SACHS J ABRIDGED JUDGMENT (DISSENTING)

Volks NO v Robinson and Others

Introduction

146. This case raises complex social and legal questions about the interaction between freedom of choice and equality in intimate relationships.

146. The problem does not lie in defining the technical legal question to be answered: does the fact that the Constitution prohibits unfair discrimination on the ground of marital status, mean that the exclusion of the survivor of a committed, permanent and intimate life partner from the benefits of the Maintenance of Surviving Spouses Act

147. Similarly, it is not difficult to illustrate the practical issues involved: to take a not unusual situation, should a person who has shared her home and life with her deceased partner, born and raised children with him, cared for him in health and in sickness, and dedicated her life to support the family they created together, be treated as a legal stranger to his estate, with no claim for subsistence because they were never married? Should marriage be the exclusive touchstone of a survivor's legal entitlement as against the rights of legatees and heirs?

148. The source of the complexity appears to lie elsewhere. In my view this is one of those cases in which however forceful the reasoned text might be, it is the largely unstated subtext which will be determinative of the outcome. The formal legal issue before us is embedded in an elusive, evolving and resilient matrix made up of varied historical, social, moral and cultural ingredients. At times these emerge and enter explicitly into the legal discourse. More often they exercise a subterranean influence, all the more powerful for being submerged in deep and largely unarticulated philosophical positions.

149. Thus the judgment of Skweyiya J, which has majority support, holds that the issue is whether it amounts to unfair discrimination to impose a duty upon the deceased estate to maintain a surviving spouse on the one hand, and not, on the other to impose that duty upon the deceased estate where the deceased bore no such duty by operation of law during his or her lifetime to maintain the partner in a heterosexual partnership. The answer, the judgment decides, is that such discrimination is not unfair.

150. I find myself in disagreement with the judgment both as to the approach utilised and to the conclusion reached, and totally so. This is not because I would challenge the legal logic used, which appears to be impeccable within the framework adopted. It is because I would locate the issue in a completely different legal landscape. I do not accept that it is appropriate to examine the entitlements of the surviving cohabitant in the context of what the common law would provide during the lifetime of the parties. To do so is to employ a process of definitional reasoning which presupposes and eliminates the very issue which needs to be determined, namely, whether for the limited socially remedial purposes intended to be served by the Act, unmarried survivors could have a legally cognisable interest which founds a constitutional right to equal benefit of the law.

151. In my view, the question of the fairness of excluding such survivors from such benefits falls to be assessed not in the narrow confines of the rules established by matrimonial law, but rather within the broader and more situation-sensitive framework of the principles of family law, principles that are evolving rapidly in our new constitutional era. By its very nature, the quality of fairness, like that of mercy and justice, is not strained. The enquiry as to what is fair in our new constitutional democracy accordingly does not pass easily through the eye of the needle of black-letter law. Judicial dispassion does not exclude judicial compassion; the question of fairness must be rigorously dealt with, but in a people-centred and not a rule-centred way.

152. The issues raised are novel. A wide range of jurisprudential perspectives are implicated. Because I differ fundamentally with the majority with regard to the point of departure and the context of the enquiry I have found it necessary to set out my views at some length. The first part of this judgment seeks to delineate and establish the jurisprudential setting in which I believe the issues should be located. The second

part sets out my reasons for holding that the Act does in fact discriminate unfairly against survivors of committed life partnerships.

PART ONE

ESTABLISHING THE LEGAL LANDSCAPE

(i) The philosophical context: freedom of choice and equality

154. Respect for human autonomy undoubtedly implies that the law must honour the choices that people make, including the decision whether or not to marry. A central argument advanced in the appellant's written submissions, and, I believe, the philosophical premise underlying the majority judgment (as well as the basis for the judgment of Ngcobo J, which I have had the opportunity to read), is as follows: By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage, a person cannot complain if she is denied the legal benefits she would have had if she had married. Having chosen cohabitation rather than marriage, she must bear the consequences. Just as the choice to marry is one of life's defining moments, so, it is contended, the choice not to marry must be a determinative feature of one's life. These are powerful considerations.

155. Sinclair indicates her respect for such an argument, which implies that freedom of choice demands that cohabitation be preserved as an alternative to marriage and not simply become a different type of marriage. She goes on, however, to negate this contention. On the premise that two people set up a home together, live in a stable, permanent, affective relationship that emulates marriage, and intend to deal fairly with one another, the law's objective, she states, should be to achieve equity between the parties. This, she adds, should be accomplished both during the currency of the partnership and after the death of one of the partners. She cites Rhode who points out that a balance must be struck

"between liberty and equality in intimate associations, between flexibility and certainty in legal rules, and between tolerance for diversity and encouragement of stability in family life . . . . The trade-off between liberty and equality

becomes less stark if liberty is defined not as freedom to do what we want when we want, but rather as freedom to form relationships of mutual trust and commitment, relationships that presuppose some obligations of honesty and fair dealing. Flexibility and certainty are more readily reconciled if we do not demand a single framework for all intimate associations, but rather search for legal guidelines that will distinguish casual from committed relationships. In the absence of explicit agreements, criteria such as the duration of the relationship, the degree of the parties' financial interdependence, and, most importantly, the presence of children, could help provide some consistency across cases."

156. In my view this balanced, flexible and nuanced approach accords well with the multi-faceted character of our new constitutional order. Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other. Yet if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not be astute to penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them.

157. It is instructive to look at the manner in which the Canadian Supreme Court has grappled with the relevance of choice in relation to cohabitation. In *Miron* the majority found that, while in theory the individual is free to choose to marry or not to marry, in practice the reality may be otherwise. It noted further that since the object of the legislation in question was to sustain families when one of their members was injured in an accident, this should be the focus of the issue, rather than what the marital status of the claimant was. The court stated that:

"If the issue had been viewed as a matter of defining who should receive benefits on a basis that is relevant to the goal or functional values underlying the legislation, rather than marriage equivalence, alternatives substantially less invasive of *Charter* rights might have been found."

Accordingly, the exclusion of unmarried partners from an accident benefit which was available to married partners, violated the Charter. In the result, the definition of 'spouse' had to be read so as to include cohabiting partners. Writing as part of the majority in that case L'Heureux-Dubé J challenged the assumption that most unmarried persons living in a relationship of some interdependence and duration are indeed exercising a 'free choice'.

"This silent and oft-forgotten group constitutes couples in which one person wishes to be in a relationship of publicly acknowledged permanence and interdependence and the other does not . . . . It is small consolation, indeed, to be told that one has been denied equal protection under the *Charter* by virtue of the fact that one's partner had a choice."

158. By way of contrast, in the more recent case of *Walsh* the court decided that merely choosing to cohabit was insufficiently indicative of an intention by cohabitants to share and contribute to each other's assets and liabilities, and therefore the exclusion of cohabiting partners from sharing in the division of matrimonial property by the Nova Scotia Matrimonial Property Act did not violate the Charter.

159. The judgment of Bastarache J emphasises how context-related the significance of choice will be. Because of its relevance to the matter before us I quote extensively from it:

"This Court has recognized both the historical disadvantage suffered by unmarried cohabiting couples as well as the recent social acceptance of this family form. As McLachlin J noted in *Miron* . . .

