

## The Mariana Trench of transphobia in South Africa: The legislative *lacunae* in *KOS v Minister of Home Affairs*

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**Summary:** *Society as a whole has for eons been premised on the importance of patriarchy and heteronormativity. During this time society has seen gradual leaps regarding people in the LGBTQI+ community. South Africa appears to be at the foreground of this recognition of the rights of people in this marginalised grouping. However, what may be present on paper may not appear to be what it is. This case discussion examines the extent to which, among others, the Alteration of Sex Description and Sex Status Act as well as the Marriage Act fail to address the matters ancillary to transgender individuals and the glaring discrimination faced by the transgender community in the face of a country that prides itself in a sense of equality that unfortunately is not enjoyed by all its people. To illustrate this point, it is important to examine the above-mentioned Acts in conjunction with *KOS v Minister of Home Affairs*. There appears to also be a glaring deficit in the fundamental understanding between sex and gender within the legislation and a need to update the legislation to the contemporary shift in the issues faced by the LGBTQI+ community.*

**Key words:** *LGBTQI+; marriages; civil unions; alteration of gender; transgender; SOGIESC*

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## 1 Introduction

Society as a whole has for centuries been premised on the perceived importance of patriarchy and heteronormativity.<sup>1</sup> Patriarchy is described as social organisation marked by the supremacy of the father in the clan or family, the legal dependence of wives and children, and the reckoning of descent and inheritance in the male line and, in broad terms, control by men of a disproportionately large share of power.<sup>2</sup> Patriarchy has informed many facets of everyday life, whether it be expected gender norms or systemically.<sup>3</sup> On the other hand, heteronormativity describes the ways in which heterosexuality is normalised through a myriad of practices, so that it becomes naturalised as the only legitimate form of sexuality.<sup>4</sup> Heteronormativity systemically and purposefully excludes the lesbian, gay, bisexual, transgender and queer or questioning (LGBTQI+) community. For the purposes of this discussion it is important to note that there has been a shift to rather use the terminology of sexual orientation, gender identity gender expression and sex characteristics (SOGI/SOGIESC) as it may be perceived as more inclusive. Thus, the author uses SOGI/SOGIESC interchangeably as to better reflect the lived experience of the LGBTQI+ community where appropriate. These concepts find themselves seeped in the legal system through the enforcement or archaic laws that no longer find application within the ever-changing landscape of a constitutional democracy premised on human rights such as dignity, equality, reasonableness and justice. One such law is that which governs the alteration of sex and/or gender descriptors as per the national birth register.<sup>5</sup> The focus of the research requires a strong understanding of sex, gender and gender identity.

Transgender is an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to that typically associated with the sex to which they were assigned at birth.<sup>6</sup> Gender identity refers to a person's internal sense of being male, female or otherwise.<sup>7</sup> The manner in which one may communicate gender identity to others through behaviour, clothing, hairstyles,

1 L Henderson 'Law's patriarchy' (1991) 25 *Law and Society Review* 142.

2 <https://www.merriam-webster.com/dictionary/patriarchy> (accessed 1 February 2021).

3 Merriam-Webster (n 2).

4 D Bell *International encyclopedia of human geography* (2009) 387-391.

5 T Boezaart (ed) *Law of persons* (2021).

6 American Psychological Association 'Transgender people, gender identity and gender expression' (AMA report), <https://www.apa.org/topics/lgbtq/transgender> (accessed 10 January 2022).

7 As above.

voice or body characteristics is referred to as 'gender expression'.<sup>8</sup> Sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy.<sup>9</sup> Gender refers to the socially-constructed roles, behaviours, activities and attributes that a given society considers appropriate for boys and men or girls and women. These influence the ways in which people act, interact, and feel about themselves.<sup>10</sup> Gender, patriarchy and the law may be areas that remain contentious in this regard. These ideals seep into every facet of life, including the institution of marriage.

Marriage in and of itself is viewed as a sacred union and has its cultural and legal roots in the legal sphere as well.<sup>11</sup> The rules and norms thereof have changed over time as society has progressed over the years.<sup>12</sup> In South Africa there are three legislative documents governing marriage and the legal consequences thereof, such as matrimonial property regimes, among others. The aforementioned legislative frameworks find their application in common law, but additionally in the Marriage Act 25 of 61 (Marriage Act), the Civil Union Act 17 of 2006 (Civil Union Act) and the Recognition of Customary Marriages Act 120 of 1998 (RCMA). The focus of this article will be limited to the common law, the Marriage Act and the Civil Union Act.

It is common cause that both the Marriage Act and the common law are gendered. The common law definition states that marriage in South Africa is 'a union of one man with one woman, to the exclusion, while it lasts, of all others'.<sup>13</sup> It is clear from the wording that the common law envisions that the spouses hereto are both cisgendered,<sup>14</sup> that is, male and female. Section 31(1) of the Marriage Act provides the wording that a marriage official must use when officiating the wedding ceremony. The section includes that one person takes the other party as their lawfully wedded wife (or husband). This will be explored in depth below.

It is clear from the wording of the applicable legislation that no one foresaw the possibility of the situation as complex as that found

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8 As above.

9 As above.

10 As above.

11 WA Haviland and others (eds) *Cultural anthropology: The human challenge* (2016).

12 LT Hobhouse *Morals in evolution: A study in comparative ethics* (1925).

13 *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 61.

