

**THE RIGHT TO REMAIN MARRIED: POSITIONING HOMOSEXUAL-
TRANSSEXUAL MARRIAGES UNDER THE SOUTH AFRICAN MARRIAGE ACT 25
OF 1961**

by

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Supervisor:

Dr. K. Chinnian

DECLARATION

I declare that this work: **The right to remain married: Positioning homosexual-transsexual marriages under the South African Marriage Act 25 of 1961** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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Date:



Signed:

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DEDICATION

This thesis is dedicated to my mother, Charmaine Matthyse. As a single parent, coming from a conservative, peri-rural area and Christian background, I know it was not an easy journey raising a child with an overtly different gender expression, identity and sexual orientation to that of the norm. Thank you for believing in me and for supporting me in all my aspirations in life. Your love and support give me the strength to pursue my ambitions in life.



KEYWORDS

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Homosexual

Human Rights

Gender affirmation

Queer Theory

Feminist critique

South Africa



ABSTRACT

THE RIGHT TO REMAIN MARRIED: POSITIONING HOMOSEXUAL- TRANSSEXUAL MARRIAGES UNDER THE SOUTH AFRICAN MARRIAGE ACT 25 OF 1961

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For many, the human rights which South Africa has been able to secure for LGBTI (lesbian, gay, bisexual, transgender and intersex) people has been very progressive. However, with the conflation of sexual orientation and gender identity, the assumption of access to human rights for all within the LGBTI and society at large, has led to transsexual people not being able to claim their rights and assert their existence as human beings effectively within our constitutional democracy.

Currently, there is a vacuum in South Africa's law of marriage based on its inability to accommodate spouses who married as a 'heterosexual' couple but where the one spouse subsequently undergoes gender affirmation, conforming the relationship to what is perceived as 'homosexual'. On account of this, the Department of Home Affairs are subjecting these couples to compulsory or forced divorces by refusing to have the transsexual spouse recognised within his or her affirmed gender on the marriage certificate. This means that the transsexual spouse either remains married under the Marriage Act and is subject to being recognised as his or her birth-sex, or submits to a compulsory or forced divorce in order to be recognised as his or her affirmed sex on a marriage certificate issued under the Civil Union Act upon them 'remarrying'.

This thesis addresses the inequalities and inequities brought about by the Marriage Act. It investigates the history of marriages within South Africa that were prohibited based on characteristics such as race which people have no control over. It looks at how the State, through its departments, has imposed itself on the social relationships people formed subject to its legal terms and conditions. This thesis questions whether the State through its action is acting in a way that is administratively just. It argues that the successfulness of a divorce decree is dependent on at least one party voluntarily applying for it. This presupposes the idea that whenever couples who are validly married are forced or compelled to divorce one

another that this, in fact, cannot be seen as one of the valid ways in which to obtain a divorce decree legally.

Before venturing into the legal aspect concerning this research topic, a theoretical framework will be advanced to position these couples in a greater social context. Subsequently, in order to establish the legal position of these couples, this thesis will draw on the current South African human rights discourse that has been developed by and for the LGBTI community, especially as it relates to the law of marriage. It will also establish the international and foreign human rights discourses that assert or, at least, seek to assert LGBTI human rights broadly. Ultimately, a constitutional analysis will be conducted to establish the position of these couples under the Marriage Act.

11 January 2016



ACRONYMS AND ABBREVIATIONS

ACHPR – African Charter on Human and Peoples Rights

ACmHPR – African Commission on Human and People Rights

Act 49 – Alteration of Sex Description and Sex Status Act 49 of 2003

CAL – Coalition of African Lesbians

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

LGBTI – Lesbian, Gay, Bisexual, Transgender and Intersex

NGO – Non-governmental organisation

UDHR – Universal Declaration of Human Rights

UN – United Nations



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CHAPTER 1: INTRODUCTION AND CONCEPTUAL FRAMEWORK

The disconnect between legal and social understandings of marriage reveals the heterosexual, companionship model as [an] idyllic social myth...¹ The treatment of sexual and gender minorities as second-class citizens, serves as a barrier to accessing constitutionally guaranteed rights and services. In addition, gaps in present legislative and policy responses... further exacerbate such barriers.²

1.1. Introduction

Over the past 20 years of democracy, development in the law of marriage has illustrated the ability of South Africa's democracy to (re)negotiate and advance respect for difference through the amendment and adoption of a myriad of laws governing intimate relationships.³ Regrettably, the law has not been able to fully comprehend the nuanced interplay between sexual orientation and gender identity and thus formulate a constitutional rights discourse for *post facto* same-sex couples. The heteronormative, cisgender and monogamous imagining and practice of intimate human relationships and marriage are insidiously pervasive. Without interrogating this dominant narrative, all other forms of intimate human relationships will continuously be subjected to legal and social marginalisation. This thesis thus focuses on the narrative of couples married under the South African Marriage Act, who due to the gender affirmation of one spouse, now find themselves positioned on the margins of the law based on their actual or legally perceived gender identity and sexual orientation.

¹ Robertson, K.C. 'Penetrating sex and marriage: The progressive potential of addressing bisexuality in Queer Theory' (1998) 75(4) *Denver University Law Journal* 1375.

² Nel, J.A. & Judge, M. 'Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses' (2008) 21(3) *Acta Criminologica* 20; See generally Nel, J.A. 'Towards the "Good Society": Healthcare provision for victims of hate crime from periphery to centre stage' (2007) *Unpublished doctoral thesis*.

³ Prior to *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 sodomy and consensual same-sex sexual acts, both common-law crimes, were criminalised in South Africa. Subsequently, based on the ruling in *Geldenhuys v National Director of Public Prosecutions* 2009 (5) BCLR 435 (CC), the age of consent for same-sex sexual acts were aligned to that of opposite-sex sexual acts within the Sexual Offences Act 23 of 1957 by the Sexual Offences and related matters Amendment Act 32 of 2007. The age of consent now uniformly is set at the age of 16 years; Same-sex marriage was only legalised as of 2006 by promulgation of the Civil Union Act 17 of 2006; See generally Sloth-Nielsen, J. & Van Heerden, B. 'The constitutional family: developments in South African family law jurisprudence under the 1996 Constitution' (2003) 17 *International Journal of Law, Policy and the Family*. In this article the authors discuss the different forms nuclear and extended families take. These would include families with same-sex partners who at times are also same-sex parents, Muslim marriages, customary marriages, amongst others.

1.2. Background to study

South Africa has a history of making arbitrary determinations around whom and what constitutes a lawful marriage.⁴ A glaring example is the prohibition that was placed on interracial marriages.⁵ Despite the advances the country has made in eradicating racial discrimination in the law of marriage, sexual apartheid has suspiciously withstood the test of time under a new regime supposedly committed to democracy and human rights for all. Evidently, non-normative sexualities and gender identities remain a sight of great contestation and struggle.⁶ The legacy inherited from a highly racist, gendered, classist and oppressive regime are still pervasively present in the law.

The hypothesis of this thesis is based on a case study that the Department of Home Affairs (the State) is currently legitimising a change in governing legislation for *post facto* same-sex couples from that of the Marriage Act to the Civil Union Act by way of subjecting the

⁴ Jacobson, C.K., Amoateng, A.Y. & Heaton, T.B. 'Inter-racial marriages in South Africa' (2004) 35(3) *Journal of Comparative Family Studies* 444. The Population Registration Act 30 of 1950 provided the machinery to designate the racial category of every person, but its application also led to the breaking up of homes. Section 1(2) of the Prohibition on Mixed Marriages Act 55 of 1949 put a prohibition on marriages between Europeans and non-Europeans; *W v W* 1976 2 SA 308 (W) is illustrative of how the law is able to undermine transsexual people married to their cisgender partners; See generally South African Law Commission (Project 52) *Report on the investigation into the legal consequences of sexual realignment and related matters* (1995); See generally Vincent, L. & Camminga, C. 'Putting the "T" into South African human rights: transsexuality in the post-apartheid order' (2009) 12 *Sexualities*.