> ‘There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits. In recent years, the disadvantage experienced by persons living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter. Nevertheless, the historical disadvantage associated with this group cannot be denied.’

Since *Miron, . . .* significant legislative change has taken place at both the federal and provincial levels. Numerous statutes that confer benefits on married persons have been amended so as to include within their ambit unmarried cohabitants. Nevertheless, social prejudices directed at unmarried partners may still linger, despite these significant reforms. In light of those social prejudices, this Court recognized in *Miron,* that one’s ability to access insurance benefits was not reducible to simply a matter of choice. L‘Heureux-Dubé J., in her concurring judgment, reasoned as follows, at para.102:

> ‘To recapitulate, the decision of whether or not to marry is most definitely capable of being a very fundamental and personal choice. The importance actually ascribed to the decision to marry or, alternatively, <u>not</u> to marry, depends entirely on the individuals concerned. For a significant number of persons in so-called “non-traditional” relationships, however, I dare say that notions of “choice” may be illusory. It is inappropriate, in my respectful view, to condense the forces underlying the adoption of one type of family unit over another into a simple dichotomy between “choice” or “no choice”.

> Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons — all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law.' [Emphasis in original.]

Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount. The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious and financial considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that many persons in circumstances similar to those of the parties, that is, opposite sex individuals in conjugal relationships of some permanence, have chosen to avoid the institution of marriage and the legal consequences that flow from it.

To ignore [the] differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected and legitimated by the state. Examination of the context in which the discrimination claim arises . . . involves a consideration of the relationship between the grounds and the claimant's characteristics or circumstances." [Reference omitted.]

160. The point is made even more explicitly in *Walsh* by Gonthier J, who draws a sharp distinction between re-arrangement of property relations, on the one hand, and providing spousal support, on the other. Referring to the Maintenance and Custody

Act which provides for maintenance, and is dependent on the need of the applicants and their capacity to provide for themselves and each other, he states that:

"It is true that in *M.v.H.*, [1999] 2 S.C.R. 3, at para. 177, I recognized that there is 'a growing political recognition that cohabiting opposite-sex couples should be subject to the spousal support regime that applies to married couples because they have come to fill a similar social role.' However, I want to underline the fundamental difference between spousal support, based on the needs of the applicant, and the division of matrimonial assets. While spousal support is based on need and dependency, the division of matrimonial assets distributes assets acquired during marriage without regard to need.

. . . .

The division of matrimonial assets and spousal support have different objectives. One aims to divide assets according to a property regime chosen by the parties, either directly by contract or indirectly by the fact of marriage, while the other seeks to fulfil a social objective: meeting the needs of spouses and their children."

161. It is relevant that the distinction drawn by Gonthier J was not based on whether payment of a benefit to an unmarried cohabitant was to be made by the state or to come out of the deceased's estate, and thereby possibly affect the entitlement of heirs. It focused on the special importance to be attributed to need and spousal support after a life-long conjugal relationship with the deceased has come to an end. As a result, on his approach claims for spousal support could legitimately compete with inheritance rights. No general marriage equivalence is required to establish the specific right to spousal support. What matters is the functional value of the legislation based on acknowledgment of a similar social role to that served by marriage.

162. The jurisprudential importance of context in deciding whether a distinction between married and unmarried persons can fairly be made, has also been underlined by this Court. In *Fraser,* which dealt with a provision that excluded unmarried fathers from the category of persons whose consent had to be sought for adoption, Mohamed DP stated:

> "In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with. *But in the context of an adoption statute where the real concern of the law is whether an order for the adoption of the child is justified, a right to veto the adoption based on the marital status of the parent could lead to very unfair anomalies.*
>
> . . . .
>
> *It is . . . evident that not all unmarried fathers are indifferent to the welfare of their children and that in modern society stable relationships between unmarried parents are no longer exceptional*." [My emphasis.]

By analogy, I believe that a de-contextualised approach to the status of unmarried survivors of intimate life partnerships inevitably leads to very unfair anomalies. The survivor of an empty shell marriage will have a claim while the survivor of a caring and committed life partnership that produced a real family, would be left destitute.

(ii)The socio-legal context: patriarchy and poverty

162. In *Fraser* this Court stressed the need for a nuanced and balanced consideration of our society in which the demographic picture will often be quite different from that on which 'first world' western societies are premised. As Mohamed DP pointed out:

"The socio-economic and historical factors which give rise to gender inequality in South Africa are not always the same as those in many of the 'first-world' countries described." [Footnote omitted.]

This Court has on numerous occasions stressed the importance of recognising patterns of systematic disadvantage in our society when endeavouring to achieve substantive and not just formal equality. The need to take account of this context is as important in the area of gender as it is in connection with race, and it is frequently more difficult to do so because of its hidden nature. For all the subtle masks that racism may don, it can usually be exposed more easily than sexism and patriarchy, which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible. The constitutional quest for the achievement of substantive equality therefore requires that patterns of gender inequality reinforced by the law be not viewed simply as part of an unfortunate yet legally neutral background. They are intrinsic, not extraneous, to the interpretive enquiry.

163. It should be remembered that many of the permanent life partnerships dissolved by death today would have been established in past decades, when conditions were even harsher than they are now, and people had far less choice concerning their life circumstances. Thus, in respect of most of the significant transactions potentially affecting present-day claims for maintenance, the social reality would have been that in a considerable number of families the man would have regarded himself as the head of the household with the right to take all major decisions concerning the family. It would have been he who effectively decided whether he and his partner should register their relationship in terms of the law. If she refused to do what he wanted, he could have been the one to threaten violence or expulsion, with little chance of the law intervening. Because he would in many cases have been the party to go out to work while she stayed at home to look after the

children and attend to his needs, it would have been he who accumulated assets, and he who had the proprietary right to determine how they were to be disposed of after his death.

165. It should be remembered too that the migrant labour system had a profoundly negative effect on family life. An essential ingredient of segregation and apartheid, it involved the deliberate and targeted destruction of settled and sustainable African family life in rural areas so as to provide a flow of cheap labour to the mines and the towns. The chaotic, unstable and oppressive legal universe in which the majority of the population were as a consequence compelled by law and policy to live had a severe impact on the way many families were constituted and functioned. Repeal of the racist laws which sustained the system, and entry into the new constitutional era, opened the way to fuller lives for those whose dignity had been assailed, and gave them renewed opportunity to take responsibility for their lives. Yet it did not in itself correct the imbalances inside the family or eliminate the desperate poverty that is still so prevalent.

166. Sinclair states that because there is exiguous welfare to protect the victims of breakdown of intimate relationships, neither public law nor private law, on its own, is adequate, and a combination of responses from both is called for. Dealing specifically with the failure of the state to provide protection for the vulnerable parties in cohabiting families, she concludes:

> "[T]here are no easy solutions to the problem of poverty. Both intervention to regulate and refraining from doing so manifest choices made by the state about the plight of its people. Not intervening, in the context of cohabitation, manifests a choice to allow substantial suffering to continue unalleviated. Far from a liberal, enlightened stance, this choice would permit the strong to remain strong and the weak and vulnerable to be removed from the consciousness of the law in the name of respect for individual autonomy." [Footnote omitted.]

