THE CHANGING FAMILY
INTERNATIONAL PERSPECTIVES ON THE FAMILY AND FAMILY LAW

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With an Introduction by
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Introduction

JUSTICE ALBIE SACHS

I am going to begin at the beginning. And in the beginning was Lucy. Everybody reading this—if the scientists are right—is descended from Lucy; who was not the first person on earth, but our common ancestor. All the others, her sisters and brothers did not leave descendants that created the human population. And I mention this because Lucy was an African. She lived, as Miriam Makeba would have said, in a native village not far from Johannesburg.[1] And I am saying this because in a few years time they might discover that in fact we are all descended from somebody who lived in Alaska or Tasmania, and while the going is good, we claim her. The one great progenitor of humanity whose seed is found in the genes of us all was an African. And as far as family law is concerned, we in South Africa have it all. We have every kind of family: extended families, nuclear families, one-parent families, same-sex families, and in relation to each one of these there are controversy, difficulty and cases coming before the courts or due to come before the courts. This is the result of ancient history and recent history. I am not proposing to go through the few hundred thousand years ever since Lucy, but one can say that family law in South Africa or the problems of family law are the product of the way our subcontinent was peopled, the way we were colonised, the way the colonists were subsequently colonised, the way we were separated and the way we came together again. Our families are suffused with history, as family law is suffused with history, culture, belief and personality. For researchers it's a paradise, for judges a purgatory.

In October 1996 the Constitutional Court of South Africa declared the Constitution of South Africa to be unconstitutional. That is another first that we claim and the context was the two-phase process of constitution making, in terms of which the original negotiators acknowledged that a final constitution could only be made by a democratic assembly but insisted that that assembly function within the framework not only of certain procedures with a two-thirds majority but also of certain principles agreed to in advance.

This was a confidence-building guarantee that majority rule in constitution making would not mean eliminating the interests and concerns of all the disparate communities in South Africa. Principle number 2 said—and I am paraphrasing roughly—that the final text of the Constitution had to enshrine and protect all

[1] There is some dispute whether the eldest known human was Lucy from further north, or Ms Ples from near Johannesburg. Present wisdom, however, is that we are all descended from ancient Africans.

fundamental rights universally recognised. One of the complaints about the final text was that there was no express recognition of a right to establish a family and to live a family life. We as a Court were confronted with a problem: was this a violation of principle 2? By not containing an express statement in constitutional language in the Bill of Rights to the effect that everybody has the right to marry freely the person of his/her choice, and to found a family, did the constitution makers fail to meet the requirements of principle 2? We struck down the constitutional text on a number of grounds, including failure properly to entrench the Bill of Rights. Yet we did not hold that the failure to include an express clause in the Constitution protecting the right to found a family or to enjoy family life, was a failure to enshrine universally accepted fundamental rights and freedoms. Basically our reasons were as follows: we accepted that a number of international instruments existed which made it very clear that the right to live in a family context was coupled with freedom of choice in establishing a family, and that these principles were universally accepted. But were they universally accepted as the kinds of rights that needed to be constitutionalised? Copyright is universally accepted but very few constitutions contain an intellectual property clause as such: there are some that do. Laws in relation to contract, delict, tort are universally accepted; commercial law is universally accepted; but they are not constitutionalised. We did a study of constitutions throughout the world and came up with interesting results. Many constitutions contain clauses expressly defending the family and a right to create a family, and there are enormous variations within that, but many constitutions do not. Germany has a clause, Austria does not; Pakistan has, India does not; China has, Taiwan and Singapore do not. There is no automatic correspondence even with national origin or history. It is an option that constitution makers have. And the reason we felt that so many countries do not constitutionalise the family and family law is that the very nature of the family, particularly in multicultural and multifaith societies, is so diverse that it is best to leave the fundamental rights and liberties in relation to family life to the basic principles of freedom, security and choice. Then, through legislation, the development of precedent in the courts, social custom and practice, the different forms of family life will manifest themselves and be appropriately protected.