⁵ Loveland, I. *By Due Process in Law? Racial Discrimination and the Right to vote in South Africa 1855 - 1960* (1999) 244; See generally Monsieur Van Den Berghe, P.L. 'Miscegenation in South Africa' (1960) 1(4) *Cahiers d'études africaines*. If a European married a non-European such a marriage was declared void and with no effect. If a person was aware that his or her spouse was not of the same racial grouping as herself or himself then such a person would be guilty of perjury.

⁶ Delpont, C. & Delpont, R. 'I didn't marry the body, I married the person inside' In Judge, M., Manion, A. & De Waal, S. *To have and to hold: The making of same-sex marriages in South Africa* (2008) 335. Christelle Delpont and Raven Delpont got married under the Marriage Act (25 of 1961) in the 1980s as a heterosexual couple when Christelle was still legally deemed to be a male as reflected in the births register. Christelle consequently made it known to her spouse that she wanted to affirm her gender by undergoing gender affirmation. In 2004 after her physical transition, Christelle and Raven were informed that in order for her to legally change her sex description, the two had to first get divorced under the Marriage Act. The couple divorced and Christelle's birth register was amended. As a result they now have to remarry in terms of the Civil Union Act (17 of 2006) because the Marriage Act no longer applies. Consequently, it appears as if prior to 2006, the year the Civil Union Act was passed, and subsequent to 2004, the year in which they got divorced, they had no legal recourse other than to remain a divorced couple who had accepted each other's differences and wished to remain married. The position that Christelle otherwise would have occupied would have been to remain married to her partner Raven under the Marriage Act but subject to her sex description remaining unchanged. Hence, she would have been a female-bodied person with a female gender identity but with a male sex-description on the marriage certificate.

couples to a compulsory or forced divorce, as being driven from the perspective of upholding heterosexuality as a prerequisite under the Marriage Act in practice.⁷ Progressively, the legislature and court have stepped in to remedy the situation for a transsexual person who seeks to marry a cisgender person of the opposite legal sex.⁸ It has however not been as considerate and responsive to the needs of *post facto* same-sex couples.

1.3. Problem statement and the rationale for the research

South Africa has a history of nullifying heterosexual marriages where one spouse is transsexual and legally deemed a person of the opposite sex in relation to their partner.⁹ Currently, there is a vacuum in South African law of marriage as to the constitutional manner in which to govern *post facto* same-sex marriages. The Marriage Act is exclusionary and precludes same-sex couples from marriage in practice.¹⁰

⁷ Legal Resources Centre & Gender Dynamix *Briefing paper: Alteration of Sex Description and Sex Status Act No. 49 of 2003* (2014) 24. In this Briefing paper the stakeholders discuss the notion that there is no legal basis in law currently for subjecting *post facto* same-sex couples to compulsory or forced divorces.

⁸ Van der Merwe, L. 'Press Release: Nadia Swanepoel, transgender woman receives justice' available at http://www.iranti-org.co.za/content/Press_Releases/2014-Nadia-Swanepoel/Transwoman-gets-justice-Nadia-Swanepoel.pdf (accessed 12 October 2014). This matter deals with Nadia Swanepoel being a transgender woman, who was born a male finally being able to marry her cisgender male-born partner under the Marriage Act. After having been denied the right to marry under the South African Marriage Act due to the Department of Home Affairs not having amended her identity document to reflect her female gender and subsequently having had her marriage to her male-partner registered under the Civil Union Act, Nadia finally received justice based on being classified as a heterosexual woman in a heterosexual marriage. Hence, her marriage has been registered as such under the Marriage Act. If the Department of Home Affairs is so stringent in incorporating heterosexual-transsexual couples under the Marriage Act, how much so for homosexual-transsexual couples? Skelton, M. *et al. Family Law in South Africa* (2010) 36. The legislature has seemingly remedied the position of transgender people wanting to marry. This has been done by virtue of the operation of the Alteration of Sex Description and Sex Status Act 49 of 2003. S3(2) of the Act provides that a person will be deemed for all purposes to be a person of the affirmed sex description, once this has been recorded in terms of the Births and Deaths Registration Act 51 of 1992.

⁹ Births, Marriages and Deaths Registration Act 81 of 1963, s7B. According to s7B of this Act, a person could alter his or her sex description retrospectively and would thus be recognised legally as a person of the opposite sex; *See W v W* 1976 2 SA 308 (W). *W v W* set the legal precedent that post-operative transsexual people could not be recognised as members of their affirmed sex for purposes of marriage. It took away the legal effect that s7B could have had in protecting the interests of a transsexual person to a heterosexual marriage.

¹⁰ Bilchitz, D. & Judge, M. 'The Civil Union Act: Messy compromise or giant leap forward?' In Judge, M., Manion, A. & De Waal, S. *To have and to hold: The making of same-sex marriage in South Africa* (2008) 150. The legislature opted to pass the Civil Union Act as a separate piece of legislation governing same-sex 'marriages' and civil partnerships in particular instead of including the word 'spouse' in the marriage formula as encapsulated in the Marriage Act. This would have included same-sex couples and *post facto* same-sex couples under the ambit of the Marriage Act by making it gender neutral.

Section 3(3) of the Alteration of Sex Description and Sex Status Act (Act 49)¹¹ clearly stipulates that no right which accrued to a person before the alteration occurred shall be adversely affected after the alteration. Presumably, and as this thesis argues, this right provides a legal mechanism through which *post facto* same-sex couples can claim their right to remain married if all the legal requirements of a valid marriage were met at the time the marriage was concluded.¹²

1.4. Research question

In utilising the Transgender, Queer and Feminist lenses as tools of analysis, these three questions are foundational to the achievement of the objectives of this thesis:

- i. What is the *de facto* and *de jure* position of *post facto* same-sex marriages in South Africa, particularly as it relates to the Marriage Act?
- ii. To what extent are the rights of *post facto* same-sex couples being compromised as a means to reinforce heteronormativity?
- iii. What is the best way in which to include and protect *post facto* same-sex marriages within the current South African constitutional dispensation, bearing in mind the values and principles of substantive equality, freedom and dignity?

1.5. Conceptual clarification

Language has been used as a powerful weapon in the processes of constituting bodies, constructing identities and how society and the law come to imagine and interact with various sexual and gender identities. Henceforth, how human identities are understood in a complex manner and contextually conceptualised and framed in this thesis is of paramount importance.

1.5.1. Inclusive language

Traditionally, the law has been structured around a binary conceptualisation of sexes and genders. In this thesis a binary construction of human bodies will only be used when

¹¹ Alteration of Sex Description and Sex Status Act 49 of 2003.

¹² Skelton M. *et al. Family Law in South Africa* (2010) 34 - 52. These requirements include the following: The partners should have the necessary capacity to get married, they must voluntarily consent to the marriage, the marriage must be lawful and it must take place in conformity with all the prescribed formalities.

contextually applicable. The construction of transsexual citizenship is predominantly premised on a binary conceptualisation of sex and gender.¹³ However, in the promotion of a more inclusive conceptualisation and framing of human bodies, neutral terms such as ‘they’, ‘their’ and ‘hir’ as opposed to ‘him’ and ‘her’ or ‘he’ and ‘she’ will be used.

1.5.2. *Post facto* same-sex couple

This is a new term formulated for the purpose of this thesis. It is descriptive of couples who initially married under the Marriage Act¹⁴ and were legally deemed to be heterosexual, cisgender and monogamous at the time the marriage was concluded.¹⁵ However, subsequent to the conclusion of the marriage, one of the parties undergo gender affirmation medical procedures to align their sex with their gender identity. Upon completion of the procedures, the transsexual spouse amend their sex-status in the birth register to reflect that of their partner in accordance with the Alteration of Sex Description and Sex Status Act.¹⁶ The effect of such affirmation is that these couples are compelled or forced by the Department of Home Affairs (the State) to divorce when they apply for the amended sex status to be reflected on their marriage certificate. The consequence of not divorcing is that the marriage certificate will continue to reflect the birth-sex of the transsexual spouse which leads to many social and legal difficulties. This brings about many social and legal challenges as the identity document reflects their affirmed sex whilst on the marriage certificate it reflects their birth-sex. However, should they opt to divorce the only option is for them to (re)marry in terms of the Civil Union Act that is particularly designated for same-sex couples.