(iii) The historical and jurisprudential context: from matrimonial law to family law

166. In a case like the present it is vital to draw a distinction between matrimonial law and family law. The difference between the two is helpfully analysed in a Discussion Paper recently issued on the question of domestic partnerships by the South African Law Reform Commission (the SALRC Paper). The SALRC Paper points out that many of the features of marriage which are assumed to have been present from time immemorial are actually of more recent origin. What is clear, however, is that marriage in its many forms has enjoyed a uniquely privileged status, while domestic partnerships have been virtually unrecognised. The SALRC Paper observes that opposite-sex partners were a largely invisible group as far as the legal system was concerned: any acknowledgment of their existence tended to be characterised by scathing references to their attempts to 'masquerade as husband and wife'. They were excluded from the rights and obligations which attached automatically to marriage, and it was not even clear whether any agreements which they entered into in order to create parallel rights and obligations, were legally enforceable.

167. The SALRC Paper notes that over the years, however, there has been an increasing focus on the rights of opposite and same-sex partners, and domestic partnerships have come to be perceived as functionally if not formally similar to marriage. It observes that the increased recognition of intimate relationships outside of marriage started in South African law with the imposition of support obligations created in domestic partnership agreements and continued with the use of principles of unjust enrichment to provide property rights and to extend statutorily defined benefits similar to partnerships.

169. The SALRC Paper comments that initially the extension was rather grudging and seemed primarily designed to 'pass the buck' from the welfare authorities to the family, and goes on to state:

"Given South Africa's conservative and Calvinistic background, it is not surprising that acceptance of domestic partnerships occurred at a slower and more reluctant rate than in countries like Canada, Sweden, England and the

United States of America. There is, however, mounting dissatisfaction with the failure of the law to adapt to changing patterns of domestic partnership." [Footnote omitted.]

. . . .

"[L]aw and social policy reforms should aim to provide for both cohabiting couples in general as well as . . . new family types. This must be done whilst acknowledging gender inequality and serious levels of violence against women." [Footnote omitted.]

170. The SALRC Paper concludes that legal regulation is needed since the existing law contains inadequate mechanisms to address disputes arising from cohabitation relationships. The significant numbers involved mean that the Napoleonic adage that "cohabitants ignore the law and the law ignores them" is no longer acceptable. Where a domestic partnership has created responsibilities for, and expectations of, the parties, the law should play a role in enforcing the responsibilities and realising the expectations of the parties that are in conflict.

171. Academic opinion also strongly favours recognition by the law of domestic partnerships. Thus Goldblatt states that families need to be understood in terms of the functions that they perform rather than in terms of traditional categories. If we move away from defining relationships in terms of marriage, we can look at the actual functions that they perform in society. She contends that the purpose of family law is to protect vulnerable members of families and to ensure fairness between the parties in family disputes. Women and children are vulnerable groups in our society and often become poorer when families break down. The lack of legal protection afforded to domestic partnerships increases the vulnerability of these groups living within such arrangements. She concludes that a domestic partnership is but one amongst many different types of family and should be included within the definition of family for the purposes of family law.

172. The new way of looking at family law represents an emphatic shift from what the SALRC Paper refers to as a definitional approach to conjugal rights and responsibilities, towards a functional one. (I believe that it is this shift that lies at the

centre of my divergence from the majority judgment). According to the definitional argument, only those who comply with the current definition of marriage are entitled to the rights and obligations attached to marriage, and only a legally valid marriage can create a family worthy of legal protection. The SALRC Paper offers its own reply. Against this argument, it states, one may put what has been referred to as the functional response, which emanates from the argument that marriage changes over time and that the time has come for marriage to be redefined.

173. The SALRC Paper goes on to say that supporters of the functional argument advocate the definition of marriage according to the function that it serves and argue that other relationships can also fulfil the functions that are traditionally conceived to be attributes of marriage only. Such an approach looks beyond biology and the legal requirement of marriage by considering the way in which a group of people function.

As a result it has been said that

> "[w]hen supporters of the definitional argument assume that couples who have made a public commitment by way of marriage are the only ones who have a legal responsibility to each other, and would be more likely to provide a child with stability and security, they are under a wrong impression. . . . [E]ven married relationships are not guaranteed for life and do end with inevitable accompanying negative consequences."

It is also submitted that it is an

> "unjustified generalisation to contend that unmarried couples . . . are not committed to their relationships . . . . Therefore, to regard marriage as a guarantee that the family created thereby would have certain characteristics is a misrepresentation [as these] characteristics could also be present in other relationships."

174. The SALRC Paper suggests that conditions in South Africa today require a shift from a purely definitional approach to marriage to a functional approach to the family

> "[b]ecause the exclusive nature of the common-law definition of marriage does not reflect social reality, [and it has thus] become necessary under certain legislation to adopt a functional approach to defining family status, with the result that couples who do not fit the traditional family model may be deemed spouse of one another."

According to the SALRC Paper, the South African courts (and the legislator) should determine whether or not to extend common law and other legal protections to family members on this basis. It asserts furthermore that such an approach will lead to greater fairness, will bring law in line with reality and is more likely to harmonise the law with the values underlying the Constitution.

(iv) The legislative context

174. Recent legislation has given extensive, if ad hoc, recognition to conjugal relationships outside of marriage. The acknowledgment of domestic partnerships can be traced in the pre-constitutional era to the Insolvency Act of 1936. It is noteworthy that the Constitution itself accepted this type of family unit by providing that a detained person, including a sentenced prisoner, has the right to communicate with, and be visited by, that person's spouse or partner. Since 1994 a flurry of statutes has recognised domestic partnerships. These include the Medical Schemes Act of 1998, the Prevention of Domestic Violence Act of 1998, the Housing Act of 1997, the Compensation for Occupational Injuries and Diseases Act of 1997 and the Basic Conditions of Employment Act of 1997.

175. Of special importance are the Employment Equity Act of 1998 (the Employment Act) and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (the Equality Act). These were adopted by Parliament to

give legislative expression to the need to achieve equality in South Africa. Covering as they do a wide range of activities and situations, they represent particularly strong legislative acknowledgment of the status of domestic partnerships. Thus, the Employment Act provides in section 1 that the definition of "family responsibility" includes "responsibility of the employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support."

176. Similarly the Equality Act provides in its definition section that "family responsibility" means "responsibility in relation to a complainant's spouse, partner, dependant, child or other members of his or her family in respect of whom the member is liable for care and support." The Act goes on to state that "'marital status' includes the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in a relationship." A key element of this definition is the acknowledgment of a relationship involving a commitment to reciprocal support. Though one does not use legislation to interpret the Constitution, the existence of express legislative purposes aimed at extending the ameliorative reach of the law, must be a factor to be considered in terms of evolving notions as to what is fair and unfair.

177. The fact that many if not all statutes adopted in recent times dealing with the rights of conjugal partners expressly include non-married partners within their ambit, is indicative of a new legislative approach consistent with new values, and as the SALRC Paper suggests, with the spirit, purport and object of the Constitution. As was said in *Daniels*:

"The fact that many statutes adopted in recent times dealing with married persons expressly include parties to Muslim unions under their provisions is indicative of a new approach consistent with constitutional values. The existence of such provisions in other statutes does not imply that their absence in the Acts before us has special significance. The Intestate Succession Act and the Maintenance of Surviving Spouses Act were both last amended before the era of constitutional democracy arrived. The fact that the new democratic Parliament has not as yet included Muslim marriages expressly within the purview of the protection granted by the Acts, accordingly, cannot be

interpreted so as to exclude them contrary to the spirit, purport and objects of the Constitution."