14 Cisgender means 'of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth'.

in *KOS v Minister of Home Affairs (KOS case)*.<sup>15</sup> This case calls into question the definition of marriage, the scope thereof and the cultural and societal norms surrounding, not only marriage and civil unions, but the response to complex issues in which there are *lacunae* in the law regarding marriage, civil unions and SOGI/SOGIESC matters.

In this matter three applicants (all of whom had been born male) lodged applications to the Director-General of Home Affairs incidental to the change of their sex description as they were all transgender.<sup>16</sup> Thus, they each (born male) desired to be identified as women. The applicants all faced the same difficulty: They had all been married to their respective partners, in terms of the Marriage Act.<sup>17</sup> Their respective partners made the decision to stay in the marriage. This posed an issue for Home Affairs that contested that the marriage should then be dissolved and be solemnised in terms of the Civil Union Act. This contention was made on the basis that the marriage had now become a same-sex union and, therefore, could not be in line with the common law definition of marriage or the Marriage Act.<sup>18</sup>

The state did acknowledge the severe gap in the legislation that effectively caused a number of violations against the applicant's rights in terms of the Constitution of the Republic of South Africa, 1996 (Constitution). However, the state contended that their hands were tied as there are no mechanisms, in terms of their computer system, in place to take into account the change in sex description.<sup>19</sup> This case not only illustrates the violation of human rights, but presents a demonstration of antiquated laws that seek to uphold heteronormative ideals. The judiciary can only go so far. This is what is demonstrated by the decision in the *KOS* decision. The legislature must intervene with immediate effect in order to see that justice is done.

## 2 Factual background to the *KOS* case

The first, third and fifth applicants, referred to individually as 'KOS', 'GNC' and 'WJV', respectively, were all born biologically male.<sup>20</sup> The second, fourth and sixth applicants, to whom *KOS*, *GNC* and *WJV* are respectively married, are female. At some point in their respective

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15 2017 (6) SA 588 (WCC).

16 Boezaart (n 5).

17 Para 2.

18 *KOS* (n 15) 61 64.

19 *KOS* 61.

20 *KOS* 2.

marriages KOS, GNC, and WJV discovered that they had gender dysphoria, the term used as per the facts of the case. The author is of the opinion that the categorisation of 'gender dysphoria' as part of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM V) is problematic as it seeks to pathologise the lived experience of human beings as being mentally ill for wanting to affirm their gender and/or sex.<sup>21</sup> It may lead to the further stigmatisation and victimisation of people who hold transphobic values.<sup>22</sup> In terms of transitioning; support may also include affirmation in various domains that may not necessarily be medical in nature. Social affirmation may include an individual adopting affirming pronouns, names, and various aspects of gender expression that match their gender identity.<sup>23</sup> Legal affirmation may involve changing name and sex markers on various forms of government identification, which is the crux of this article. As per the medical community, gender dysphoria (which usually manifests in early childhood) describes a psychological condition in which they experience incongruence between their experienced gender and the gender associated with their biological sex.<sup>24</sup> However, it is important to note that not all transgender persons experience gender dysphoria.<sup>25</sup>

The respective partners of KOS, GNC and WJV made the decision to stay in the marriage. This posed an issue for the Department of Home Affairs that contested that the marriage should then be dissolved and be solemnised in terms of the Civil Union Act. This contention was made on the basis that the marriage had now become a same-sex union and, therefore, could not be in line with the common law definition of marriage or the Marriage Act.<sup>26</sup> The state acknowledged the severe gap in the legislation that effectively caused a number of violations against the applicants' rights in terms of the Constitution.<sup>27</sup> However, the state contended that it was unable to comply with the

21 Z Davy & M Toze 'What is gender dysphoria? A critical systematic narrative review' (2018) 3 *Transgender Health* 159-169; J Drescher 'Queer diagnoses: Parallels and contrasts in the history of homosexuality, gender variation, and the diagnostic and statistical manual' (2010) 39 *Archives of Sexual Behaviour* 427-460.

22 As above.

23 L Durwood, KA McLaughlin & KR Olson 'Mental health and self-worth in socially transitioned transgender youth' (2017) 56 *Journal of the American Academy of Child and Adolescent Psychiatry* 116-123.

24 American College of Pediatricians 'Gender dysphoria in children' (2017) 32 *Issues in Law and Medicine* 287.

25 American Psychiatric Association 'What is gender dysphoria?' <https://psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (accessed 8 August 2022).

26 KOS (n 15) 60.

27 KOS (n 15) 61 64.

relevant legislation as there are no mechanisms in place to take into account the change in sex description.<sup>28</sup>

In the *KOS* case, after they had married their respective spouses, each of the transgender spouses underwent surgical and/or medical treatment to alter their sexual characteristics.<sup>29</sup> The transgender spouses essentially wanted to transition – that is, the process of shifting toward a gender role different from that assigned at birth, which can include social transition, such as new names, pronouns and clothing, and medical transition, such as hormone therapy or surgery.<sup>30</sup> The parties wished to alter their sex in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003 (Alteration Act).<sup>31</sup> The applications had the support of the transgender spouses' marriage partners, who additionally did not wish to end their respective marital relationships.<sup>32</sup> However, this was met with a myriad of problems. The parties were effectively told that they could not remain in a marriage in terms of the Marriage Act and had to go ahead with divorce proceedings and then 're-marry' in terms of the Civil Union Act as this had now become a same-sex marriage. None of the parties wished to do so.