1.5.3. Compulsory or forced divorce

A compulsory or forced divorce, refers to a divorce forced upon a couple already married under the Marriage Act, by the Department of Home Affairs (the State), based on the fact that one of the spouses is a transsexual person who is in the process of legally affirming his or her

¹³ See Transgender Theory at 2.2.3. and Transgender Citizenship at 2.3.

¹⁴ Marriage Act 25 of 1961.

¹⁵ Whether one or both parties to the marriage in fact identified as heterosexual and/or cisgender at the moment when the marriage was concluded and during its subsistence is beyond the scope of this thesis.

¹⁶ Alteration of Sex Description and Sex Status Act 49 of 2003.

gender in accordance with Act 49.¹⁷ The divorce is compelled or forced in light of a legal alteration of the transsexual spouse's sex on the marriage certificate not being able to be affected unless the couple divorce.

1.5.4. Transgender and transsexual

The term transgender is descriptive of a continuum of gender identities and gender expressions that are incongruent with contextually normative social gender identities and gender expressions associated with the two conventional binary sexes, male and female.¹⁸ Societies have context-specific understandings of what sex identify with which gender and how they express themselves in line with the gender codes it embodies. Dynamically, transgender is an umbrella term that refers to transsexual people, gender non-conforming persons, drag queens and kings as well as androgynous people, to name a few.¹⁹

For the purpose of this thesis, discussions will primarily focus on transsexual identity. Conscious of transgender identity politics, transsexual identity will be critically positioned within the broader transformational and social politics of the transgender discourse.

'Transsexual' is a term used to describe a transgender person as someone who identifies as the conventional opposite sex and who has a strong and persistent need to alter his or her sex to that of the conventional opposite sex.²⁰

Currently, there are some uncertainty as to whether transsexual identity is an indefinite identity-category (even after gender affirmation) or whether it is linked to the specific period from which a person becomes aware of their cross-gender identification to the moment at which gender affirmation has been completed in the form of legal affirmation and surgical

¹⁷ Legal Resources Centre & Gender Dynamix *Briefing paper: Alteration of Sex Description and Sex Status Act No. 49 of 2003* (2014) 24. Gender Dynamix and the Legal Resources Centre uses 'forced divorce' to describe the unwanted State intervention into the continuation of *post facto* same-sex marriages under the Marriage Act.

¹⁸ Morgan, R. *et al. Trans: Transgender life stories from South Africa* (2009) 7.

¹⁹ Morgan, R. *et al. Trans: Transgender life stories from South Africa* (2009) 7; Jobson, G.A. *et al. 'Transgender in Africa: Invisible, inaccessible, ignored?'* (3 September 2012) *Journal of Social Aspects of HIV/Aids* 161; See generally Sausa, I.A., Keatley, J. & Operario, D. 'Perceived risks and benefits of sex work among transgender women: Systematic review and meta-analysis' (2007) 48(1) *Journal of Acquired Immune Deficiency Syndromes*.

²⁰ American Psychiatric Association *Diagnostic and Statistical Manual of mental disorders* 5 ed (2013) 451 – 53.

intervention.²¹ This is an important element to consider in order to understand how the law engage transsexual bodies (*de facto* and *de jure*) for various legal interventions. However, this is a matter outside the scope of this thesis.

1.5.5. Cisgender

The concept ‘cisgender’ is descriptive of a person who is content with the sex assigned to him or her at birth and expresses him or herself in line with the socially prescribed gender norms associated with such sex.²² Being cisgender has no bearing on a person’s sexual orientation.²³ A person can be homosexual, asexual or bisexual yet at the same time be considered cisgender on the basis that they are content with the sex assigned to them at birth and content with identifying and expressing the gender associated typically with that sex.

1.5.6. Gender identity

Before defining the term gender identity, mention needs to be made that this thesis is premised particularly on the assumption that gender is a social construct that differs from context to context and presupposes that gender is not determined by a person’s sex but something that is learned.²⁴ Hence, the term gender identity refers to a particular gender a person affirms and identifies with, irrespective of their sex assigned at birth.²⁵

²¹ Moser, E.C. *A matter of life: When gender doesn’t work – A woman’s view on having been transsexual* (2007) XIII.

²² Johnson, J.R. ‘Cisgender privilege, intersectionality, and the criminalisation of CeCe McDonald: Why intercultural communication needs transgender studies’ (2013) 6(2) *Journal of International and Intercultural Communication* 137; Morgan, R. *et al. Trans: Transgender life stories from South Africa* (2009) 5.

²³ Jobson, G.A. *et al.* ‘Transgender in Africa: Invisible, inaccessible, ignored?’ (3 September 2012) *Journal of Social Aspects of HIV/Aids* 161.

²⁴ American Psychiatric Association *Diagnostic and Statistical Manual of mental disorders* 5 ed (2013) 451; Morgan, R. *et al. Trans: Transgender life stories from South Africa* (2009) 6.

²⁵ See generally Bradford, J.B. *et al. Policy focus: How to gather data on sexual orientation and gender identity in clinical settings* (2012); Jobson, G.A. *et al.* ‘Transgender in Africa: Invisible, inaccessible, ignored?’ (3 September 2012) *Journal of Social Aspects of HIV/Aids* 161. According to Bradford and Jobson, a person’s gender identity is not necessarily a fixity and may change during their lifetime.

1.5.7. Sexuality

Sexuality is the collective term used to describe a person's sexual orientation and sexual practice.²⁶ This means that it is descriptive of who a person is attracted to and the sexual practices that a person engages in. In this context, sexual practice is not necessarily informed by a person's sexual orientation and sexual orientation does not necessarily prescribe a person's sexual practice.

The term 'sexual orientation' describes who a person is physically, romantically, emotionally, intellectually and/or spiritually attracted to.²⁷ Based on these factors a person can be attracted to their own sex and self-identify as and/or be defined as homosexual,²⁸ that of the conventional opposite sex (heterosexual) or an intersex person.²⁹ It is important to note that sexual orientation can be categorised as actual sexual orientation (what a person believe their sexual orientation to be based on the factors above) or perceived sexual orientation (what other external actors belief a person's sexual orientation is based on the same factors above).³⁰

1.5.8. Gender affirmation or sex reassignment

These concepts refer to the process through which a person seeks to align their sex with their gender identity. Such alignment is possible by way of hormonal treatment, surgical intervention and/or legally amending the birth register, with their gender identity.³¹ For the purpose of this thesis, gender affirmation entails the legal affirmation of sex through the

²⁶ Young, R.M. & Meyer, I. 'The trouble with "MsM" and "WsW": Erasure of sexual minority person and public health discourse' (2005) 95(7) *AM J Public Health* available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449332/> (accessed 18 October 2015).

²⁷ Morgan, R. *et al.* *Trans: Transgender life stories from South Africa* (2009) 6.

²⁸ See generally Reddy, V. 'Decriminalisation of homosexuality in post-apartheid South Africa: A brief legal case history review from sodomy to marriage' (2006) 20(67) *Agenda*.

²⁹ The politics of self-identification and being labelled by external parties is complex. *Post-facto* same-sex couples visibilises the many assumptions and determinations the law makes about human bodies based on how it perceives these human bodies. In this case, the rigidly constructed confines of law inadvertently define who people are based on who they choose as a partner and thus prescribe definitive sexual orientations and gender identities to people.

³⁰ Rivers, I. 'Social exclusion, absenteeism and sexual minority youth' (2000) 15(1) *Support for Learning* 13.

³¹ American Psychiatric Association *Diagnostic and Statistical Manual of mental disorders* 5 ed (2013) 451; Newman-Valentine, D. & Duma, S.E. 'Transsexual women's journey towards a heteronormative health care system' (2014) 1(2) *African Journal for Physical, Health Education, Recreation and Dance* 385.

amendment of a person's birth register and marriage certificate in terms of the Alteration of Sex Description and Sex Status Act.³²

1.6. Literature review

The visibility which transgender people now receive comes after a challenging period which saw 'gender identity' and 'sexual orientation' as two mutually exclusive concepts conflated under the latter concept.