179. The increased legislative recognition being given to cohabitation suggests that cohabitation has achieved a particular status of its own. This status gives it something of a marriage-like character, without equating it for all purposes to marriage. Unlike marriage, the legal response to cohabitation is not dictated by general laws. In practice it will depend upon the qualitative and quantitative nature of the cohabitation and the particular legal purpose for which it is being claimed, or denied, that a couple is cohabiting. A distinction will usually be drawn, for example, between short-term and long-term cohabitation, between the casual affair and the stable relationship, between relationships which have resulted in the birth of children and those which have not, and between couples who live together and couples who do not. Marriage law in this respect is different: you are either married with all the legal consequences that follow, or you are not. Your life circumstances are irrelevant. The consequences are to that extent invariable. By way of contrast, Parry observes it is not perhaps surprising that the legal response to relationships outside marriage has been as variable as the relationships themselves.

180. Finally, government policy is clearly committed towards dealing with families in functional rather than definitional terms. Thus the Department of Population and Welfare Development defines family as follows:

"Family: Individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system. The family is the primary social unit which ideally provides care, nurturing and socialisation for its members. It seeks to provide them with physical, economic, emotional, social, cultural and spiritual security."

Conclusion

180. The SALRC Paper, the thrust of legislation and academic opinion all point in the same direction. It is towards establishing a new legal landscape consistent with the values of diversity, tolerance of difference and the concern for human dignity expressed in the Constitution. The emphasis shifts from locating conjugal rights and responsibilities exclusively within the tight framework of formalised marriages, towards embracing a wider canvass of rights and responsibilities so as to include all marriage-like, intimate and permanent family relationships. The problem at the heart of this case is that although the law has advanced rapidly in granting recognition to cohabitants in relation to public life and in respect of third parties, it has done little, if anything, to regulate relationships amongst themselves.

181. One further introductory point needs to be made. At the hearing of the present matter none of the parties argued in principle against granting recognition to maintenance claims by cohabitant survivors. The intervention by the state was limited to seeking to ensure that the remedy does not have the effect of pre-empting comprehensive and thought-through legislative reform in the area.

PART TWO

FRAMING AND RESOLVING THE LEGAL QUESTION

(i) The origin and purpose of the Act

183. It is in the above context that I turn to the question of whether the exclusion of non-married members of intimate life partnerships from the benefits of the Act constitutes unfair discrimination against them. It is convenient to begin the enquiry by examining the circumstances in which the Act was passed. Its genesis explains its object, which was to overcome a perceived source of injustice stemming from limitations of the common law.

184. The decision of the Appellate Division in *Glazer v Glazer N.O.* established that under the common law (as interpreted in 1963) no duty to support a disinherited surviving spouse rested on the deceased spouse's estate. In the course of his judgment, Steyn CJ said:

> "It is one thing to hold a divorced guilty husband liable for the maintenance of an innocent wife. To grant a needy widow a share in her husband's deceased estate or maintenance out of the assets in his estate, merely because she is indigent and without regard to other circumstances which may have influenced him in deliberately making no provision for her, is a somewhat different matter. The recognition of the obligation in the one case would not tend to prove the existence of a right in the other case."

Pleas were long made for legislative intervention to overcome the harsh effects of implacably subordinating a widow's rights to her deceased husband's freedom of testation. They finally bore fruit in the form of the Act. The Act emanated from the recommendations of the South African Law Commission to the effect that the institution of a legitimate portion would not be the appropriate solution to the problem, and that a claim for maintenance should be given to the surviving spouse by operation of law. Rejecting the notion that the testator would not have disinherited the widow without good reason and that considerations of morality should play a role, the Commission stressed that the only consideration should be that of need.

185. It is convenient to set out once again the provisions of section 2(1) of the Act. They read:

> "If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings."

In terms of section 1 of the Act "survivor" is defined as "the surviving spouse in a marriage dissolved by death."

186. In *Daniels* this Court recently observed that although linguistically gender-neutral, in substantive terms the Act benefited mainly widows rather than widowers. The Court went on to say:

> "The value of non-sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women. The reality has been and still in large measure continues to be that in our patriarchal culture men find it easier than women to receive income and acquire property." [Footnotes omitted.]

The Court stressed that the Act be seen as a measure intended primarily to rescue widows from possible penury. I would add that the survivor's need for maintenance is particularly acute if she finds herself penniless at a time of emotional bereavement accompanied by a dramatic change in life circumstances. To the extent, then, that the widow has a claim against the estate at least for her basic needs to be satisfied, the choice by the deceased not to provide for her by will (or simply the consequences of his failure to make a will) is to be overridden or disregarded.

(ii) The nature of the constitutional enquiry

186. It is against this particular legal background, and within the broad legal landscape delineated in Part One of this judgment, that the question in this matter must be asked: given the manifest remedial purposes of the Act and the constitutional requirement of ensuring equal protection and benefit of the law, must the Act's ambit be extended to cover survivors of permanent life partnerships that have not been consecrated by marriage?

187. In what the SALRC Paper referred to as the Calvinistic and conservative atmosphere of the pre-constitutional era, the answer to this question would have been simple. People living in extra-marital unions would have been condemned at worst as living in sin, and at best as being irresponsible. They would have been disentitled from claiming any benefit whatsoever under the law. Today, however, we are not

bound by the original intent of the legislators. We are living in an open and democratic society in which pluralism and diversity are acknowledged,[184] different forms of family life are tolerated by society and recognised by the law, and the right to equality is listed before any other right in our Constitution.

188. Section 9(1) of the Constitution states that:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

This provision is given further texture by section 9(3) which provides:

> "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."

Section 9(5) goes on to say that:

> "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

The Constitution accordingly declares that everyone has the right to equal protection and benefit of the law, and expressly forbids unfair discrimination on the ground of marital status. So the legal issue before us is whether the non-inclusion of unmarried cohabitants under the Act violates their constitutional right not to be discriminated against on the ground of marital status.

189. The restriction of the benefit to married survivors only, clearly differentiates them from unmarried survivors who share with them the status of bereavement and

need after the death of their intimate life partner. All that distinguishes them is their marital status: the one group was married, and the other was not. This Court has held that once there is differentiation on one of the listed grounds, there is discrimination. The only issue remaining, then, is whether the discrimination is fair.

(iii) The framework of the enquiry

190. In considering the fairness of the Act it becomes vital to decide what the framework of the enquiry should be. In my view, the very nature of the equality enquiry requires a framework of reference that goes beyond the classificatory landscape established by the impugned measure itself. As Wilson J pointed out in the Canadian case of *R v Turpin*:

"[I]t is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also the larger social, political and legal context . . . . A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged."

The larger socio-legal context has already been described. I will now examine the larger constitutional and legal context. In particular, I will give the reasons why I believe that the context for the analysis should be that of family law, and not just that of matrimonial law.

191. The point of identifying differentiation on the grounds of marital status is to save from unfair treatment those families that cannot invoke the protections provided by matrimonial law. By implication, the enquiry must shift from the relatively precise, circumscribed and rule-governed terrain of matrimonial law to the wider and evolving fields of family law. It is important to note that the present case does not involve any attack on the rules and principles of matrimonial law. Indeed, the challenge is not to any malevolence in the Act, but to the limits of its beneficence.