The result was that the applications by *KOS* and *GNC* in terms of the Alteration Act have effectively been refused and the Department of Home Affairs has failed to come to a decision in respect of them. In *WJV*'s case the Department did alter the sex description. However, when it did so, it simultaneously deleted the particulars recorded in the population register of *WJV*'s marriage with the sixth applicant. This was done without permission from the spouses. It also changed the record of the sixth applicant's surname to her maiden name.<sup>33</sup>

The applicants in this case also faced hostility and ignorance on the part of the Home Affairs officials. Comments made included that changing one's sex 'must be an offence of some kind'.<sup>34</sup> Further problems arose as the surgical interventions and treatment to facilitate the transition from male to female began to manifest physically day by day.

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28 As above.

29 *KOS* (n 15) 2.

30 <https://www.apa.org/monitor/2018/09/ce-corner-glossary#:~:text=Transition%3A%20The%20process%20of%20shifting,as%20hormone%20therapy%20or%20surgery> (accessed 8 August 2022). Also see Durwood and others (n 23).

31 Sec 2(1).

32 *KOS* (n 15) 11.

33 *KOS* 15.

34 *KOS* 34.

The delay in the process by the Department of Home Affairs had real-life consequences for the transgender spouses as they began to look more female by the day. It resulted in a number of embarrassing and invasive scenarios when called upon to explain why their appearance did not correspond with that depicted on their official identity cards.<sup>35</sup> This also resulted in a number of issues such as the opening of bank accounts and other daily scenarios for which an identity card is a prerequisite.<sup>36</sup> This contributed to the mental deterioration of the transgendered spouses as they found themselves within the realm of a transphobic world.<sup>37</sup>

### 3 National legislative framework

The Preamble to the South African Constitution sets the foundation for these discussions. The Preamble states, among others, that the Constitution (as the supreme law of South Africa) shall lay the foundations for a democratic and open society in which government is based on the will of the people, and every citizen is equally protected by law. Section 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>38</sup> Furthermore, this section provides that the state may not directly or indirectly unfairly discriminate against anyone on the grounds of, among others, gender, sex and sexual orientation.<sup>39</sup> Gender identity is not an explicitly-protected category. However, courts have interpreted this as falling under non-discrimination protection on the basis of gender.<sup>40</sup> It therefore is imperative for purposes of this discussion that the shortfalls of the law in this regard be analysed against the backdrop of the aims of justice, non-discrimination and equality. There are also a number of other constitutional rights that come to the fore in this discussion. The rights to human dignity,<sup>41</sup> privacy,<sup>42</sup> bodily and psychological

35 KOS 36.

36 KOS 36, 47, 55.

37 KOS, eg, began to withdraw from dealing with the outside world and left the management of her affairs to her wife.

38 Sec 9(1).

39 Sec 9(3).

40 *Qwelane v South African Human Rights Commission & Another* 2021 (6) SA 579 (CC); W Luhur, L Mokgoroane & A Shaw 'Public opinion of transgender rights in South Africa' Williams Institute, UCLA School of Law, June 2021, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-Trans-South-Africa-Jun-2021.pdf>Public-Opinion-Trans-South-Africa-Jun-2021.pdf (accessed 20 October 2023).

41 Sec 10.

42 Sec 14.

integrity<sup>43</sup> and freedom of movement<sup>44</sup> are all violated by the *lacunae* in the law.

In terms of the Alteration Act the purpose thereof is to provide for the alteration of the sex description of certain individuals in certain circumstances, and to amend the Births and Deaths Registration Act 51 of 1992 (BDRA) as a consequence, and to provide for matters incidental thereto.<sup>45</sup> The Alteration Act is severely wanting. Section 1 of the Alteration Act displays an incorrect conflation of sex and gender in a number of ways. This, for example, is best displayed in the definition of sexual characteristics. The definition provides that it means ‘primary or secondary sexual characteristics or gender characteristics’. The issue is further exacerbated by the definitions of primary and secondary sexual characteristics as defined by the Act: The term ‘primary sexual characteristics’ means the form of the genitalia at birth; ‘secondary sexual characteristics’ means those that develop throughout life and that are dependent upon the hormonal base of the individual person.

This conflation can also be seen in section 7(2)(a) of the Identification Act 68 of 1997 (Identification Act), which states:<sup>46</sup>

An identity number shall be compiled in the prescribed manner out of figures and shall, in addition to a serial, index and control number, consist of a reproduction, in figure codes, of the following particulars, and no other particulars whatsoever, of the person to whom it has been assigned, namely – (a) *his or her* date of birth and *gender*.

As pointed out in *September v Subramoney NO & Others*,<sup>47</sup> according to the BDRA, no provision is made for persons who have commenced treatment for a sex alteration, but before a change on the population register occurred.<sup>48</sup> The implication, therefore, is that a transgender person shall be considered by their sex assigned at birth until such time that they commence treatment. Furthermore, as previously stated and as will be demonstrated below, there is no requirement for surgical transitioning in terms of the Alteration Act.<sup>49</sup> There are a number of issues here. First, the use of ‘his’ or ‘her’ feeds into the binary view of gender, that is, there are only two genders – male and female.<sup>50</sup> Second, gender and sex appear to be conflated. This

43 Sec 12(2)(b).

44 Sec 21.

45 Preamble to the Alteration Act.

46 My emphasis.

47 4 All SA 927 (WCC).

48 *September v Subramoney* (n 47) 56.

49 *KOS* (n 15) 39.