Coombs argues that the debate around same-sex marriage have wrongfully ignored transgender people.³³ The author rebuts the assumption that same-sex marriage is just about being gay or lesbian. Vincent and Camminga argue that 'sexual orientation' usurped 'gender identity' as a separate rights-discourse in an early post-1994 era.³⁴ This study agrees with the assertions of these authors due to the uncertain legal position *post facto* same-sex couples married under the Marriage Act now finds themselves in. With the passing of the Civil Union Act governing same-sex couples particularly and the effect of the Marriage Act still exclusively governing opposite-sex couples, it would mean that purposefully *post facto* same-sex couples must be regulated *prima facie* by the Civil Union Act, despite having been legally and validly married under the Marriage Act.³⁵

In seeking to establish where *post facto* same-sex couples may position themselves under South African marriage law, this thesis will provide a clear legal outline as to the requirements, content and consequences of concluding a valid civil marriage under the Marriage Act.³⁶ It also provides insight as to the circumstances under which a marriage is void or voidable and the consequences that are incidental thereto. Transgender case law will be cited, which provide an understanding as to the historical discourse which existed under

³² Alteration of Sex Description and Sex Status Act 49 of 2003.

³³ Coombs, M. 'Sexual dis-orientation: transgender people and same-sex marriages' (1998) 8 *UCLA Women's Law Journal* 219.

³⁴ Vincent, L. & Camminga, C. 'Putting the "T" into South African human rights: transsexuality in the post-apartheid order' (2009)12 *Sexualities* 692.

³⁵ Ntlama, N. 'A brief overview of the Civil Union Act' (2010) 13(1) *PER/PELJ* 191.

³⁶ Cronje, D. & Heaton, J. *South African family law* 3 ed (2010) 44 - 63.

apartheid as well as the contemporary discourse under our democratic dispensation.³⁷ The South African Law Commission's *Report on the investigation into the legal consequences of sexual realignment and related matters* illustrates how the state viewed transgender bodies at the dawn of democracy.³⁸ Citizenship is a fundamental concept that may encapsulate the experience of a person to participate in the life of a nation and be valued for whom they are (their bodies, their sexuality, their gender identity, their sexual orientation) in light of the laws and rights which makes this possible or not.³⁹ Seidman, Evans and Monro thus elaborates on the impact of social and political power reflected in the level of 'citizenship' that accrues to transgender people.

Ultimately, this thesis argues that excluding *post facto* same-sex couples from the Marriage Act where this was the Act which they initially married under is unconstitutional. It will illustrate how people who are different to the social norm reflected at a secular level in terms of the Marriage Act are overtly relegated to second-class citizens due their inclusion under the Marriage Act when they are considered heterosexual and cisgender⁴⁰ but exclusion when this ceases to be the case. The scholarship will thus expose a material reality in South Africa that homosexual-transgender (transsexual) bodies are currently deemed of lesser value than heterosexual-cisgender bodies.

1.7. Research methodology

This thesis will consist of a critical qualitative desktop-based research method. This method of research finds relevance in the fact that the study will be exploring the legal landscape on 'marriage' and the effect it has on the lives and experiences of people who are considered to be *post facto* same-sex couples under the Marriage Act. Primary sources consisting of a documented case study, case law, statutes and other legal documents will be analysed in light of how the law has been constructed to reinforce hierarchies of sexual and gender identities.

³⁷ See generally *W v W* 1976 (2) SA 308 (W); See generally *Sims v Sims* 1981 (4) SA 186 (D); See generally *Corbett v Corbett* [1970] 2 All E.R. 33 (Divorce Ct.).

³⁸ South African Law Commission (Project 52) *Report on the investigation into the legal consequences of sexual realignment and related matters* (1995).

³⁹ Hames, M. 'Women's rights, citizenship and ten years of democracy in South Africa' (2006) 27(7) *Third World Quarterly* 1313.

⁴⁰ Morgan, R. *et al.* (2009) 5. A 'cisgender' person is described as a person whose gender identity is congruent with the sex they have been assigned at birth.

A contextual analysis will be undertaken to evaluate the rationale for possible exclusion from or inclusion of *post facto* same-sex couples under the Marriage Act. In locating *post facto* same-sex couples within the ambit of the Marriage Act, secondary sources such as journal articles, books, reports, foreign law and international instruments will also be used. These documents are accessible through the library, websites and non-governmental organisations. They will be used to establish the development of an existing transgender discourse in South Africa. A content analysis will be done after collecting all the relevant secondary sources.⁴¹

In doing the content analysis, this study will need to find and interpret patterns of overt and implied discrimination and prejudice and consequently classify these patterns. The patterns or trends will need to be analysed in their historical context, in the application of the legal historical method, as well as in their contemporary context in order to draw a conclusion on the type of development, if any, that occurred.⁴² An important element to the analytical process would be being conscious of the lens through which this analysis will be done. The research and sources will be analysed through a Transgender, Queer and Feminist lens. Using these lenses draws one's attention to the problematic relationship which exists between sex, gender, sexuality and by extension the law.⁴³ This lens is useful in advocating for the dismantling of existing social norms and structures in order to serve larger goals of empowerment, equity, equality, inclusion and transformation.

As researcher and gender non-conforming person (an identity that is broadly categorised under the term 'transgender') I am caught in the binarism of being both insider and outsider in this research study. Chmielewski and Yost positions 'insider' research as an approach to qualitative research where investigation regarding a particular phenomenon is undertaken in a manner through which the investigator studies himself, people like him, his family as well as community.⁴⁴ Although insider status may potentially influence the research process it

⁴¹ Flick, U. *et al.* *A Companion to qualitative research* (2004) 266. Accordingly, this book provides that the goal of the content analysis method of research is to examine certain material.

⁴² Du Plessis 'A self help guide: Research methodology and dissertation writing' (2007) 30 available at http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/pfl/documents/Du_Plessis_Research_Methodology_FINAL.pdf (accessed 26 November 2014). The legal historical method in the process of affecting law reform by assessing the historical legal developments within a particular discourse and within legal institutions.

⁴³ Fineman, M. 'Introduction: feminist and queer legal theory' available at <http://www.ashgate.com/pdf/...Feminist-and-Queer-Legal-Theory-Intro.pdf> (accessed 29 January 2013).

⁴⁴ Wilkinson, S. & Kitinger, C. 'Representing our own experiences: Issues in "Insider" research' (2013) 37(2)

challenges the claim that only sensitised outsider researchers can discover the ‘objective’ reality(ies) of other cultures and groups.⁴⁵ The advantage of being insider is that one has a deeper understanding of the history of the institution, culture and interplay between people.⁴⁶

This thesis is premised on what Wilkinson and Kitzinger terms ‘[my] priori intimate knowledge’ of the transgender people I work with in addition to my own personal experience.⁴⁷ Through the different roles I fulfil, I am aware of the shifting status of insider/outsider from moment to moment.⁴⁸ As a transgender (gender non-conforming) identifying person I am automatically an insider. However, as a researcher and someone who has not experienced the bureaucracy and indignity that *post facto* same-sex couples endure, I occupy a space at a relative distance and power to their lived realities. Hence, I would be positioned what Grant describes as a ‘central’ outsider.⁴⁹

1.8. Delimitation of study

The nature of the research topic is limited by the myriad of tensions, contradictions, paradoxes, ironies and ambiguities that arise when, as Audre Lorde argues, one tries to dismantle the master’s house with the master’s tools.⁵⁰ Hence, this study is limited in various

Psychology Women Quarterly 251; See generally Chmielewski, J.F. & Yost, M.R. ‘Psychosocial influences in bisexual women’s body image: Negotiating gender and sexuality’ (2013) 37 *Psychology of Women Quarterly*.

⁴⁵ Wilkinson, S. & Kitzinger, C. ‘Representing our own experiences: Issues in “Insider” research’ (2013) 37(2) *Psychology Women Quarterly* 251; See generally Hockey, J. ‘Research methods: Researching peers and familiar settings’ (1993) *Research Papers in Education*; See generally Lewis, D.K. ‘Anthropology and colonialism’ (1973) 14 *Current Anthropology*.