192. Supporting the need for enlarging the scope of family law, Goldblatt underlines in a helpful analysis that families need to be understood on the basis of the functions that they perform, rather than in terms of traditional categories. If we move away from defining relationships in terms of marriage, we can look at the actual

functions that they perform in society. The question asked is: where a domestic partnership has created responsibilities for, and expectations of, the parties, should the law play a role in enforcing the responsibilities and realising the expectations of the parties that are in conflict?

193. Goldblatt states further that the purpose of family law is to protect vulnerable members of families and to ensure fairness between the parties in family disputes. Women and children are vulnerable groups in our society and often become poorer when families break down. A domestic partnership is but one amongst many different types of family and should be included within the definition of family for the purpose of family law. These relationships produce a sense of responsibility and commitment and create dependence between the parties. It also implies that the partners intend the relationship to be stable and enduring.

194. Goldblatt notes that more than a million South Africans are in non-marital relationships with their intimate partners. These 'domestic partnerships' play a crucial role in meeting the financial, emotional, reproductive and other needs of their members. There are many reasons why people, often across race and class divides, cohabit without marrying. One of the main reasons for the prevalence of such relationships in South Africa is the extent of migrancy in our country. She observes that many men marry in the rural areas and form domestic partnerships in the urban areas which are often lengthy and committed.

195. The issue in the present matter, then, is not whether it is fair for the state to single out married partners for claims of maintenance, as opposed, say, to siblings or parents or life-long friends of the deceased. Nor is it to decide whether widows are entitled to special consideration not accorded to other persons who might be alone, elderly and in need. It is, first, to examine the specific purpose that the Act is intended to serve in the context of the overall objectives of family law. Then it is to determine whether in substantive terms the committed life partner of the deceased bears the same relationship to the deceased in every respect as a married partner, save for not having gone through the formalities of marriage. Finally, it is to decide if such person in such circumstances can fairly be excluded from that benefit.

(iv) Marital status as a ground of unfair discrimination

196. In considering the question of fairness I do not believe that a mechanical application of the presumption of unfairness provided by section 9(5) of the Constitution takes the matter very far. Rather, analysis should begin with identification of the specific kinds of marginalisation and exclusion which led to the identification of marital status as a constitutionally outlawed ground of unfair discrimination.

197. These would include the directly discriminatory practices of the past, such as penalising women for being married (e.g. women teachers and civil servants who automatically lost their employment on marriage on the basis that they could not hold down a job and look after their husbands and children at the same time); or penalising women for not being married (e.g. for bringing disgrace on an institution, neighbourhood, building or workplace by having a child 'out of wedlock'); or treating married women as losing the autonomy they formerly had as single women, because from marriage onwards they required their husband's consent for various legal transactions. Alternatively, certain posts, such as ambassadorships, were as a matter of practice reserved for married people only. In addition, there were indirect forms of disadvantage affecting people not living as a married couple. Thus single parents, widows and widowers could be denied housing, or suffer from tax or social security disadvantages or be refused mortgages because they did not fit the format of the married and male-headed-couple household.

198. Two points need to be noted. First, it is women rather than men who in general suffered disadvantage because of their status of being married or not married. Any investigation of unfairness resulting from marital status would accordingly have to take account of the manner in which patriarchy resulted in elements of structured advantage and disadvantage being associated with the status of being and not being married.

199. The second is that by the time the Constitution was adopted, legal disabilities associated with being married had been eliminated from the common law. Nevertheless, marital status was expressly identified in section 9(3) as one of the grounds of potential discrimination. This would seem to suggest that it was included precisely to protect the rights of people who were vulnerable not because they were married, but because they were not married. It is not easy to see why, if it was not regarded as a prototypical source of unfair discrimination in our society, marital status was itemised in section 9(3) in the first place. By implication its inclusion

problematises the vulnerability of the unmarried, and directs constitutional attention to the specific difficulties they face. The obvious classes of people requiring protection against unfair discrimination in this category would be single parents, divorcees, widows, gay and lesbian couples and cohabitants.

200. Once more it will be instructive to look at the manner in which the Canadian Supreme Court has approached the question. In *Miron*, where the applicants challenged an accident compensation statute on the grounds that it provided for the needs of married dependents only, McLachlin J held as follows:

"Exclusion of unmarried partners from accident benefits available to married partners under the policy violates s. 15(1) of the *Charter*. Denial of equal benefit on the basis of marital status is established in this case, and marital status is an analogous ground of discrimination for purposes of s. 15(1). First, discrimination on that basis touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Second, marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1). Persons involved in an unmarried relationship constitute an historically disadvantaged group, even though the disadvantage has greatly diminished in recent years. A third characteristic sometimes associated with analogous grounds, namely distinctions founded on personal, immutable characteristics, is also present, albeit in attenuated form. While in theory, the individual is free to choose whether to marry or not to marry, in practice the reality may be otherwise. Since the essential elements necessary to engage the overarching purpose of s. 15(1) — violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making — are present, discrimination is made out."

202. The point was reinforced in the same matter by L'Heureux-Dubé J, who stated that the question whether or not persons in relationships analogous to marriage have typically suffered historical disadvantage is not clear-cut, partly because the modern phenomenon of common law cohabitation as an alternative to marriage is a comparatively recent one. She went on to observe that the subgroups within the

ground of marital status that have typically suffered the most historical disadvantage and marginalisation are individuals who are single parents, or are divorced or separated. The mere fact that the common law spouses are not in the first group that comes to mind when considering historical disadvantage does not mean, however, that such relationships have escaped completely from societal opprobrium. She concluded that in fact

"non-traditional relationships outside of marriage have in the past generally been frowned upon and considered undesirable by large portions of society. Only recently have they come to be increasingly accepted. That they have become more accepted does not mean, however, that they are now accepted without reservation into the mainstream of society.

. . . .

I therefore have no difficulty concluding that persons in opposite-sex relationships analogous to marriage have suffered, and continue to suffer, some disadvantage, disapproval and marginalization in society, and are therefore somewhat sensitive to legislative distinctions having prejudicial effects."

203. South African society has indeed become far more tolerant than it once was towards different ways of creating families, including cohabitation not formalised in marriage. Yet there can be no doubt that many prejudices of the past linger on, particularly against women who are seen as not conducting their lives in a manner befitting their culture or religion. A certain degree of conventional disdain coupled with moral disapproval is still directed at unmarried couples. By the very nature of their unconventional relationship they are regarded as either immoral, irresponsible or defiant. This will be irrespective of the actual degree of commitment, seriousness and stability of their family relationships.

204. It is important to stress at this point that the issue is not whether members of religious or cultural communities should as a matter of faith be free to regard marriage as a sacred contract which constitutes the only acceptable gateway to legitimate sexual intimacy and cohabitation. Nor is it to query the corollary right of such believers to condemn those who are guilty of what they may regard as fornication and adultery. Clearly their entitlement as part of their religious belief to criticise what they regard as misconduct remains unchallenged. The question, rather, is whether the state should be bound by such concerns. Going further, it is whether the state is required or entitled by these, or by more secular considerations, to give exclusive recognition for purposes of spousal maintenance to married survivors only. In seeking to answer this question, I will consider why the state gives pre-eminence to the institution of marriage, examine the constitutional values that marriage both embodies and promotes, and then ask whether these require that marriage be given absolute status under the Act.