50 J Drescher ‘Out of DSM: Depathologising homosexuality’ (2015) 5 *Behavioural Sciences* 3.

is further demonstrated in the absence of a definition for gender in section 1 of the definitions of the Identification Act. Finally, if the Alteration Act does not require medical treatment, why does the BDRA make the implication that it is necessary to medically transition before a change on the population register occurred as per *September v Subramoney*? This conflation is typical of those who do not understand the nuance thereof. Since the 1980s sex began to be understood, like gender, as a historical and social phenomenon and, as such, a fluid, variable and constructed category.<sup>51</sup> Sex and gender are not only applicable in the realm of scientific and anthropological studies; but must also be construed in terms of politics and the law. 'It must be questioned whether it is correct that people should be required to fit the convenience of legal categories rather than the law reflecting the complexities and realities for individuals.'<sup>52</sup> By doing so, the state must be cognisant enough to navigate these complexities and realities within the realm of the legislative framework. However, at present it seems that South African transgender persons currently have to be legally recognised as one of two genders (male or female).<sup>53</sup> The legal contextualisation of sex/gender in a binary system has historically relied heavily on biomedical definitions.<sup>54</sup>

Furthermore, the aforementioned Acts (the Alteration Act, the BDRA and the Identification Act) do not speak to one another. The effect of section 3(3) of the Alteration Act is that the recordal of a post-nuptial sex/gender change in respect of either or both the spouses has no effect on their mutual marital rights and obligations.<sup>55</sup> These endure as long as the marriage does. It also has no effect on the transgendered person's rights against and obligations to third parties.<sup>56</sup> This effectively provides that a marriage should not, in theory, be affected in any manner by the change in sex/gender of any of the spouses to a marriage. An issue arises concerning the change of recordal of the alteration in terms of the BDRA and the Identification Act. Both these Acts require an alteration of the record of a person's gender or sex description on their birth register<sup>57</sup> and, subsequently, section 8 of the Identification Act states that the information to be recorded includes particulars of such persons' names, dates of birth, gender and identity numbers. Interestingly

51 T Klein 'Who decides whose gender? Medico-legal classifications of sex and gender and their impact on transgendered South Africans' family rights' (2012) *Ethnoscripts* 14.

52 PL Chau & J Herring 'Defining, assigning and designing sex' (2002) 16 *International Journal of Law, Policy and the Family* 354.

53 Drescher (n 50) 28.

54 As above.

55 KOS (n 15) 4.

56 As above.

57 Sec 5 BDRA.

enough, the Identification Act speaks of 'gender' and not 'sex' as per the aforementioned section thereof. The word 'gender' is used in the Identification Act to the same effect as the expression 'sex description' is used in the Alteration Act.<sup>58</sup> The issue now becomes that the Identification Act then, pursuant to section 8(e), states that the following should be in the population register: 'the particulars of his or her marriage contained in the relevant marriage register or other documents relating to the contracting of his or her marriage, and such other particulars concerning his or her marital status as may be furnished to the Director-General'.

According to the population register, the identification number of a person is expressed as a set of figures. While it does not reflect a person's marital status, it does indicate a person's gender.<sup>59</sup> Therefore, according to the Identification Act and the BDRA, the identification number will change to reflect the change in sex/gender. The actual identification document states 'sex'. It does not state 'gender'.

In making an argument for purposes of satisfying the requirements for a legally-appropriate population register, there is a discussion to be had regarding the rights affected by the strict compliance of the applicable legislation. There are a number of other constitutional rights that come to the fore in this discussion (as stated in under this heading). The rights affected are, namely, the rights to human dignity, privacy, bodily and psychological integrity and freedom of movement.

Regarding the constitutional rights violated as mentioned above, the right to human dignity, although at times difficult to definitely properly define, often speaks for itself. Dignity is defined as 'the quality or state of being worthy, honoured, or esteemed'.<sup>60</sup> This was clearly violated in this case as the Department of Home Affairs disregarded the worth of the applicants and reduced their plight to a number of transphobic tropes. With regard to privacy, the inner sanctums of the person's physiological traits were questioned not only in public at the Department of Home Affairs; but also with regard to people who did not believe that the transgender spouses were who they said they were based on their physical appearance. This led to embarrassing situations, in the *KOS* case, where the transgender spouses had to explain to complete strangers why their physical appearance did not

58 *KOS* (n 15) 5.

59 Sec 7(2)(a) Identification Act. Once again there is no mention of the term 'sex'.

60 <https://www.merriam-webster.com/dictionary/dignity> (accessed 8 August 2022); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 1 BCLR 1517 (CC) 125.

match the biological sex descriptor on their identity documents.<sup>61</sup> To have to be questioned and having to explain your gender identity, any medical procedures or treatment done, is a clear violation of a person's medical history as well as their privacy in general. With regard to bodily and psychological integrity, it is clear by what the transgender spouses stated regarding their mental health and their desire to retreat from everyday life in order to escape questions that it took a toll on them psychologically. Transgender people suffer from high levels of stigmatisation, discrimination and victimisation, contributing to negative self-image and increased rates of other mental health disorders.<sup>62</sup>

Further, gender reassignment surgery actually is not a requirement for relief in terms of the Alteration Act.<sup>63</sup> This, therefore, may be construed as a violation of the rights in section 12(2)(b) of the Constitution which includes the right to have security in and control over their body insofar as it places an undue duty on individuals to medically transition in order to satisfy the requirements of the conflicting BDRA regulations. The conundrum finds application in that in terms of regulation 19 of the BDRA a person is required to apply for a change in sex descriptors, in line with the Alteration Act, by filing the application as provided in Annexure 12 (that is, Form DHA-526). The BDRA (nor its regulations), however, does not in fact state anything about needing to have undergone gender reassignment surgery or any other treatment. In contrast, however, Form DHA-526 contains a provision that the applicant must produce medical reports from two different medical doctors. This discrepancy between the Alteration Act and the BDRA creates the impression, on the one hand, that one need not undergo gender reassignment surgery (as per the Alteration Act) but, on the other hand, there is a need for gender reassignment surgery (according to Form DHA-526 of the regulations of the BDRA). One Act, therefore, allows for a reading of bodily autonomy, while the other Act does not.