⁴⁶ Hanson, J. ‘Educational development as researchers: The construction of insider research to enhancing understanding of role, identity and practice’ (2013) 50(4) *Innovation in Education and Teaching International* 391.

⁴⁷ Wilkinson, S. & Kitzinger, C. ‘Representing our own experiences: Issues in “Insider” research’ (2013) 37(2) *Psychology Women Quarterly* 251.

⁴⁸ Wilkinson, S. & Kitzinger, C. ‘Representing our own experiences: Issues in “Insider” research’ (2013) 37(2) *Psychology Women Quarterly* 252; See generally Kitzinger, J. & Kitzinger, C. ‘The “window in opportunity” for death after severe brain injury: Family experiences’ (2012) *Sociology of Health & Illness* available at <http://www.doi:10.1111/1467-9566.12020>. [accessed on 7 January 2016].

⁴⁹ Hanson, J. ‘Educational development as researchers: The construction of insider research to enhancing understanding of role, identity and practice’ (2013) 50(4) *Innovation in Education and Teaching International* 391; See generally Grant, B.M. ‘The mourning after: Academic development in time of doubt’ (2007) *International Journal for Academic Development*.

⁵⁰ Lorde, A. ‘The master’s tools will never dismantle the master’s house’ In Lorde, A. *Sister Outsider: Essays and speeches* (1984) 110.

ways based on legal advocacy that seeks to achieve immediate short term relief for *post facto* same-sex couples as well as aligning this study to a broader transformative politic in the law of marriage long term.

For many couples, marriage, especially marriage in terms of the Marriage Act is an oppressive institution that should be problematised and dismantled. In acknowledging the importance of advocating for radical transformation in law, this thesis will be limited to arguing for the continued legal inclusion of *post facto* same-sex couples under the protection of the Marriage Act. Hence, the study is centred around the seemingly discriminatory application of the Marriage Act in light of the non-normative sexual orientations and gender identities of couples.

The focus of the study is not to establish a justification as to why *post facto* same-sex couples should be governed by the Civil Union Act when they got married under the Marriage Act. The purpose of the study is to highlight the discrimination couples face under the Marriage Act based on their homosexual sexual orientation and transsexual gender identity which subjects them to unnecessary and undue uncertainty, bureaucracy and instability.

Consequently, the aim is also not to deconstruct ‘gender’ and ‘gender identity’ in proving their fluidity to the point of disempowering transsexual people who wish to switch between the two separate and essentialised genders.⁵¹ However, this thesis does critically place essentialist transsexual identity politics within broader fluid transgender politics.

1.9. Chapter outline

This thesis consists of five chapters. Chapter 1 introduces the topic and provides insight into the research problem and research methodology premised on a case study and socio-legal background that is situated within the delimitation of the study. This chapter also provides clarification of complex concepts foundational to this study alongside the literature review.

⁵¹ Nagoshi, J.L. & Brzuzy, S. ‘Transgender theory: Embodying research and practice’ (2010) 25 *Affilia: Journal of Women and Social Work* 431. Previously essentialist approaches have emphasised that social identities are fixed within a person. However, feminist and queer theories locate social identities in between the conflict that exist between social determinants and that which is determined by the self. Hence, the degree and manner in which ‘gender’ should be deconstructed remains a much contested matter within both Feminist Theory and Queer Theory.

Chapter 2 situates the research problem within a broader theoretical framework. Queer Theory and Transgender Theory will be predominantly employed to articulate the disjuncture between the law, sexuality and gender identity. Feminist critique will be drawn upon to strengthen theoretical arguments presented by Queer Theory and Transgender Theory as they relate to non-normative sexualities and gender identities being continued casualties at the instance of patriarchy and heteronormativity.

Chapter 3 provides an overview of the international legal instruments, international law and regional law that are applicable to shaping a LGBTI human rights discourse in South Africa, particularly as they relate to protecting *post facto* same-sex marriages.

Chapter 4 engages the research topic within its historical context in South Africa and linking it to other forms of marginality, particular that of the prohibition of mixed race marriages during the years of apartheid. In focusing on constitutional imperatives and progressive legislation, an argument for the right of *post facto* same-sex couples is enunciated. This chapter also provides insight as to how flexible the law has been in granting couples access to marriage outside of the heteronormative cisgender status *quo*.

Chapter 5 concludes this thesis by way of making recommendations premised on reimagining the law of marriage to be more flexible in its scope and application as a means to steer clear from subjecting *post-facto* same-sex couples, on account of their actual or perceived sexual orientation and gender identity, to overt and implied legal discrimination.

CHAPTER 2: THEORISING GENDER IDENTITY AND SEXUAL ORIENTATION IN SOUTH AFRICAN LAW

2.1. Introduction

‘Inequality is an outcome of particular social phenomena... [and] of an ideology that consists of a study of ideas and a rationalisation for dominance.’¹ According to Karl Marx, the dominant ideas of an epoch are the ideas of the ruling class, which in principle and reality is still true today.² These dominant ideas form the building blocks of the ruling culture which encourage people to think, act and believe in particular ways.³ Currently, because of its constructed compulsory nature, heterosexuality and being cisgender is the dominant sexual orientation and gender identity most people affirm.⁴

A direct consequence of the operation of the politics of domination is that some groups occupy more superior social positions at the expense of others occupying more inferior positions. In addressing sexuality, Foucault asked: ‘What is at stake when constructing sexuality at different historical moments?’ He also questions how power circulates through the production of knowledge about sex?⁵ The context in which he asked this question was based on his argument that knowledge about something in a particular discourse is bound up with power.⁶ This questions and problematises the production of heteronormativity and cisgender as the only knowable truth about human existence.

¹ Kirsh, M.H. *Queer Theory and Social Change* (2000) 40. According to the author inequality in this context ‘can be defined or asserted, analysed or deconstructed’. However, a discussion of its presence or absence plays out at the ideological level in relation to current social relations; See generally Therborn, G. *The ideology of power and the power of ideology* (1980). Therborn argues that ideology is not merely a social foundation but that ‘ideas’ have expressions that have political implications.

² Marx, K. *Writings of the Young Marx on philosophy and society* ed (1967) 438.

³ Clifford, G. *The interpretations of cultures* (1973) 33. ‘Culture’ is defined in terms of theory as the way in which people find meaning in their surroundings; Kirsh, M.H. *Queer Theory and Social Change* (2000) 45. In relation to a shared system, ‘culture’ refers to the set behaviour and norms that people adhere to on an everyday-basis. It also commodifies things and gives them social meanings in order to define experiences.

⁴ Rich, A, ‘Compulsory heterosexuality and lesbian existence’ In Jackson, S. & Scott, S. *Feminism and Sexuality: A reader* (1996) 130 – 41.

⁵ Spargo, T. *Postmodern encounters: Foucault and queer theory* (2000) 16.

⁶ Spargo, T. *Postmodern encounters: Foucault and queer theory* (2000) 16.

Heteronormativity as a system of domination can be defined as a system that is premised on cultural, legal and institutional practices that maintain normative assumptions about gender, sex and sexual attractions.⁷ It presupposes that gender is associated with a person's biological sex, which is typically narrowed down to female and male, and can therefore only be performed in one of two ways, namely femininity and masculinity. Consequently, with women needing to perform femininity and men performing masculinity, heteronormativity prescribes that the two be mutually attracted to one another as a natural feature. In this case compulsory heterosexuality and being cisgender relies on structures, institutions and social organisations such as religion, culture and the law for its maintenance through constant uninterrupted reinforcement.⁸

In locating *post facto* same-sex couples under the South African Marriage Act, a deconstruction of heterosexual-cisgender legal privilege will be embarked upon in order to illustrate the adverse legal position which this demographic currently occupies informed by the associated social inequality. This chapter will seek to illustrate that homosexual people who identify as transgender (and specifically transsexual) have unique voices derived from systematic discrimination which they continuously are exposed to.⁹ These narratives thus enables the law to listen and respond to the challenges of these demographics of people.