(v) The institution of marriage

205. In *Satchwell* this Court acknowledged the role of marriage in society in the following terms:

"In terms of our common law, marriage creates a physical, moral and spiritual community of law which imposes reciprocal duties of cohabitation and support. The formation of such relationships is a matter of profound importance to the parties, and indeed to their families and is of great social value and significance."

As the SALRC Paper comments, the rights and obligations associated with marriage are vast. Besides the religious and social importance of marriage, marriage as an institution was (at the time the SALRC Paper was produced) the only source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights. The SALRC Paper adds that marriage is also

important in regulating the legitimacy of children and the financial relationship between the parties on breakdown of the relationship.

205. As this Court said in *Dawood*, "[t]he decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most, people . . . ." I would add that our painful history provides additional reasons why the institution of marriage should receive support. In the pre-democratic era the racist policies of the state involved disgraceful use of the law in ways that showed profound disrespect for the marriages of the majority. Thus the migrant labour system, administered under racist laws and enforced by racist courts, deliberately targeted the self-sufficiency and autonomy of rural African families, forcing married men to live in what were called bachelor quarters in the towns. Prohibitions on inter-racial marriage and the refusal of the law to recognise Hindu and Muslim marriages prevented people from marrying persons of their choice and from receiving recognition of the marriage rites and ceremonies appropriate to their beliefs. A host of laws permitted gross intrusion by police and state officials into the intimate lives of the majority, who as a result were compelled to live in chaotic social and legal circumstances. Special support for marriage today accordingly helps heal the ravages of the past. It promotes social stability and supports dignity by giving state recognition to fundamental choices people make about their lives.

206. Formalisation of marriages provides for valuable public documentation. The parties are identified, the dates of celebration and dissolution are stipulated, and all the multifarious and socially important steps which the public administration is required to make in connection with children and property, are facilitated. Furthermore, the commitment of the parties to fulfil their responsibilities is solemnly and publicly undertaken. This is particularly important in imposing clear legal duties on the party who is in the stronger position economically. And, since the economically advantaged party is usually the man, the result in general terms is that the solemnisation of marriage tends to favour gender equality rather than the reverse.

207. There can accordingly be no doubt that the institution of marriage is entitled to very special recognition and protection by the law. The issue, however, is not whether marriage should in many respects be privileged. Clearly it has to be. The question is whether it must be exclusive.

208. For convenience, I will refer to the principle of restricting claims under the Act to married survivors only, as the 'exclusivity principle'. The first constitutional issue, then, is whether the exclusivity principle is compatible with the prohibition of unfair discrimination on the grounds of marital status. If it is held to be unfair, the next matter for decision is whether such unfairness is justifiable under section 36 of the Constitution. It is not easy to separate the question of fairness from that of justification, since each involves elements of proportionate balancing, and inevitably there will be overlap between them. Nevertheless I will deal with each in turn, on the basis that the focus of fairness is on the impact on the interests of those affected, while the emphasis in the case of justification is on the public interest.

(vi) The fairness of limiting the benefits of the Act to married persons only

209. Any consideration of the fairness of the exclusivity principle must take account of this Court's emphasis on the need to recognise diversity of family formations in South Africa. In the *First Certification* case the Court stated that:

"Families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms."

In *Dawood* O'Regan J said that:

"[F]amilies come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."[Footnote omitted.]

Ackermann J made similar statements in *National Coalition (2)*, dealing with the rights of same-sex life partners:

"It is important to emphasise that over the past decades an accelerating process of transformation has taken place in family relationships, as well as in societal and legal concepts regarding the family and what it comprises. *Sinclair and Heaton*, after alluding to the profound transformations of the legal relationships between family members that have taken place in the past, comment as follows on the present:

'But the current period of rapid change seems to 'strike at the most basic assumptions' underlying marriage and the family.

. . .

Itself a country where considerable political and socio-economic movement has been and is taking place, South Africa occupies a distinctive position in the context of developments in the legal relationship between family members and between the State and the family. Its heterogeneous society is "fissured by differences of language, religion, race, cultural habit, historical experience and self-definition" and, consequently, reflects widely varying expectations about marriage, family life and the position of women in society.'" [Reference omitted.]

Similarly, Skweyiya J in *Du Toit* emphasised:

"[F]amily life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change."[Reference omitted.]

210. In each of the above matters there was a specific legal issue which prompted a general observation about the need to adopt a flexible and evolutionary approach to family life. I do not think it is appropriate to cherry-pick statements from the above cases simply on the basis that they appear to be favourable to any particular outcome in the present matter. Though all highlight the importance of the courts not being bound by traditional views of how families should properly be constituted, none deals expressly and directly with the issue of the rights of unmarried heterosexual life partners. Indeed, each case underlines how important its specific social, historical and legal context is.

211. The one unifying theme lurking in the evolving approach to all the different forms of family units being created is that the general purpose of family law is to promote stability, responsibility and equity in intimate family relations. In this context it is significant that the specific objective of the Act is to furnish a preferred claim to a survivor who is not otherwise provided for and finds herself in need. In the present matter, hardship on its own, even if associated with the status of not being married, would not in itself be sufficient to establish unfairness. The Constitution does not seek to take to its bosom and respond to all the inequities to be found in our society. Not every unfairness in life becomes unfairness in law. In order for unfairness in a constitutional sense to be established, there must be a specific link between the survivor's intimate relationship with the deceased, her state of need, the overall appropriateness in the circumstances of debarring her from being able to claim maintenance, and the resulting impact on her dignity of re-inforcing the negative type-casting of her as an unworthy person because she was not married.

212. The critical question accordingly must be: is there a familial nexus of such proximity and intensity between the survivor and the deceased as to render it manifestly unfair to deny her the right to claim maintenance from the estate on the same basis as she would have had if she and the deceased had been married? I believe that there are in fact at least two circumstances in which, applying this test, it would be unfair to exclude permanent, non-married life partners from the benefits of the Act.

213. The first would be where the parties have freely and seriously committed themselves to a life of interdependence marked by express or tacit undertakings to provide each other with emotional and material support. The unfairness of the exclusion would be particularly evident if the undertakings had been expressed in the form of a legal document. Such a document would satisfy the need to have certainty, at least inasmuch as it establishes a clear commitment to provide mutual support within their respective means and according to their particular needs. Like a marriage certificate, the document would thus both prove the seriousness of the commitment and at the same time satisfy the need for certainty.

214. What should be central, however, is the serious content of the mutual commitment and not the particular form in which it is expressed. Thus the undertaking could be inferred from conduct that clearly established a relationship acknowledging a mutual duty of support. In *Satchwell* Madala J pointed out that:

> "[H]istorically our law has only recognised marriages between heterosexual spouses. This narrowness of focus has excluded many relationships which create similar obligations and have a similar social value.
>
> . . . .
>
> The law attaches a duty of support to various family relationships, for example, husband and wife, and parent and child. In a society where the range of family formations has widened, such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same-sex life partnerships. Whether such a duty exists or not will depend on the circumstances of each case."