Finally, regarding freedom of movement, section 21 of the Constitution states the following:

- (1) Everyone has the right to freedom of movement.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter, to remain in and to reside anywhere in the Republic.

61 KOS (n 15) 39.

62 SL Reisner and others 'Global health burden and needs of transgender populations: A review' (2016) 388 *The Lancet* 412-436.

63 KOS (n 15) 39.

- (4) Every citizen has the right to a passport.

The problem herein as it pertains to free movement is evident. If one cannot obtain identification documents, one's movement is severely restricted. One does not have the right to leave or return to the Republic. One may be prevented in certain instances from entering establishments that require an identification document or a driver's licence as proof of identity and one cannot access a passport, among other things.

All of the above-mentioned rights violations do not accord with the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). The long title of PEPUDA makes it clear that section 9 of the Constitution be upheld and that the state prevents and prohibits, among other things, unfair discrimination and harassment; and promote equality and eliminate unfair discrimination. Section 2 of PEPUDA contains the objects of the Act. Therein lays the provision that the state must enact legislation that gives effect to the objects of section 9 of the Constitution.<sup>64</sup> Furthermore, PEPUDA seeks to give effect to the spirit of the Constitution, particularly the equal enjoyment of all rights and freedoms by every person and the promotion of equality, among others.<sup>65</sup> In failing to uphold the spirit, object and purpose of the Bill of Rights, the contradictory and exclusionary legislation that seeks to gate-keep marriage within heteronormativity and patriarchal values cannot be in line with PEPUDA.

#### 4 Inconsistent application of the legislation

It is apparent from the facts of the *KOS* case that the rules pertaining to this particular situation are inconsistent. There is a long-standing belief that that homosexuality (and, by extension, SOGIESC issues) is 'un-African'.<sup>66</sup> This is a systemic issue that has seeped into the very fabric of the African lived experience, and South Africa (despite its Constitution) is no stranger thereto. It speaks to the sentiments of a country that may be progressive in terms of its laws, but not in terms of the conservative sensibilities of the people on the ground. The treatment that each of the transgender spouses received was different in the implementation thereof, but still deeply rooted in transphobic sentiments. This may offer one reasons as to why the officials of the Department of Home Affairs were allowed to act with impunity: from the applicants in the *KOS* case needing to see two

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64 Sec 2(a).

65 Sec 2(b).

66 S Nyanzi 'Dismantling reified African culture through localised homosexualities in Uganda' (2013) 15 *Culture, Health and Sexuality* 952-967.

different officials who both were clearly not acquainted with the Alteration Act<sup>67</sup> to the erasure of pertinent information about WJV and her wife and learning that the Department's 'system' reflecting that they had never married.

Gender Dynamix (GDx), a registered non-profit organisation that seeks to advance, promote and defend the rights of transgender and 'gender non-conforming' persons in South Africa and beyond<sup>68</sup> had a heavy hand in pointing out these inconsistencies. GDx entered these proceedings as an applicant. They stated that the absence of a uniform approach by the Department of Home Affairs to these matters was astounding.<sup>69</sup>

In an example provided by GDx in 2011, a person who had applied for relief under the Alteration Act was initially informed by the Department of Home Affairs that she would first need to obtain a divorce, which she refused to do. The Department of Home Affairs was eventually persuaded, after the applicant had obtained legal representation with the assistance of GDx, to amend the gender marker despite the continued subsistence of the marriage. It did so without 'converting' the record of the union to one under the Civil Union Act.<sup>70</sup> The Court in *KOS* noted that it was unclear of the circumstances under which this was allowed to happen.<sup>71</sup> Another example was that in 2009 an applicant had had the record of her marriage, which had been solemnised in 1976 in terms of the Marriage Act, changed, without her knowledge, to that of a marriage purportedly solemnised under the Civil Union Act in 2009 (just as in the case of applicant WJV in the *KOS* case).<sup>72</sup>

In terms of section 33(1) of the Constitution, everyone has the right to administrative action that is lawful, reasonable and procedurally fair. In executing just administrative action, legislation must, among other things, promote the efficient administration thereof.<sup>73</sup> The Alteration Act does not have a set of procedures that allows for fair and reasonable administration thereof. In fact, there is an absence of prescribed forms and procedures for the administration of the Alteration Act.<sup>74</sup> Further, in executing the administration of the Identification Act, there are provisions contained therein that

67 *KOS* (n 15) 27 34.

68 <https://www.genderdynamix.org.za/> (accessed 9 August 2022).

69 *KOS* (n 15) 30.

70 *KOS* 29.

71 *KOS* (n 71).

72 *KOS* 27.