The minute you constitutionalise the family, the courts are obliged to establish a prototype of what is meant by the family, and families take on such diverse forms in South Africa that this could impose a straitjacket on future development. At the same time the freedom to choose your partner is clearly defended in the Bill of Rights. The essential content of living in a family would be protected under the many clauses of privacy, dignity, and liberty that are enshrined in our constitution. There are other indirect supports, such as strong principles relating to the rights of children. And then there is a special format permitting (not requiring but permitting, depending on choice, legislative choice, community choice), different systems of personal law. So thus far, there is no vacuum or non-existence of the importance of the family, but neither is it prescribed in

constitutional terms; what is universally accepted is that countries can put in express provisions relating to family law or they need not do so, and we took a middle road, that is, indirect protection of the families without prescribing any particular format.

How are we going to approach what inevitably is a tension between firm, express principles of equality which run right through our constitution from the preamble to the end, and the diversity of our country; the multiplicity of faiths, belief systems, modes of constituting and dissolving families? How are going to reconcile the two? I am going to step back from that problem, as it would be inappropriate for me as somebody who might be professionally involved in future, to lay down any principles in advance. I hide behind the fact that as a judge I am becoming accustomed to saying that I have to hear argument first before I pronounce on any difficult subject. But I am going to suggest a number of dimensions which can be resolved in one of two ways and all of which have a, shall we say, contextual surrounding, environmental influence on this central issue. What is going to matter is acknowledging the tension and how to deal with it rather than suppressing it.

The first relates to the question of universality and particularism. Our country is in the process of formally adhering to a large number of international instruments which project themselves as being universal and many deal directly with the question of the family and family law. And yet we are a country of enormous diversity. Is it possible to reconcile the two? Does one have to make a choice between universal principles on the one hand, and local, historical, cultural, philosophical, personality-based particularities on the other? Or does one dissolve the universal and opt for a multiplicity of particular systems, all rooted in history, culture and tradition? Well, I do not think that we are faced with an either/or choice. I would resolve or approach the resolution of this tension (and there is a tension, it's a real tension), with the following two thoughts in mind.

First, we have to distinguish between globalisation and universalism. Globalisation presupposes that you have an idea or technique or thing, a means that starts in one part of the globe and then spreads to encompass the whole of the globe. It does not change its character; it simply spreads itself to envelope everybody and everything. That is globalisation. Universalism is just the opposite. Universalism starts everywhere where people are, with their practices and their ways, and finds that wherever people are, however they live, however they associate, there are certain commonalities, shared experiences and similar ways of seeing and doing things. Then you distil from the variety of human experience these commonalities, and they are universal. It is a complete opposite of globalisation. I would not say there is no interaction between the two, but the essential underlying concept is the opposite. And so if we envisage the process of enshrining certain fundamental principles of family law and family life which might be enshrined in international instruments, which become points of reference for constitutional courts and other courts throughout the world, it is not because we are saying we want to prove we are civilised, that we can match up to the best

thinking in this part of the globe or that part of the globe or this county or that country. We are saying, based on our own experiences, on our own suffering, disruption, idealism, hope and coming together in South Africa, that we feel that there are certain things we all have in common that form the foundation of our new constitutional order; that provide the lifeblood of the system of values under which we want to live.

I came across this universalism in a rather poignant and sad sense working, and doing research on family law, in Mozambique during the period of exile. I took a plane from Maputo up to Pemba in the North and then a car on a tarred road and then a four-wheel truck deep, deep, deep into the bush to a little village that had no radio, that had as its only contact this four-wheel-drive truck coming once a month, or once every two months. We discovered that the family law problems of people living in that small village were exactly the same as problems you would get in Cape Town or in London—of persons living together who were destroying each other; they just cannot get on as society expects them to, and there is a certain inertia, trapped, but they are just not making it any more. What is the court going to do about it, what is going to happen to the children, what is going to happen to the house? And the house might have been a reed hut but it was the home, it was the place where the people lived. There was a public sentiment about who associates with whom, what you are in the community depended very much on whom you were living with. I could not help thinking afterwards when Charles and Diana had their highly publicised misfortunes, they were no different from the misfortunes of a family struggling in Capo Delgado in northern Mozambique. I coined the sad phrase: the universality of matrimonial misery.