These sentiments were directed specifically at the situation of same-sex couples. I believe that a similar approach would be apposite in the case of cohabitants. What *Satchwell* establishes is that one can infer as a matter of fact whether a duty exists, not from any

principle of the common law, but from the actual life circumstances of the parties in each case.

216. Unless the purpose of the Maintenance Act is to stigmatise unmarried life partners as being beyond the pale, I can see little reason in fairness why the responsibility for maintenance should not survive the death of a partner where either by express or by tacit agreement, each has undertaken as part of their relationship to support the other within his or her means. If anything, the element of voluntarism and autonomy is particularly strong in these circumstances. Resistant to acknowledging the need to respect such undertakings are notions in society of 'living in sin' and 'bohemianism', reminiscent of stereotypical notions imposed by the intransigent 'Calvinist and conservative' public morality of yesteryear. Whether consciously expressed or unconsciously held, these are inappropriate for an open and democratic society that acknowledges diversity of lifestyle and bases itself on respect for human dignity, equality and freedom.

217. In considering the claims of manifestly meritorious survivors any eagerness to uphold mainstream respectability must accordingly cede to the need to acknowledge the reality of committed, if heterodox, family relationships. The issue should not be seen exclusively as one of the sanctity of marriage, or simply of the important social purpose that marriage serves, but as one of the integrity of the family relationship. Conventional condemnation of such relationships, though less powerful than it used to be, is a dangerous backcloth against which to consider fundamental rights. The danger lies precisely in the apparently natural and commonsensical character of regarding marriage as normal and anything outside of it as deviant, thoughtless, bizarre or objectionable.

218. Secondly, I am of the view that responsibility for maintenance can arise not only from express or tacit agreement but directly from the nature of the particular life partnership itself. The critical factor will be whether the relationship was such as to produce dependency for the party who, in material terms at least, was the weaker and more vulnerable one (and who, in all probability, would have been unable to insist that the deceased enter into formal marriage). The reciprocity would be based on care and concern rather than on providing equal support in material or financial terms.

219. One thinks of the woman who bore children fathered by the deceased, looked after them in infancy, saw them through school, cared for the home, attended to the needs of the deceased and nursed him through sickness and the infirmities of old age. While he earned and accumulated assets, she nurtured the family and remained penniless. Because of the way in which our patriarchal society has allocated roles and responsibilities, it will not have been unusual for the deceased to have accumulated assets and paid towards the upkeep of the home, while the survivor contributed what she had to offer, namely, her care and sweat equity. The deceased might in fact have resisted requests by her that they get married in terms of their religion or before a magistrate. Yet whether or not she can show that she sought marriage and he did not, the crucial fact remains that there is a direct relationship between her present need and her past relationship with the deceased. In the words of the Equality Act, what matters is whether in the relationship there was a commitment to reciprocal support.

220. In the not uncommon circumstances mentioned above the nexus between the survivor and the estate is so strong that I do not think any meaningful distinction can be drawn between what is legally unfair and what is socially and morally unfair. It must be borne in mind that the claim is not being brought to establish unfairness under the common law, or even to show that the common law itself is unfair. The issue is whether the statute, interpreted in the light of the common law as it stands, impacts unfairly on a class of persons because of their marital status. Had the purpose of the Act been primarily to promote marriage as an institution, it might not have been unfair to exclude unmarried people from its reach. The purpose of the Act, however, was to provide a statutory claim against the estate for recently bereaved widows in need. The key ingredients are the familial relationship, intimacy and need. Taking them in combination, in the circumstances of the very typical example given above, I conclude that to exclude the survivor simply because she has no marriage certificate, is not only socially harsh, it is legally unfair.

221. Maintenance by its nature is concerned with survival. Relegation to poverty, coupled with the imputation of having been a lawless interloper in the life of the deceased, severely affronts the dignity of the survivor. The indignity is all the greater where the relationship with the deceased was marked by intense mutuality of concern and freely given reciprocal support. Where legal formulae function in a stereotypical manner that is impertinent to those affected, serious equality issues are engaged. As so often happens in cases where prejudice is habitual and mainstream, the hurt to

those affected is not even comprehended by those who cause it, and passes unnoticed by members of the mainstream.

222. I should add that while it is true that caring for one's family is one of life's great joys, and as such calls for no extra reward, fairness does not inevitably translate into sacrifice. As this Court said in *Baloyi*, the purpose of constitutional law is to convert misfortune to be endured into injustice to be remedied. It would indeed be a perverse interpretation of family law that obliged one to disregard the fact that the circumstances of need in which a typical survivor might find herself, were produced precisely by her selfless devotion to the deceased and their family during his lifetime. I believe it is socially unrealistic, unduly moralistic and hence constitutionally unfair, for the Act to discriminate against the powerless and economically dependent party, now threatened with destitution, on the basis that she should either have insisted on marriage or else withdrawn from the relationship.

223. The issues are not simple. There is a great social need to promote marriage as an institution which provides stability, security and predictability for intimate family relations. By so doing our society stresses the importance of people taking responsibility for their lives, and showing respect for the fact that they are members of a law-governed and interdependent community. It encourages self-reliance and self empowerment; helps people escape from a world made up of victimisers and victims into one consisting of free and equal people; and induces the previously disadvantaged and subordinated to advance in life by calling on their inner strengths rather than allowing themselves to fall into dependence on external support.

224. At the same time it is necessary to acknowledge and respond in a sensitive and practical manner to the fact that people have had to accommodate themselves to harsh and diverse life circumstances over which they may have had little control. Many have been obliged to shoulder burdens heavier than any notion of fairness would tolerate. All measures aimed at redistribution of such uneven loads, whether through family law or welfare law, risk being criticised as being calculated to undermine self-reliance. Yet, while over-paternalism can be disempowering and negate the very objective of achieving equality, what has disparagingly been called the concept of judicial tough love can be unduly insensitive to the actual and overwhelming problems people have had to face in life. The knowledge that the law will intervene to provide basic justice will in fact assist such people to overcome a sense of helplessness and fatalism. That, indeed, is why courts intervene to protect

fundamental rights. In so doing they enhance rather than undermine dignity and self-respect.

225. The reality against which the Act must be interpreted is that many recently bereaved, elderly, and poor women find themselves with no assets or savings other than their clothing and cooking utensils, little chance of employment and only the prospect of a state old-age pension to keep them from penury. Thus, while it is necessary to emphasise the importance of people taking responsibility for their lives, and to acknowledge the extraordinary self-reliance shown by many women in the face of extreme hardship, the law cannot ignore the fact that lack of resources has left many women with harsh options only. Their choice has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other. Any consideration of the fairness or otherwise of excluding from maintenance claims people who chose the latter path, must take account of this.

226. It follows from the above that the exclusivity principle operates unfairly in at least two broadly defined sets of circumstance, neither of which is so far-fetched, hypothetical or unusual as to escape the net of constitutional concern. In each case the unfairness operates both directly and indirectly. In direct terms it treats the unmarried claimants in a way that disrespects the actual commitment they have shown to their families through a lifetime of endeavour, while excluding them from being potential beneficiaries under the Act. Furthermore, it tells the world that there is something unworthy and not respectable about them because they had a family without getting married. Indirectly, it impacts on all persons living in permanent intimate life partnerships outside of marriage. It reinforces the stereotype that, irrespective of the actual character of their relationship and the reality of their commitment to each other, they are all irresponsible and unconcerned about the need to live in a good family relationship that is infused with love, concern and mutual support.