73 Sec 33(3).

74 *KOS* (n 15).

demonstrate a clear relationship between the Alteration Act and the Identification Act. For example, chapter 4 of the Identification Act creates criminal offences for not being in possession of an identity document and being unable to provide proof of identity, among other things. A person whose application is declined in terms of the Alteration Act cannot obtain a change in their identity number and, therefore, cannot possess an identity document. The prevention of the ability to obtain an identity document on the basis of marriage on the face of it appears arbitrary and not in line with section 33 of the Constitution and, thus, also unconstitutional in terms of section 172(1)(a) of the Constitution which states 'that when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. For the purposes of this article, the author will not delve deeper into issues that are in the purview of the Promotion of Administrative Justice Act 3 of 2000. However, it is important to note that there is a very clear symbiotic relationship between the Alteration Act and the Identification Act in terms of, among other things, the administration thereof.<sup>75</sup>

## 5 Marriage Act and Civil Union Act

The contestation of the Department of Home Affairs is that they cannot change the sex markers on their system as the marriage is no longer heterosexual in nature and that, thus, the parties must enter into a civil union in terms of the Civil Union Act.<sup>76</sup> The Court in the *KOS* case stated that it seemed as though the respondents' approach had been influenced by the persisting influence of the religious and social prejudice against the recognition of same-sex unions.<sup>77</sup> This is very clear in light of the decision by the legislature to create a parallel system in passing the Civil Union Act and not an amendment to the Marriage Act to include same-sex marriages. As Ntlama rightly puts it, the Civil Union Act has the potential to produce new forms of marginalisation, despite the caution by the Court in *Minister of Home Affairs v Fourie* (*Fourie* case),<sup>78</sup> namely, that Parliament, in creating the Civil Union Act did not create a new form of marginalisation through a parallel system of marriage<sup>79</sup> – especially with South Africa's past regarding 'separate, but equal' sentiments expressed

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75 *KOS* 77.

76 *KOS* 67.

77 *KOS* 69.

78 2006 (1) SA 542 (CC), 139 150; N Ntlama 'A brief overview of the Civil Union Act' (2010) (13) *Potchefstroom Electronic Law Journal* 192.

79 This was altered to a degree in the *Fourie* case, which led to Parliament correcting the defect identified in sec 30(1) of the Marriage Act to include 'spouse' and not just 'husband/wife'.

by the oppression of black people during apartheid. The decision to have a parallel system of marriage has no shortage of critique in jurisprudence, and it is not the intention of the author to dwell on those vastly-correct critiques and sentiments. The crux herein is to illustrate the farce that is 'separate but equal development'. The creation of a separate institution of 'marriage' has reduced the equal rights of couples in same-sex relationships and still reduces same-sex couples to the realm of second-class citizens.<sup>80</sup>

Both the Civil Union Act and the Marriages Act are devoid of a definition of 'marriage', and we thus rely on the common law position. However, according to section 1 of the Civil Union Act, a 'civil union' means 'the voluntary union of two persons who are both 18 years of age or older. Which is solemnised and registered by way of either marriage or a civil partnership in accordance with the procedures prescribed in this Act. To the exclusion, while it lasts, of all others.'

The word 'marriage' is included in this definition. However, it also includes 'civil partnership', which is also devoid of a definition. The language seems oddly placed in order to distinguish one institution from the other. It seems to give gravitas of a marriage solemnised in terms of the Marriage Act top billing.<sup>81</sup>

Thus, in the *KOS* case the conundrum regarding the institution of marriage seems grounded in the sensibilities, as warned in the *Fourie* case. It seemingly seeks to erase decades-long institutions solemnised in terms of the Marriages Act to the above-mentioned inferior institution of a civil union. It completely ignores the espoused views that the spouses involved herein are and have been satisfied with their respective marital relationships. Furthermore, the prevailing sentiment by the Department of Home Affairs officials is that the spouses obtain a divorce and then solemnise their union in terms of the Civil Union Act. Nowhere in the Divorce Act 70 of 1979 (Divorce Act) is it stated that a gender reassignment as envisaged in terms of the Alteration Act is sufficient grounds for divorce. It is common cause that a marriage may be dissolved in the following scenarios: (i) the irretrievable break-down of the marriage as contemplated in section 4 of the Divorce Act; and (ii) the mental illness or the continuous unconsciousness, as contemplated in section 5 of the Divorce Act, of a party to the marriage. As stated above in this article, the wives of the transgender spouses did not wish to get a divorce

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80 Ntlama (n 78) 197.

81 Ntlama (n 78) 199.

as there were no grounds. Therefore, and as emphasised throughout this article, the wives of the transgender spouses were supportive of their transgender spouses and wished to continue the marital relationship. As one of the applicants aptly put it, 'she sees "no need to get a divorce to satisfy a computer system"'.<sup>82</sup> To obtain a decree of divorce on the basis of the Alteration Act surely was not envisaged if the spouses did not find it to be the basis of the irretrievable breakdown of the marriage. There could indeed be circumstances in which it would lead to the irretrievable breakdown of the marriage, but this evidently was not the case in *KOS*.

## 6 Possible solutions?

What is clear is that there is a need for change. What is difficult is the question of what that change would look like. It is clear that the computer system employed by the Department of Home Affairs is flawed if it allows for the denigration of constitutional rights. But how would one fix the problem? The author will delve into three possible solutions.

### 6.1 Case-by-case basis

The matters relating to marriages solemnised in terms of the Marriage Act where transgender spouses are involved could be upheld under the discretion of the director-general of the Department of Home Affairs. This would entail an official escalating of the matter to the director-general for approval. The issues with this method are four-fold:

#### 6.1.1 *The bureaucracy, red-tape and paperwork*

The process of altering one's sex/gender in terms of the Alteration Act is already onerous on the part of the party seeking the alteration. There substantial paperwork involved in terms of the BDRA. One not only completes Form DHA-526 as discussed in part 3 above, but there is also the process of changing the identity number in terms of the system at Department of Home Affairs, with shockingly poor service of the Department in general, including long queues and sheer number of complaints regarding the poor demeanour of the

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<sup>82</sup> *KOS* (n 15) 46.