There are these commonalities, positive ones, hopeful ones, idealistic ones, negative ones, sad ones, but always coping. That is what the law is doing, the law is coping; it is not creating, it is coping with, handling, creating frameworks for, minimising the loss and damage of interpersonal relationships. All may be affected in different ways by different cultures, expressed in different languages, different procedural forms but in essence I would say it is the same processes that are involved. So we distinguish between globalisation and universalism in the way that I have just mentioned.

Secondly, the value of pluralism is a universally accepted value in itself. Diversity, the right to choose how to associate with others, the right to conscience, belief, preference, taste, lifestyle; these are universally accepted as values. So there is a commonality in the acceptance of pluralism and if we can allow that pluralism then to seep into our concepts of the universal, the tension remains but it is not inherently antagonistic or conflictual.

That brings me to my second dilemma, the tension between uniformity and pluralism, which is central to our preoccupations in South Africa. We have fought and fought and fought for the right to be citizens of one country, just to be South Africans, to have an undifferentiated legal personality, just to be human beings with dignity; and not to be Europeans or Non-Europeans or Bantu or Whites or

Zulus or whatever, just to be human beings. We needed a common platform of citizenship, of uniformity, of equality in that sense, non-discrimination, non-differentiation. But we have also fought for the right to be different, to express ourselves in different ways, to speak different languages, to organise our family lives in different ways. In the past, difference was imposed. The whole Bantustan Apartheid policy was based upon the state telling people how to live, where to live, how to be educated, whom to associate with. It was an imposed difference.

The way one reconciles the two to my mind is to say that the right to be the same (a uniform platform of rights) is the foundation, not the enemy, of the right to be different. If difference is related to inequality then difference becomes an instrument of domination and subordination and marginalisation and exclusion. But if difference is simply difference, on the basis of a common platform of equality, then they are not antagonistic, they are not enemies. So my right to vote, my right to participate in political life, my right to be a litigant, my right to enter into contracts, my right to be educated, my right to receive medical treatment, my right to housing, these things do not depend upon who my ancestors were, what my language is or my gender. I am a citizen, I am a South African and I have these rights. But my use of language, my lifestyle, my preferences, whom I want to marry; these are rights to be different, and these are things that are constitutionally protected. Until very recently in terms of the marriage law, the Christian marriage was the prototype marriage. When people mention the Lesotho case, those in the Anglo-Saxon jurisprudential tradition will know what I am speaking about. One person, one woman for life became the point of reference for judging the validity of any marriage. This was not the right to be different. In fact it was on this very issue that M. K. Ghandi led one of the first passive resistance campaigns in South Africa. Thousands of men and women of Indian origin, Muslim and Hindu, broke the law deliberately, were caught and jailed because they insisted that their marriages should be treated on an equal basis with Christian marriages. Wives were not concubines, and children were not illegitimate; they were simply living in terms of a different religious, cultural framework that the law ought to recognise. It is quite clear that that kind of discrimination is completely incompatible with our new constitutional order. But there are many ways in which difference can be accommodated and one is not forced into a situation where you have either a totally dualistic or pluralistic legal system with completely different court structures and principles and values for people married in different ways, or else a completely uniform system. The art of the game is to find all the in-between possibilities, the reconciliation and balances that acknowledge the tensions.

One way of reconciling the huge cultural differences is to say that people can organise their affairs according to their religious principles, according to their belief systems in their own way. Catholics can marry in the church where the sacrament is binding on them in terms of the religious law, but as far as the state is concerned they are not bound by the religious law. The problem in South Africa is that the equivalent of Catholic marriages, Muslim marriages and Hindu

marriages had no recognition at all. They had no validity, they were outside the pale. Now they must come into the pale but what will the implications be? To what extent will the Sharia apply as far as the state courts are concerned? That's something we leave open at the moment. The fact is that as far as the essential dignity and equal respect for the institutions of Islam are concerned, there has to be full equality with other religions. As far as the detailed application of the rules is concerned, there is a great variety of possibilities, but each country has to find the right kind of a way. Even in a country as unified as the United Kingdom—I think it is separating out a little bit these days—there is some tolerance, some recognition of what are called minority religions and their law. It is not very much but there is something: it is not completely excluded.

