it was like segregating out one group and placing them in a separate kraal.<sup>25</sup> You would have a different ceremony in a different institution, and be unable to declare to the world that you were married. The opinion also referred to the manner in which interracial marriages had been forbidden in South Africa until recently, and in the United States until the 1960s. For this audience, the 1960s are back in the days of Napoleon, but I was already practicing at the bar in the 1960s. It's not like this happened in an ancient medieval period. It was in my lifetime that Virginia prohibited black and white from marrying and one of the legislators, maybe one of the judges, said, "If God had intended black and white people to marry, he wouldn't have made them different colors."<sup>26</sup> It's so similar to the argument today that 'if God had intended two men to marry or for two women to marry, he wouldn't have made them with separate genitalia.'

Now, the problem of principle was how to involve Parliament in the process of establishing respect for equal protection and overcoming the effects of unfair discrimination. All eleven judges agreed that the common law and the Marriage Act needed to be corrected to enable same-sex couples to marry. Ten of us felt that Parliament should be brought into the process. The principle was, 'thou shalt provide a mechanism to enable same-sex couples to celebrate the unions, achieve the status, and accept the responsibilities that heterosexual couples get through marriage.' How it was done, the actual legislative modalities, was to be left to Parliament—a nod in the direction of separation of powers. The thinking was that this would be less intrusive than adopting the position forcefully argued by my colleague Kate O'Regan, in a dissent on the remedy that the Court take it upon itself to simply add the words "or spouse" to the marriage vows. The majority, however, preferred to leave this as one option available to Parliament. Another way open to the legislature would have been to follow a recommendation by the South African Law Reform Commission to adopt a law permitting registration of domestic partnerships and civil unions

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<sup>25</sup> A kraal is a cattle pen.

<sup>26</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967). The opinion was authored by the trial court judge in that case, Judge Leon M. Bazile, who wrote, "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix." *Id.* at 3.

by heterosexual couples who, for one reason or another, didn't want to get married, and then add on special provisions to permit same-sex marriage. Or, Parliament could choose to adopt a new stand-alone law dealing only with same-sex marriages. Whatever the process, it was necessary to ensure that if Parliament failed to enact appropriate legislation within a relatively short time, the constitutional rights of same-sex couples would be vindicated. And so, we created a new remedy, or, rather, adapted an already well-tried remedy, to meet the situation.

The South African Constitution is quite clear as to the duty of the Court if a case before it establishes that public power has been exercised by either the legislature or the executive in and unconstitutional manner. It must publicly declare that a violation of the Constitution has taken place.<sup>27</sup> It can't say well, it's really inconvenient, come back next year. But the declaration doesn't have to take effect immediately. It can, and very, very frequently does, invoke the power given to the Court by the Constitution to suspend the operation of the declaration for a specified period in order to enable the legislative body to take such corrective actions as it sees fit. Indeed, more often than not a declaration of constitutional invalidity would be coupled with a suspension order, which in turn might incorporate equitable interim arrangements.

We decided to give Parliament one year to adopt the new legislation that would end discrimination through under-inclusion of same-sex couples.<sup>28</sup> The clincher was that if Parliament failed to do that within one year, automatically the words "or spouse" would be read into the statute.<sup>29</sup> So, it wasn't left open to Parliament to ask, "should we or shouldn't we?" But Parliament was given the opportunity to decide how.

The order also meant that Parliament would have one year to engage with the nation on the matter. These were issues that the whole nation had to confront. It wouldn't advance the emancipatory constitutional project to the maximum if the public gained the view that same-sex marriages had been sneaked in by sympathetic judges so as to bypass the popularly elected legislature. On the other hand, if Parliament shirked duties placed upon it by the Constitution, then the Court would have the last word. The nation had accepted equal protection in the Constitution, coupled with express outlawing of unfair discrimination on the grounds, amongst others, of sexual orientation. Now was the time for the nations resolve to be measured. If there was a massive amount of homophobia, let it come out and let it be dealt with in public debate. Parliament sent out committees to consult in various parts of the country. Often very unnerving homophobic statements were made, sometimes even by members of Parliament. But if that was what some people felt, that was a reality that should engaged rather than avoided.

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<sup>27</sup> S. Afr. CONST., 1996 ch. VIII § 167.

<sup>28</sup> See *Minister of Home Affairs v. Fourie* 2006, (1) SA 524 (CC) at para. 156 (S. Afr.).