Department's officials as well as long waiting times to receive identity documentation after application therefor.<sup>83</sup>

Another setback would be the lack of awareness by the officials at the Department of Home Affairs regarding the Alteration Act as discussed in part 2 above. A lack of awareness regarding legislation within the purview of one's entire occupation points to a possible lack of education and training at the Department of Home Affairs. KOS even had a copy of the Alteration Act with her and the officials still refused to either assist her or were sceptical of the existence of the alteration process.<sup>84</sup> There is a need at ground level to educate the officials at the Department of Home Affairs and to conscientise those officials with regard to the sensitive issue of the various human rights involved.

There are also the discretionary powers of the director-general of the Department of Home Affairs to consider. The powers and duties of the director-general are contained in regulation 2 in the regulations of the BDRA. According to section 5(1)(a) of the BDRA, the director-general is the custodian of all documents relating to births and deaths (required to be furnished) under this Act or any other law. The section contains *any other law*. However, when construed with the births and deaths specifically, it does not lend itself leeway into the realm of the Alteration Act. *Any other law* would suggest that the list is not closed, but the caveat is that it must relate to births and deaths specifically. Does this mean that the Alteration Act is not a consideration? The BDRA makes mention of the Alteration Act in section 27A in broad terms, namely, the mechanic manner in which forenames or surnames and gender markers must be changed to accord with the Alteration Act. This section states, among others, that if the director-general grants an application in terms of the Alteration Act, the director-general shall alter the sex description on the birth certificate of the person concerned. It does so without elaborating on issues incidental to that alteration. This seems peculiar as a transgender person may want to assume another name or surname, which the BDRA does allow in terms of section 24 (forename) and section 26 (surname) thereof. The administrative process is very onerous and provides for the wide discretion of the director-general.

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83 T Washinyira 'South Africans hamstrung by Home Affairs as complaints over queues and service standards escalate' *Daily Maverick* 21 October 2021, <https://www.dailymaverick.co.za/article/2021-10-21-south-africans-hamstrung-by-home-affairs-as-complaints-over-queues-and-service-standards-escalate/> (accessed 11 August 2022).

84 KOS (n 15) 34.

The first obstacles find their application in the heteronormative and patriarchal list of duties with which the applicant must comply:<sup>85</sup>

Subject to the provisions of this Act or any other law, no person shall assume or describe himself or herself by or pass under any surname other than that under which he or she has been included in the population register, unless the Director-General has authorised him or her to assume that other surname: Provided that this subsection shall not apply when –

- (a) a woman after her marriage, assumes the surname of the man with whom she concluded such marriage or after having assumed his or her surname, resumes a surname which she bore at any prior time;
- (b) married or divorced woman or a widow resumes a surname which she bore at any prior time;
- (c) a woman, whether married or divorced, or a widow adds to the surname which she assumed after the marriage, any surname which she bore at any prior time.

Note the usage of binary terms and the focus on women and no mention of men, transgender men, intersex persons and gender-non-binary persons. Section 26(1) of the BDRA displays the discretionary powers of the director-general of Home Affairs in this regard:

At the request of any person, in the prescribed manner, the Director-General may, if he or she is satisfied that there is a good and sufficient reason as may be prescribed for that person's assumption of another surname, authorise the person to assume a surname other than his or her surname as included in the population register, and the Director-General shall include the substitutive surname in the population register in the prescribed manner.

The regulations are even more onerous. The Department of Home Affairs requires, among other things, a certified copy of an identity document<sup>86</sup> (an identity document which in reality would not be issued because of the rejection of an application as per the Alteration Act) and proof of payment of the application fee.<sup>87</sup> What would the director-general consider 'good and sufficient' reasons? This discretion seems too open-ended and there is the possibility of abuse thereof.<sup>88</sup>

85 Sec 26(1).

86 Regulation 18(3)(a).

87 Regulation 18(3)(f). This fee is non-refundable.

88 *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC). Discretion is characterised as involving a degree of judgment and choice in that a discretionary power permits a public authority some freedom to decide how it should act; also see *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 para 46 regarding how the exercise of the discretion by public officials must be done in a manner consistent with the provisions of the Bill of Rights.

### 6.1.2 *The repeal of the Civil Union Act in its entirety*

The parallel system of marriage is a farce at best. As discussed at length in part 2 above, the Civil Union Act actually reinforces ideas that that a 'union' is inferior to a 'marriage'. There is no set definition of 'marriage' in either piece of legislation. It would perhaps be wise for the legislature to provide such a definition. As pointed out in the *Fourie* case:<sup>89</sup>

Marriage and its legal consequences sit at the heart of the common law of persons, family and succession and of the statutory scheme of the Marriage Act. Moreover, marriage touches on many other aspects of law, including labour law, insurance and tax. These issues are of importance not only to the applicants and the gay and lesbian community but also to society at large.

In the *Fourie* case the common law definition of marriage was declared to be inconsistent with the Constitution and invalid to the extent that it did not permit same-sex couples to enjoy the same rights as heterosexual couples. The Constitutional Court ordered that the legislature align the legal position in light of the *Fourie* case. The result thereof was the enacting of the Civil Union Act, a piece of legislation that flies in the face of the seemingly pertinent issue that same-sex couples be allowed to be married and not unionised. The Civil Union Act also contains the provision that a marriage officer may object to performing a civil union.<sup>90</sup> Section 1 of the Civil Union Act defines a marriage officer as follows:

'Marriage officer' means –

- (a) a marriage officer *ex officio* or so designated by virtue of section 2 of the Marriage Act; or
- (b) any minister of religion or any person holding a responsible position in any religious denomination or organisation, designated as marriage officers under section 5 of this Act.