In response to difference, this chapter focuses on Queer Theory, Transgender Theory and Feminist critique as a means to understand the exclusion of *post facto* same-sex couples from the Marriage Act. These theories will be synthesised to advance a theoretical framework that seeks to promote the inclusion of *post facto* same-sex couples under the Marriage Act for

⁷ Kitzinger, C. 'Heteronormativity in action: Reproducing the heterosexual nuclear family in after-hours medical calls' (2005) 52(4) *Social Problems* 477 - 98; Kristen, S. & Westbrook, C. 'Doing gender, doing heteronormativity' (August 2009) *Gender & Society* 441.

⁸ Rich, A. 'Compulsory heterosexuality and lesbian existence' (Summer 1980) 6 *Sign: Journal of Women in Culture and Society* 633 & 48. Institutions of heterosexuality are the 'benchhead' of male dominance and oppress everything and anyone that is not male and masculine. [Cisgender heterosexual] men have particular power over everything and everyone that does not embody this. '...the failure to examine heterosexuality [patriarchy and cisgenderism] as institutions is like failing to admit that the economic system called capitalism or the caste system of racism is maintained by a variety of factors, including both physical violence and false consciousness.'

⁹ See generally Gender Dynamix and Legal Resource Centre *Briefing paper: Alteration of Sex Description and Sex Status Act, No.49 of 2003* (2013). The Briefing paper identifies various challenges that the transgender community experience within South Africa. Amongst others, these include, denial of access to health care, bureaucracy in amending identity documents to reflect their affirmed 'sex', being subjected to 'forced' or 'compulsory' divorces (the subject of this thesis); and experiencing depression, discrimination and financial constraints.

continued legal protection by challenging sexual and gender inequality, constructs of normality and gender binaries. They are instrumental in explaining and rationalising the inherent oppressive position occupied by *post facto* same-sex couples within the law of marriage.

2.2. An inconvenient reality: Theorising the intersectional dilemma of *post facto* same-sex couples

LGBTI peoples' experiences of society and the law are very specific. Their adverse realities, narratives and politics are often overlooked or ignored in order to address different forms of marginalisation and oppression considered to be more important. These would include racism, sexism and classism that are arguably a more 'comfortable' politic to engage in as opposed to the politics of sexuality and gender. Queer Theory, Feminist critique and Transgender Theory exposes this discomfort whilst simultaneously calling upon structures such as the law to account for the lack of recognition and protections afforded to LGBTI people.

2.2.1. Queer theory: Challenging the 'normal'

The word 'queer' can be used in one of two ways. It can be used either as a noun or adjective and in both ways it is in response to what is considered 'normal' or 'normalising'.¹⁰ According to a Foucauldian discourse analysis,¹¹ Queer Theory is a collection of intellectual engagements that critically describe a diverse range of critical practices and priorities in lieu

¹⁰ See generally Foucault, M. *The history of sexuality: An introduction* (1990); Spargo, T. *Postmodern encounters: Foucault and queer theory* (2000) 8; Butler, J. *Bodies that matter: On the discursive limits of sex* (1993) 228. Butler provides that the term 'queer' should be a site of 'collective' contestation that ensures that it itself can expand for political purposes; Halperin, D.M. *Saint Foucault: Towards a gay hagiography* (1995) 79. Halperin in turn defines 'queer' as an essence(less) identity without a given condition but filled with endless possibility. It puts up a resistance to social norms (the status *quo*) in order to positively construct different ways of life.

¹¹ Spargo, T. *Postmodern encounters: Foucault and queer theory* (2000) 7. A Foucauldian discourse analysis is premised on the theories of Michel Foucault around social power relations. Michel Foucault was a gay identifying philosopher, historian and activist. His influential intellectual work was generally categorised as poststructuralist. The predominant focus of his work was about knowledge and power which has formed a paradoxically destabilising foundation for recent work on the human [subject].

of the relations between sex, gender and sexual orientation.¹² McRuar describes ‘queer’ as a critical perversion that has the ability to form unexpected alliances, giving voice to those whom the current heteronormative and cisgender culture seeks to silence.¹³

In academic realms, Queer Theory has developed as a course of inquiry within the past two and a half decades.¹⁴ The focus of the theory has loosely been directed at illustrating the ways in which traditional disciplinary expositions have failed to do justice to queer populations.¹⁵ Queer Theory seeks to place the question of sexuality as the centre concern and as the key category through which other social, political, and cultural phenomena are to be understood.¹⁶ These phenomena would be inclusive of the law. As a postmodern and post-structural theory, it focuses on the rejection of all categorisations in that they are limiting because they have been labelled by dominant power structures.¹⁷

As a category ‘queer’ is always in the process of formation with a definitional indeterminacy that dramatises the incoherency in the alleged stable relations between chromosomal sex,



¹² Spargo, T. *Postmodern encounters: Foucault and queer theory* (2000) 9 - 10. These critical practices and priorities include various readings about same-sex desire and how these are represented in literary texts, films, music, images. It also includes an analysis about the social and political power relations encapsulated by sexuality. It critiques the sex-gender system and studies transsexual and transgender identification, sadomasochism and transgressive desires.

¹³ McRuer, R. *The queer renaissance: Contemporary American literature and the reinvention of lesbian and gay identities* (1997) 5.

¹⁴ Kirsh, M.H. *Queer Theory and Social Change* (2000) 32. Writings have been particularly focussed on social sciences with the aim of addressing the medical canon eventually in light of specifically addressing the reinterpretation of various assumed concepts.

¹⁵ Kirsh, M.H. *Queer Theory and Social Change* (2000) 32. Teresa de Laurentis first used this term in 1989; Hogan, S. & Hudson, L. *Completely Queer: Gay and Lesbian Encyclopedia* (1998) 491. Teresa de Laurentis used the term at a conference in 1989 in the context of questioning the meaning assumed in the binary definitions of sexuality; See generally Sedgwick, E.K. *Between Men* (1985); See generally Sedgwick, E.K. *Epistemology of the closet* (1990).

¹⁶ Edgar, A. & Sedgwick, P. Key concepts in cultural theory (1999) 321.

¹⁷ Kirsh, M.H. *Queer Theory and Social Change* (2000) 33; Namaste, K. ‘The politics of inside/out: Queer theory, poststructuralism, and a sociological approach to sexuality’ (July 1994) 12 (2) *Sociological Theory* 220. ‘Poststructuralism’ is typically associated with the French philosophers Foucault and Derrida in relation to the interpretation of ‘the self’ and ‘the social’ in light of breaking traditional epistemologies. It shifts away from the autonomous individual being the creators of themselves and their social worlds. It highlights the power of complex networks of social relations.

gender and sexual desire.¹⁸ Hence, Queer Theory proposes that the traditional ‘heterosexual/homosexual’ dichotomy be abandoned in order for the emergence of more ways of describing and analysing sex and gender.¹⁹ This latter point has particular relevance for this thesis as it problematises the current legal dichotomy between homosexuality and heterosexuality that essentialises sexuality to the detriment of recognising and protecting sexual and gender differences in a more complex and nuanced fashion.

Queer Theory will be used in this thesis as a means to deconstruct the institute of marriage as it is known under the Marriage Act as the constructed ‘normal’ or ‘normalising’ institution. It will focus on such deconstruction in as far as it seeks to exclude *post facto* same-sex couples from legal protection. For the purpose of this thesis, claiming inclusion and protection under the Marriage Act does not mean that *post facto* same-sex couples seek to uphold the hetero-patriarchal status *quo* of marriage. In relation to radical transformation, it can be seen as a means to effectively dramatise the incoherency in the ‘alleged’ stable relations between chromosomal sex, gender and sexual desire. Due to this, *post facto* same-sex couples are positioned as key in dismantling and radically transforming the traditional understanding of marriage as protected by the Marriage Act as the socially superior institution protecting families. In line with challenging the traditional ‘heterosexual/homosexual’ dichotomy, *post facto* same-sex couples blur the space of ‘normality’ because it exposes the incoherency of attaching value to certain relationships over and above ‘Others’. The need for the structural and social exclusion of *post facto* same-sex couples from the Marriage Act illustrates the shift of the couple from being perceived as ‘normal’ to an ‘abnormal’.