Another major dilemma is the tension between abstracting legal issues and concretising or contextualising them. I might say as a judge I find this possibly my greatest difficulty. To deal with a legal problem and to find an answer you have to isolate it, reduce the number of variables, to pose a problematic in a conceptual form. But the reality of life, particularly of family life, is ongoing, it is dynamic and it is not very susceptible to that abstraction. The advantage of abstraction is predictability. You have rules, you have principles, which you apply to situations as long as they fit more or less, and you end up with predictability. The disadvantage is you get injustice, it is unreal, artificial. Also, you are frequently compelled to establish, when you have competing principles, a hierarchy of principles in a rather formalistic way. Which comes first: personal freedom? property rights? cultural rights? and then you say one trumps the other which trumps the other again, and that too creates enormous problems in cases of conflict. One should be looking at the intensity of the value in relation to the particular circumstance, rather than whether that value trumps another value. Again I would think that the courts are moving more and more in the direction of proportionally balanced relationships rather than choice, with winner taking all.

If you look at the concrete context in which an issue arises, you are looking at the real lives of real people. And when it comes to family law jurisprudence and to equality jurisprudence, and the connections between the two, this concreteness is absolutely vital. A formalistic, technicist approach to equality in relation to family law can in fact perpetuate enormous injustice, whereas a contextualised approach that looks to the dignity and the real lives of the people concerned provides often completely different and much fairer consequences. It poses a heavier burden on the judges because you have to weigh up a whole lot of factors in each case, in each set of circumstances. It also presupposes that over time values and the lives of people change so that the same rule has to be reinterpreted in the light of new developments. It is not something totally new for jurisprudence, but it is something that is perhaps underestimated.

The next tension to which I draw attention is between insiders and outsiders. There are the people who make the law, who determine what the values are and who apply the law, and the people who are the subjects of the law. You have to have specialists, professionals, a certain continuity, a certain coherence and

inconsistency; you have to have that. But at the same there is something almost inherently unfair and unjust in allowing people who are right outside the situations that they are adjudicating upon, whose lifestyles, experiences backgrounds and thoughts are totally abstracted and different from the situations they are dealing with, to be the ones who are determining the fates of those who appear before them. Again, you cannot solve the problem by denying it or by completely democratising the judicial process and leading to a kind of anarchistic spontaneity, because you can get immense injustices when local power takes over and there is no rule of law and no consistency. But I think the answer, especially in the family law context, is to involve people from the community as much as possible and the individuals concerned as much as possible in the resolution of disputes. Instead of lawyerising and professionalising everything in terms of abstract notions of rights, duties, responsibilities, it should be a much more participatory and involving process. Instead of the debate being, do we want a rights-based court system or a welfare-based court system, I think we should have a community-based family court system that is imbued with rights and rights principles. We have great possibilities in this country because that is our tradition, we have a great tradition of popular participation in resolving what are called social disputes and problems. The community gets involved in the old way but we need the new values and the new principles to be the guiding ones.

The public, private tension—public law, private law: in earlier times family law was public law. If you go to Vienna and visit the wonderful art museum of one of the queens of the eighteenth century, you will see beautiful pictures from Spain and the Netherlands, and that is because of the family alliances and the dynasties and the arrangements. Constitutional law was very much family law, and that is why Henry VIII's sex-life became a public issue, not just to sell newspapers but because it affected the future of the country. Certainly in South Africa until fairly recently, and in some parts of the country even now, family law is public law, it has public dimensions and consequences. Yet the processes of industrialisation, of creating a state separate from the dynastic, feudal arrangements of the past, the concept of one-person one-vote, personal autonomy, production outside the home or the field, have separated family law from public law. The family homestead ceases to be the centre of production, the family as such ceases to be the centre of one's rights and duties. For a long time the head of the family, the male patriarch, represented the family in public life in relation to other families and that was really what public life was all about. That patriarchy continued even into the era of democracy, but we are moving away from that now. Yet the argument in favour of a private domain so that the rigid rules of the old society do not apply automatically (so that there is freedom of choice, that there is autonomy) suddenly becomes a trap. The privacy of the home permits gross violations of fundamental rights, impervious in practice and sometimes in law to legal intervention from the state because one is dealing with a domestic situation and not a public situation.