<sup>29</sup> *Id.* at para. 161.

When it came to the final vote, one of the ANC<sup>30</sup> Parliamentary caucus leaders who had once been imprisoned with an activist who had come out as gay in the 1980s<sup>31</sup> made a passionate plea to the ANC members of Parliament to support the legalization of same-sex marriages. In so many words he told them: “gay and lesbian people were fighting alongside us for freedom; how can we say that we have freedom and not allow them to be free?” The caucus, which represented about sixty-five percent of the members in Parliament, ultimately decided to support the measure to allow gay and lesbian couples to marry.<sup>32</sup>

The legislative technique was in fact to include the right of same-sex couples to marry in a new law being adopted to permit heterosexual couples to enter into civil unions. Same-sex couples were given the option to register civil unions. But they could also opt to ‘marry’ and be referred to as ‘spouses’. Although it was called the Civil Union Act,<sup>33</sup> the door was opened for same-sex couples to marry.<sup>34</sup>

A part of the opinion that occupied several pages dealt with the fraught and controversial issue of how the secular and the sacred should coexist in South Africa’s constitutional democracy. I—as I’ve told you—I’m secular. As a child, I had to fight for my right not feign a belief that I didn’t have. The consequences proved very difficult for me as a child in a school where half the kids were Jews and half were Christian. I’m a Jew; it’s an aspect of my culture, my background, and my ancestry. But I thought that if I pretended a belief in a deity, in God, that I didn’t have, it would be disrespectful to me and disrespectful to God, if God existed. And that’s quite tough for an eleven- or twelve-year-old to try to work through. One result is, for me, is that conscience is Number One. It comes before food, before the vote. It comes before health, education, even before freedom of speech. Conscience is what makes you a person. It’s so central to your notion of yourself, your community, your sense of existence, and your future. It’s deep. It’s profound.

And so, on the Court, I became possibly the Judge who most expressly acknowledged the importance that religion had for people in our society. This was not to impose a religion on anybody, but to acknowledge that faith had huge meaning for millions of people in South Africa. So in the opinion I stated that religion could not be restricted simply to something that people practiced in private in their homes or in their sacred spaces. Religion had become part

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30 AFRICAN NATIONAL CONGRESS, <http://www.anc.org.za> (last visited July 26, 2013).

31 Simon Knoll was an activist who worked against apartheid and went on to become one of the heroes of the LGBTI movement in South Africa.

32 Assoc. Press, *South Africa to Legalize Gay Marriage*, NBC News (11/14/2006 10:09:11 AM) <http://www.nbcnews.com/id/15714036/#.UaplFZWbEdI> (last visited June 1, 2013).

33 Civil Union Act 17 of 2006 (S. Afr.).

34 *Id.* § 11(2) (“In solemnising [sic] any civil union, the marriage officer must put the following questions to each of the parties separately, and each of the parties must reply thereto in the affirmative: ‘Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage/civil partnership with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful spouse/civil partner?’”).

of the temper of our nation, of our society. This comes through in our anthem. *Nkosi sikelel' iAfrica*,<sup>35</sup> God bless Africa. We all sing it, believers and non-believers alike. It's a part of who we are. Maybe, because I'm secular, I can speak about the significance that religion has in our society in a way that my religious colleagues would hesitate to do because of concern at being seen to be proselytizing. I'm not proselytizing. I'm acknowledging a sociological, cultural, and psychological fact. At the same time, however, we can't allow the religious beliefs of our citizens, our people, even of the majority, to detract from the fundamental rights of citizens of our country. We can't allow scripture and the interpretation of scripture to be cited as a text in support of interpreting the Constitution. Indeed, religious denominations often fight amongst themselves as to how to interpret those texts—imagine the judges being drawn in as well! It would also be improper and dangerous for the faith communities, to have judges interpreting religious texts.

But the judgment also emphasized that the same constitution that protected the fundamental rights of same-sex couples to celebrate their unions in a public way, to achieve public acknowledgment of their intimacy and closeness and commitment to each other, that very same constitution protected the right of faith communities not to be compelled to celebrate in any way unions that went against their innermost religious convictions.