¹⁸ See generally Jagose, A. *Queer Theory: An introduction* (1998) 23. Queer theory is always inflected by a sense of potentiality that cannot quite articulate; See generally Halperin, D.M. *Saint Foucault: Towards a gay hagiography* (1995).

¹⁹ Kirsh, M.H. *Queer Theory and Social Change* (2000) 34. Queer Theory is also different from Gay and Lesbian politics because by asserting ‘gay’ and ‘lesbian’ categories as subjects automatically erases everyone who do not perfectly match.

2.2.2. Feminist critique: Understanding equality

Feminist legal theory was initiated in the context of the limitation which laws and theoretical constructs that were created by men, placed upon women.²⁰ According to Sylvia: ‘Early feminist approaches to law and legal reform were derived from the civil rights movement and race relations.’²¹ Amongst the many types of feminism, all of them ask a central question: ‘how to understand gender from a critical and equality-driven perspective.’²² The focus of the equality project in feminism is that of achieving both formal as well as substantive equality.²³ This thesis links the struggles of transgender people to feminism through Spade’s correct assertion that being ‘transgender’ has more to do with a person’s gender (and sense of gender identity) than with a person’s sexuality.²⁴

South Africa, like other parts of the world, is governed by politics of domination in which one party must be superior at the expense of the inferiority of ‘the Other’ in the context of systematic dehumanisation.²⁵ The principle of challenging domination from an empowering position based on social oppression is derived from feminism. Feminism has been at the vanguard of challenging male social dominance. The rationale being that due to the polarisation of two sexes, male and female, that the social subordination of women as a group were natural on account of their purported physical inferiority, fragility and vulnerability

²⁰ Menkel-Meadow, C. ‘Feminist Legal Theory, Critical legal studies and legal education or ‘The Fem Crits go to law school’ (1988) 38 *Journal of Legal Education* 71; See generally Sylvia, A. ‘Law, Rethinking Sex and the Constitution’ (1984) 132(5) *University of Pennsylvania Law Review*. In the United States of America women at the time sought equality as well as ‘equal protection’ under the Fourteenth Amendment. However, the Supreme Court interpreted ‘equality’ in a way that did not always result in equal treatment of women. This was the case as it used the ‘equality’ principle in a way that did not take into account the differences between men and women. Its failure to treat pregnancy as a sex discrimination problem signalled a great example of how formal equality may exist but how hollow it can be in practice and reality.

²¹ Sylvia, A. *Law, Rethinking Sex and the Constitution* (1984) 132.

²² Fineman, M. “Introduction: Feminism and Queer Legal Theory” In Fineman, M. *Feminism and Queer Legal Theory: Intimate Encounters, uncomfortable conversations* (2009) 197.

²³ Craig, E. ‘Converging feminist and queer legal theories’ (2010) 28(1) *Windsor Year Book* 213. .

²⁴ See generally Spade, D. ‘Resisting medicine, re/modelling gender’ (2003) 15 *Berkeley Women’s Law Journal*.

²⁵ Marx, K. *Writings of the Young Marx on philosophy and society* ed (1967) 438; Nagoshi, J.L. & Brzuzy, S. ‘Transgender theory: Embodying research and practice’ (2010) 25(4) *Affilia: Journal of Women and Social Work* 433.

when compared to men.²⁶ However, the ideological differences regarding the destabilisation of the gender binary, which was instrumental in affirming women as different and a foundational principle in the arguments for formal and substantive gender equality between men and women, ultimately polarised feminism.²⁷ A feminist critique, therefore, gets its point of departure from the experiential point of view of the people and groups in society that are oppressed, dominated and devalued.²⁸ Hence, Feminist critique argues that the previously devalued be revalued.²⁹ In line with this essentialist argument, the same principles would apply in transgender people challenging cisgender domination and homosexual people challenging heterosexual domination based on their differences informing their right to access formal and substantive equality. In this way, feminism provides a promise of social and legal reconstruction for transsexual people informed by conceptual construction coupled with experience.³⁰

Traditionally 'gender' is assumed to be based on a mandatory binary system that fills a person's physically sexed body with social characteristics.³¹ Post-structural feminism challenges this fixed binary conception of gender identity by providing that such an

²⁶ Hooks, B. "Understanding patriarchy" available at <http://www.imaginenoborders.org/pdf/zines/UnderstandingPatriarchy.pdf> accessed (1 November 2015); Hooks, B. *Feminist theory: From margin to centre* 2ed. (2000) 11 – 4.

²⁷ Nagoshi, J.L. & Brzuzy, S. 'Transgender theory: Embodying research and practice' (2010) 25(4) *Affilia: Journal of Women and Social Work* 433.

²⁸ Menkel-Meadow, C. 'Feminist Legal Theory, Critical legal studies and legal education or 'The Fem Crits go to law school' (1988) 38 *Journal of Legal Education* 61.

²⁹ Menkel-Meadow, C. 'Feminist Legal Theory, Critical legal studies and legal education or 'The Fem Crits go to law school' (1988) 38 *Journal of Legal Education* 61.

³⁰ See generally Held, V. 'Feminism and Epistemology: Recent work on the connection between gender and knowledge' (1985) 14 *Philosophy and Public Affairs*.

³¹ Nagoshi, J.L. & Brzuzy, S. 'Transgender theory: Embodying research and practice' (2010) 25(4) *Affilia: Journal of Women and Social Work* 433. In terms of an essentialist understanding of gender this would presuppose that if a person is born a male that he takes on a masculine gender and be sexually attracted to women and if born a female that she takes on a feminine gender and be sexually attracted to men; See generally Connell, R.W. *Gender: A short introduction* (2002). An essentialist understanding of gender therefore perpetuates the stereotype that all people are cisgender and heterosexual and negates the fact that many people identify as being transgender and/or homosexual. In upholding the traditional understanding of gender and sex, the so-called status quo, society makes use of both positive and negative reinforcement mechanisms such as the law, religion and culture. See generally Hausman, B.L. 'Recent transgender theory' (2001) 27 *Feminist Studies*.

essentialist view omits to address the intersectional issues that make up a person's identity.³² Butler, a post-structuralist feminist critic of gender, argues that 'the materiality of the body was "already gendered, already constructed", such that the supposed physical basis of the gender binary was a socially derived construction of reality.'³³ This argument presupposes the idea that a person's sense of identity and by extension gender is fixed to a certain extent due to the physicality of the body. Here, Butler's argument is not absolute but provides for the appreciation of transsexual persons who identifies strongly with the gender typically associated with the opposite sex in the binary construction and understanding of gender and sex.

Feminist scholars have addressed 'gender' from various perspectives and have defined it in numerous contexts. These perspectives and definitions include 'gender' being a mere attribute of a person, to it being a form of social organisation as well as it being an ideology that informs sex-roles, power differentials and analytical categories.³⁴ Harding argues that 'gender' is an important part in the process of how people are identifiable by others, how relationships are organised as well as how meaning is developed through certain natural and social events.³⁵ Hence, if the complexities of transgender existence are actively omitted from law-making processes and laws, it would mean that their existence would continuously be subjected to questioning which makes it challenging for them to be legally recognisable. In turn, it makes it challenging to build meaningful relationships and organise themselves in a manner that will acquire meaning within the formal legal framework for the purpose of social transformation.

According to Hausman 'gender' is an 'epistemology' for knowing and understanding how cultures define identities in relation to social construction informing people's perception and experiences of the world and their supposed sense of belonging to one gender category or the

³² Nagoshi, J.L. & Bruzuzy, S. 'Transgender theory: Embodying research and practice' (2010) 25(4) *Affilia: Journal of Women and Social Work* 433.

³³ Butler, J. *Bodies that matter: On the discursive limits of "sex"* (1993) xi.

³⁴ Hawkesworth, M. 'Gender as an analytical category' In Hawkesworth, M. ed *Feminist inquiry: From political conviction to methodological innovation* (2006) 6 & 12.

³⁵ See generally Harding, S. *The science question in feminism* (1986).

other.³⁶ If a transgender understanding of gender is excluded what we know about gender is limited and how the legal system offers protection to transgender people is strained.