What a dilemma there is here. We know the state used to send its police at night to raid homes looking for passes, looking for liquor, looking for people who were working—not unemployed—who were working illegally without permission. There was no respect for privacy, for domesticity, for an inviolable place where people could go and rest and dream and make love and read and act out the interior fantasy life that people need so much for themselves. That did not exist. So we cannot attack privacy as being a negative notion in itself. We acknowledge the two sides of privacy. If the state tortures it is regarded as one of the most gross, and it is one of the most gross, violations of fundamental human rights. But if the same actions take place systematically representing domination and subordination to terrorise people in the confines of the home it is not seen as torture, it is seen simply as a violation of the ordinary criminal law. International standards do not apply and again the public-private separation just does not meet the reality of people's lives.

Finally, in terms of these dilemmas, the tension between rights and relationships. Rights are seen as defensible areas against state intrusion, spheres of autonomy that can be invoked in a tribunal, in a court. I find increasingly the concept of rights in relation to family law incongruous. If rights are understood as that little bit of space and it is my space, whether in relation to property or in relation to a person, they just do not correspond to and describe what is going on. We are dealing with relationships. It is not "keep off the rest of the world, it's my relationship with my spouse, my parent, my child" that is involved. And these relationships are constantly in flux in a way that rights based on a property concept or defensible space just are not. They have their own internal dynamic and momentum. They involve interdependence; they have no meaning outside of other persons. So what the court is concerned with is not so much defending a right as protecting a relationship and managing it and mediating it and dealing with all the different parties to that relationship. And I would suspect that that has great implications for the future conceptualising and application of family law. What worries me about the rights concept is that family law is reduced very much to questions of property; where rights concepts fit in easily I say to myself: what profiteth a woman that she gains half or three-quarters of her husband's estate, and she loses her own soul? We globalise, commercialise, marketise relationships because they correspond to questions of rights, we put a money value on rights, and I think that often undermines rather than supports the rights. I am not saying this to weaken the importance for dignity of having a home and income. But the starting off point should be the dignity, the involvement, the rights of the person in the fullest global sense, the right to happiness and self-fullfilment and not just the right to get ahead or the right to survive.

I think in South Africa we have great opportunities and great dangers. I do not know myself how this mix is going to work out. In colonial and apartheid times there was an awful, unholy alliance between the patriarchs of colonial society and the patriarchs of traditional society who got together and formalised the law which rigidly placed the man as the head of household. Despite all the

[illegible] an African family life, despite the fact that millions of African women [illegible] leading households, were leading independent careers, were getting their [illegible] property, they were treated as minors. That was a solidified and perverted [illegible] presentation of traditional African law. We might have something similar happen in the future, with a new opportunistic, bureaucratic élite manipulating the [illegible] system in order to entrench advantage for themselves, and that might be the worst of both the old and the new. Or we might have the best of both, we might have the dynamism, the capacity for development that is so powerful in African society as we see in our country, the capacity to overcome enormous problems and difficulties. We might achieve the triumph of the values, as we put it, of humanity, of respect for everybody else, of great sensitivity to the fact that we live in a community. I am a person because I acknowledge that you are a person.

The values of process, of hearing everybody, of dialogue, of involving everybody are deeply rooted in African cultural tradition. Our court logo in the Constitutional Court is a tree with people underneath, taken from the site of traditional African dispute resolution. What could be more open than that? Under the tree everybody walking past could join in. If these traditions are brought together with the best traditions of the common law and legislation and all the international inputs in our law under the overall umbrella of the Constitution then we might have a rich, vigorous, fair, just family law that really serves as a model for other countries, and not only in Africa.

Much depends on dialogue, and that there is a close relation between dialogue and dignity. You cannot prescribe the answers, you cannot say in a textbook way that this problem has to be solved in the following manner. You pose the dilemma, you bring everybody together, you try out different things, you see how they work and you listen. The most important aspect of dignity is to respect the voices of everybody who might be affected by a particular law or principle or program. And so with dialogue and dignity, dignity and dialogue, I think we can make remarkable progress in this country, continuing the progress that we have already made