In this connection, the judgment observes that calling people who oppose same-sex marriages 'bigots' is not helpful. In the open and democratic society envisaged by the Constitution, people will inevitably have different worldviews. It is only if the way some see the world reaches a stage where they're injuring others, attacking others, or insulting others, then legal action can be taken against them. But it will be a legal response to their actions, not to their beliefs. Dividing the nation between the 'enlightened', that's us, and the 'benighted,' that's them—that's not the role of the Court. It's not the role of the Court to cement divisions in the population. The Constitution seeks to find a way of bringing in everybody, with all humankind's diversity. And bringing in everybody doesn't mean homogenizing everybody. The right to be different can be as important as the right to be the same. This connotes not only the right to be different in terms of sexual attraction, but also the right to hold views that are different. You uphold the rights of gay and lesbian couples to have their marriages recognized in public through the law. That is unqualified. But you also don't denounce as bigots people who are opposed to same-sex marriage in principle because it conflicts with their beliefs.

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<sup>35</sup> *National Anthem*, SOUTH AFRICAN GOVERNMENT INFORMATION, <http://www.info.gov.za/aboutgovt/symbols/anthem.htm> (last visited July 26, 2013).

The South African Council of Churches called the judgment Solomonian.<sup>36</sup> I was very happy about that because my Dad's name happened to be Solomon! This was not a cultural war with battles won and lost. The expanding vision of human dignity as envisaged by the Constitution was the victor. The right to have your love and commitment recognized by the law co-existed with rather than fought against the right to believe that such unions are impermissible in the eyes of the Lord.

It was important that those who were disappointed by the outcome of the case should feel they had been listened to, and that their arguments had been taken seriously and had entered into the equation. Their views had not been dismissed on the basis of their having been categorized as bigots and defined out of the debate. A couple of years after the *Fourie* decision had been handed down, I am sitting at a table at the University of Cape Town signing copies of my book *The Strange Alchemy of Life and Law*,<sup>37</sup> which contains a chapter on that case. People are lining up and I see somebody with a familiar face. He starts speaking and I think: that voice—I remember it from somewhere. And he says, “You might not remember, but I came before you in the—” straight away, I knew it was Mr. Smyth. He was the advocate who had quoted from the Scriptures. As he held out his copy of the book for me to sign; he thanked me in his well-elocuted voice for the, I think he called it, ‘the very gracious way in which you dealt with my arguments.’ And I was very pleased about that.

How do things stand in South Africa today, eight years later, with regard to same-sex marriage? I think December 5, 2006 was the end of the year that we gave to Parliament to pass the necessary ? , and December 4 the day they actually did so.<sup>38</sup> And in January, it would have been about January 10, 2007, I'm driving to Kirstenbosch Botanical Gardens in Cape Town. Anybody here know Kirstenbosch Botanical Gardens? I see that a few of you do. It's on the slopes of Table Mountain. It's the most bourgeois family-oriented place. You go there for tea and scones—it's posh to say tea and scones. I'm driving and looking for the sign and then I see it: “To Amy and Jean's Marriage.” It was just so simple. There was a little celebration in a restaurant. Jean told me that she had phoned the restaurant owner to book the restaurant. Then, a few days before she said had phoned in again, “I should tell you Mrs. (whatever the name was) we are

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36 See Press Release from Eddie Makue, Deputy General Secretary, South African Council of Churches, SACC Responds to Concourt Decision on Same-Sex Marriage (Dec. 1, 2005) available at <http://www.sacc.org.za/ARCHIVED%20SACCNEWS/news05/concourt.html> (referring to the ruling as “an extremely weighty and difficult ruling for the Justices to make” and praising the Court's sensitivity to the religious sphere); see also Open Letter on Marriage from Eddie Makue, General Secretary, South African Council of Churches (Sept. 7, 2006) available at <http://www.sacc.org.za/ARCHIVED%20SACCNEWS/newso6/marriage.html>. But see Bronwen Dachs, *Southern African Bishops Condemn Court Ruling on Same-Sex Marriage*, CATHOLIC NEWS SERVICE (Dec. 9, 2005), <http://www.catholicnews.com/data/stories/cns/0507040.htm> (criticizing the Court's decision).

37 ALBIE SACHS, *THE STRANGE ALCHEMY OF LIFE AND LAW* (2009).

38 Civil Union Act 17 of 2006 (S. Afr.).

two women." And the owner had said, "that's wonderful—you'll be the first, and I'm so happy that you chose us." And I thought, terrific.

Sitting here speaking today, I feel very proud that as a Judge on the Constitutional Court applying our Constitution, I was party to a measure that was so simple, so overdue, and so necessary. It brought a lot of joy and a lot of happiness and a lot of emancipation to many people. Thank you.