227. There might well be other circumstances in which it would be unfair to stigmatise a surviving cohabitant as being unworthy of claiming spousal maintenance. The two examples given, however, are sufficient to establish that the Act is invalid for under-inclusivity. I conclude therefore that the blanket nature of the exclusivity principle results in unfair discrimination in conflict with section 9(3) of the Constitution.

Justifiability

228. There appear to be two possible arguments based on public interest which could be advanced in favour of justifying retention of the exclusivity principle, in spite of the fact that it operates unfairly.

229. The first is connected with problems of proof. The argument is that the absence of a marriage certificate makes it difficult to determine whether the life partnership ever existed or whether it continued until the death of the deceased. There are undoubtedly great advantages in terms of certainty that flow from the registration of marriages, and concomitant disadvantages related to difficulties of proof which would result from the proposed recognition for certain purposes of non-formalised cohabitation.

230. It needs to be remembered, however, that the claim for maintenance stems from the social regard to be given to commitment, intimacy, interdependency and stability in the family. In the case of a married survivor these will be presumed to have existed as a matter of law. However brief, unstable and non-intimate the marriage might have been, the certificate alone would suffice to grant a claim. In the case of the unmarried survivor, on the other hand, the partnership relationship would have to be proved as a matter of fact.

231. As the SALRC Paper makes clear, the problems of proof are far from insuperable. The many statutes that have encompassed the rights of cohabitants since the achievement of democracy presuppose that appropriate proof can be found. The SALRC Paper shows that there is rich international experience that can be drawn on. In addition it is possible to build on and adapt the factors already enunciated by this Court in relation to problems of proof concerning same-sex committed life partnerships.

232. In my view, then, such difficulties of proof as exist might be of relevance to the remedy that should be crafted. They do not justify the continuation of unfair treatment to manifestly meritorious survivors who find themselves in need after a lifetime of devotion to the family relationship.

233. The second and more substantial contention put forward to justify the exclusivity principle is that any departure from it would undermine the institution of marriage, which must be supported at all costs. As this judgment has indicated, the institution of marriage plays a particularly important role in South Africa today and

must without doubt be supported by the law. It is not clear to me, however, how marriage is dignified through the imposition of unfairness on those who for one reason or another live their lives outside of it.

234. The law would continue to privilege marriage, even if partnerships are given limited recognition. The purpose of family law is to promote stability and fairness in family relationships. Marriage is the most widely recognised and most straightforward way of achieving this. The law recognises this fact. Mere production of a marriage certificate is sufficient to establish the degree of commitment and seriousness that the Act requires. No proof need be provided of permanency, intimacy, cohabitation, fidelity or shared lives. The law attributes to marriage all these qualities in irrebutable fashion. It will continue to privilege married survivors. Thus, even if the executors of the estate could show that none of the above qualities existed in fact, the survivor would still be able to lodge a claim for maintenance, simply on the basis that she and the deceased had been married.

235. Furthermore, whether or not Parliament decides one day to narrow or eliminate the gap between married couples and unmarried life partners, I do not believe that in the interim the institution of marriage can only survive if alternative forms of family organisation are disregarded in all circumstances. Indeed, the element of voluntariness which lies at the heart of marriage is threatened rather than enhanced if people feel coerced into marrying for fear of adverse consequences if they fail to do so.

236. It follows that the continued blanket exclusion of domestic partners from the ambit of the Act, irrespective of the degree of commitment shown to the family by the survivor, cannot be justified. The Act is accordingly invalid to the extent that it excludes unmarried survivors of permanent intimate life partnerships as identified above, from pursuing claims for maintenance.

PART THREE

THE REMEDY

237. The Minister of Justice and Constitutional Development points out that a law reform process is currently underway which seeks to make a determination on whether domestic partnerships should be protected, and if so, exactly how that protection should be secured. She states that the South African Law Reform

Commission is considering proposals for law reform with regard to the following issues:

- whether domestic partnerships should be legally recognised and regulated;
- whether marital rights and obligations should be further extended to domestic partnerships;
- whether a scheme of registered partnerships should be introduced;
- whether marital rights, obligations and benefits should require registration or marriage and which should depend only on the existence of a domestic relationship;
- whether legislation should provide for same-sex marriage; and
- whether marital rights and obligations should be further extended to people living in interdependent relationships having no sexual element.

There are various options currently being considered by the South African Law Reform Commission. These may be broadly divided into the following categories:

1. Same sex partnerships;
2. Registered partnerships; or
3. Unregistered partnerships.

The Minister accordingly avers that the backdrop against which relief by this Court must be viewed is that it should not stifle the law reform process that is currently underway.

238. I find these arguments persuasive. The very factor which gives rise to constitutional concern, namely, the huge variety of non-standard family relationships in South Africa, is the one that makes crafting a remedy in the present matter particularly difficult. Problems of proof arise, and although not insuperable, as the gay and lesbian permanent life partnership cases showed, they pose difficulties. There are

problems about de facto polygamy. There are difficulties of overlap and interaction between various statutes, as well as potential impact on the common law. Third parties stand to be affected. It has implications for inheritance law. Above all, we are concerned with sensitive social issues requiring maximum impact from all concerned. They cry out for democratic debate and legislative solution. I believe that over-ambitious judicial prescription could impede comprehensive legislative reform and retard rather than advance the achievement of fairness in this field.

239. In these circumstances I believe the best way forward is to follow a non-prescriptive remedial path. I would declare the Act to be unconstitutional to the extent of the inconsistency outlined in this judgment, and suspend the operation of the declaration of invalidity for two years. This would give Parliament a free hand as to how the under-inclusiveness of the Act should best be remedied.

240. The question then arises as to whether a special order would need to be made to vindicate any entitlement of the applicant in this matter. I believe not. This is not because I have doubts as to whether her relationship was of a kind that merited the protection of the Act. Acceptance of a duty of mutual support was built into the relationship of interdependence between herself and the deceased. This was not a casual affair but a committed, enduring and intensely intimate marriage-like relationship, one that survived over many years all the stresses of the bipolar condition which affected the moods of the deceased. She provided what she had to offer, namely, companionship, management of the household and personal support in every way, while he contributed companionship and a regular allowance for her needs and the needs of the household. Tacitly, if not expressly, a clear duty of mutual support was undertaken. What deprives her of the right to be a claimant now is the fact that reasonable provision has in fact been made for her under the will.

241. It should be noted, however, that an important part of her objective in bringing the case (with the support of the Women's Legal Centre) was to highlight the marginalisation by the law of women cohabitants in situations similar to hers. I believe that guided by the principles outlined above, the legislature is constitutionally obliged to determine and provide for the circumstances in which permanent life partnerships should qualify for maintenance. In the result, to the extent that in my view the litigation should lead to a declaration of invalidity on the grounds of under-inclusivity, the applicant should have the satisfaction of succeeding in her moral objective, if not in her material one.

241. Since preparing this judgment I have had the opportunity of reading the judgment by Mokgoro and O'Regan JJ. In succinct terms, and through a close examination of how family law operates in the broad landscape of our legal system today, it captures core aspects of the reasoning which I believe should govern this matter. Though I prefer to locate the issues in a wider context, I align myself with the specific considerations they advance and concur in the order they propose.