Section 23 of the Marriage Act also contains a provision under which a marriage officer may object to solemnise a marriage. Thus, there is unnecessary repetition contained in the Civil Union Act and the Marriage Act. Therefore, if a marriage officer raised their right to constitutional right to freedom of religion, belief and opinion,<sup>91</sup> it would have the same effect, or at least it would have had the same effect but for section 6 of the Civil Union Act being repealed in terms of the Civil Union Amendment Act 8 of 2020 (Amendment Act). In terms of section 6 of the Civil Union Act a marriage officer, who is a

<sup>89</sup> *Fourie* (n 78) 9.

<sup>90</sup> Sec 9.

<sup>91</sup> Sec 15.

part of a religious denomination or organisation who applied to be a marriage officer, would not be compelled to perform a same-sex union and could apply in writing to the Minister of Home Affairs that he or she objects on the ground of conscience, religion, and belief to solemnising a civil union between persons of the same sex. However, with the repealing of this section by the Amendment Act, it means that such a marriage officer may be compelled to solemnise a same-sex union. This surely begs the question of whether the Marriage Act would be amended in this manner. If we measure this against section 9 of the Constitution, the author argues that it would not be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom<sup>92</sup> to differentiate between the Marriage Act and the Civil Union Act in this regard.

It is the author's contention that if the Civil Union Act were repealed and there was only one manner in which to solemnise a marriage (not including the RCMA as that may open up a can of worms in terms of South African customary law), there would then be no need to call upon transgender spouses to seek out a divorce and solemnise the marriage in terms of the Civil Union Act.

### 6.1.3 *Technological intervention*

One of the arguments brought forth by the Department of Home Affairs hinged on the computer system employed by the Department. In many instances in the *KOS* case the officials at the Department of Home Affairs and, indeed, the respondents themselves insisted that the system would not allow a change in sex descriptors as the population register would now recognise the marriage as a same-sex marriage.<sup>93</sup> The course of action would then be to dissolve the marriage and solemnise the marriage in terms of the Civil Union Act. One official even stated that attempting to stay married in terms of the Marriages Act and seeking to alter one's sex in terms of the Civil Union Act would 'confuse the system' and slow down the process of approval.<sup>94</sup>

As described in part 3 above, in terms of section 7(2) of the Identification Act an identity number is compiled in the prescribed manner out of figures with a serial, index and control number. Section 7(2)(a) of the Identification Act provides that 'gender' [*sic*]

92 Sec 36 – the limitation clause in the Constitution that allows for the limitation of rights if it is reasonable and justifiable to do so.

93 *KOS* (n 15) 46 50.

94 *KOS* 50.

must be specified as well. If it is a technological issue, there should be a technological solution thereto. Would there not be a manner in which a person who is transgender and married (who had their marriage solemnised in terms of the Marriage Act) seeking to alter their sex in terms of the Alteration Act would be flagged by the system and not have their marriage dissolved, questioned and become a barrier to a successful application in terms of the Alteration Act? If such a system were in place, there would be no need to engage with the Department of Home Affairs regarding the status of one's marriage in light of the Alteration Act and the Identification Act.

## 7 Conclusion

It is within the ethos of the Constitution that everyone be treated equally in the eyes of the law. The dignity of each person shall be protected and the sanctity of their privacy respected. In embracing a dispensation that protects transgender persons, one must be willing to invoke the spirit of equality. In terms of section 39(1)(a) of the Constitution in interpreting the Bill of Rights a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. This also means recognising means recognising the value and inherent worth of a person's identity – gender or otherwise. Cisgendered persons may take for granted that they can obtain identity documents, open bank accounts, apply for driver's licences, open clothing store accounts and be asked by a designated person for an identity document to confirm their identity. As WJV (who often has to travel out of the country for work) rightly stated, the concerns for a transgender person would be the constant fear of 'what if'? It has been a constant concern to her that the incongruence between her identity documents and her physical presentation might lead to difficulties on her business trips, as is the prospect of being stopped by the local law enforcement authorities and having to explain her situation to strangers who might not accept her account and arrest her.<sup>95</sup> All of the transgender spouses in the *KOS* case laid out in detail the difficulty of navigating ordinary life and how it took a toll on their mental health and threats to their well-being.

The Court in *KOS* upheld the right in terms of section 39(1)(a) of the Constitution. The relief sought by the parties in this case was granted. It was declared, in terms of section 172(1)(a) of the Constitution, that the manner in which the Department of

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95 *KOS* 55.

Home Affairs dealt with the applications by the first, third and fifth applicants under the Alteration Act was conduct inconsistent with the Constitution and unlawful in that it:<sup>96</sup>

- (a) infringed the said applicants' right to administrative justice;
- (b) infringed the said applicants' rights and those of the second, fourth and sixth applicants to equality and human dignity; and
- (c) was inconsistent with the state's obligations in terms of s 7(2) of the Constitution.

The Court further held that applications pursuant to a change in sex/gender under the Alteration Act should not have an effect on a marriage solemnised in terms of the Marriage Act.<sup>97</sup>

While this judgment is to be heralded as a step in the right direction for the rights of sexual and gender minorities, it is the author's opinion that the matter should be considered before the Constitutional Court and the legislature in order to result in substantive change.

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96 *KOS* 90.

97 As above.