In light of the equality argument that feminism presents, an altered equality argument relating to sexual orientation and gender identity may be ‘what is needed to achieve formal and substantive equality for *post facto* same-sex couples in a system such as marriage law that promotes heterosexuality and cisgenderism as being a more legitimate way of founding a family’? The equality argument in feminism brings to the fore key indicators such as systematic dehumanisation, systematic devaluing of people, social oppression and the polarisation of sexes that belies the politics of domination. Together these trample over the rights of *post facto* same-sex couples much like it does in relation to women. In the context of *post facto* same-sex couples the question then becomes, how can a demographic such as *post facto* same-sex couples, who have previously been devalued along the lines of both sexual orientation and gender identity, be revalued under a system of marriage law, specifically the Marriage Act, in light of the overarching right of these couples to access equality?

2.2.3. Transgender Theory: Dismantling binaries

The term ‘transgender’ is broadly seen as an umbrella term that encapsulates various forms of non-normative gender identities and expressions.³⁷ By its very nature, Transgender Theory premised on transgender lived experiences challenges the heteronormative assumptions

³⁶ Hausman, B.L. ‘Recent transgender theory’ (2001)27 *Feminist Studies* 473; See Stryker, S. ‘My words to Victor Frankenstein above the village of Chamounix: Performing transgender rage’ *GLQ: A Journal of Lesbian and Gay Studies* (1994).

³⁷ Tanis, J. *Transgendered theology ministry and communities of faith* (2003) 18. Tanis defines ‘transgender(ed) people’ as people who do not comfortably fit into the traditional social understandings of sex and gender; See generally Stryker, S. ‘My words to Victor Frankenstein above the village of Chamounix: Performing transgender rage (1994) 1 *GLQ: Journal of Gay and Lesbian Studies*; See generally Roen, K. ‘Transgender theory and embodiment’ (2001) 10(3) *Journal of Gender Studies*; See Morgan, R. *et al. Transgender life stories from South Africa* (2009) 5 - 7; See generally Green, J. *Becoming a visible man* (2004). This article defines ‘transgender’ as a term that describes the breaking up of gender roles and gender identity and/or going across the boundaries as it is known from one gender to another; Hird, M.J. ‘For a sociology of transsexualism’ *Sociology* (2002) 36. ‘Transgender’ people typically express themselves outside of the conventional heteronormative mould and may at times seek sex-reassignment or gender-affirmation surgery and/or hormone treatment. The various identities and expressions encapsulated by this term include transsexuality, cross-dressing, dragging, and currently the much contested identity and expression of ‘gender non-conforming’.

which exist in relation to gender, sexuality and identity.³⁸ It is defined as a theoretical orientation that encompasses the different and unique experiences of transgender people as a group.³⁹ It challenges the essentialist approaches to gender and gender identification that argues that these two concepts are fixed within a person by breaking set gender roles through emphasising the fluidity of gender, gender identification and expression which exist and are embodied.⁴⁰

For Transgender Theory, having a fixed or essential understanding of a person's social identity without taking into account social construction, self-construction and a person's lived experiences would amount to validating and justifying that class, race, sex and other differences are natural.⁴¹ However, this does not mean that Transgender Theory seeks to invalidate modes of identification between the traditional binary sexes of male and female by proposing that gender is an artificial phenomenon.⁴² The importance of not being dismissive of gender identification also being informed by biology is derived from the experiences of transsexual people, on the transgender continuum, who experience innate cross-gender

³⁸ Nagoshi, J.L. & Brzuzy, S. 'Transgender theory: Embodying research and practice' (2010) 25(4) *Affilia: Journal of Women and Social Work* 432. Transgender theory addresses these assumptions much more comprehensively than what Feminist Theory with its essentialist view and Queer Theory with its social constructivist view is doing. However, there is an essentialist element to Transgender Theory which is informed by the lived reality of transsexual people who moves between identifies and/or transition between the traditional two sexes, male and female; See generally Elliot, P. *Debates in transgender, queer and feminist theory: Contested site* (2012). Elliot acknowledges that transgender theory is complex, heterogeneous and politically diverse; See generally Chambers, S.A. 'Cultural politics and the practice of fugitive theory' (2006) 5 *Contemporary Political Theory*.

³⁹ Nagoshi, J.L. & Brzuzy, S. 'Transgender theory: Embodying research and practice' (2010) 25(4) *Affilia: Journal of Women and Social Work* 431. According to this article transgender theory emerged from feminist theory and queer theory that used social constructivist approaches as a means to challenge the essentialism upon which the continued oppression of certain gender and sexual orientation existed.

⁴⁰ Nagoshi, J.L. & Brzuzy, S. 'Transgender theory: Embodying research and practice' (2010) 25(4) *Affilia: Journal of Women and Social Work* 431. Haberstam, J. 'F2M: The making of female masculinity' In Doan, L. ed *The lesbian postmodern* (1994) 225. Haberstam reduces gender to a 'fiction' and provides that it is articulated in the way in which transgender (transsexual) people simulate this through surgery; Stryker, S. 'My words to Victor Frankenstein above the village of Chamounix: Performing transgender rage' *GLQ: A Journal of Lesbian and Gay Studies* (1994). Stryker explains this phenomenon as 'the rising up of transsexuals from the operating table and embodying something more, and something other, than what their creators intended them to be.

⁴¹ Nagoshi, J.L. & Brzuzy, S. 'Transgender theory: Embodying research and practice' (2010) 25(4) *Affilia: Journal of Women and Social Work* 432.

⁴² Lane, R. 'Trans as bodily becoming: Rethinking the biological as diversity, not dichotomy' (2009) 24 *Hypatia* 136 - 7.

identification.⁴³ Broadly, Transgender Theory actively advocates for both the social and legal recognition of transsexual people within society.

Contrary to Queer Theory that has a broader focus in deconstructing any structure that holds itself out as 'normal' or 'normalising' in relation to sexuality, Transgender Theory has a narrower focus. Transgender Theory's focus is on collapsing the heteronormative and cisgender nature of marriage under the Marriage Act and seeks to advance the interests of *post facto* same-sex couples who have effectively broken the set gender roles with their transgression of gender, gender identity and expression.

2.3. Transgendering 'citizenship' in South Africa

*Citizenship in South Africa has always been a politically charged and contested notion. Today it serves as a unifying symbol within the broader political project of nation building. ...the term is inextricably bound up with the struggle for liberation and democracy. Citizenship is of immediate significance in South Africa since it is related to the construction of a coherent and unifying national identity.*⁴⁴

Johnson correctly argues that citizenship is heteronormatively conceptualised which forms the basis for the political system and associated discourses.⁴⁵ Consequently, there has been a strong push by activists that a model of citizenship be constructed that consisted of fairness and justice of social-liberalism, yet at the same time guaranteeing the protection of all

⁴³ Newman-Valentine, D. & Duma, S.E. 'Transsexual women's journey towards a heteronormative health care system' (2014) 1(2) *African Journal for Physical, Health Education, Recreation and Dance* 385. Newman-Valentine and Duma follows adopts Spicer's definition of a 'transsexual' person; Spicer, S.S. 'Healthcare needs of the transgender homeless population' (2010) 14(4) *Journal of Gay and Lesbian Mental Health* 320. Spicer defines a transsexual as a person who identifies psychologically and emotionally as having a gender identity that is in opposition to the one assigned at birth. Hence, such a person may want to change their physical embodiment through gender confirming hormone therapy and/or surgery; Nagoshi, J.L. & Brzuzy, S. 'Transgender theory: Embodying research and practice' (2010) 25(4) *Affilia: Journal of Women and Social Work* 431.

⁴⁴ Seidman, G.W. 'Gendered citizenship: South Africa's democratic transition and the construction of a gendered state' (1999) *Gender and Society* 287; See South African Women's Charter of 1994; See generally McEwan, C. 'Engendering citizenship: Gendered spaces of democracy in South Africa' (2000) 19 *Political Geology*.

⁴⁵ Johnson, C. 'Heteronormative citizenship and the politics of passing' (2002) *Sexualities* 317.

minorities based on various grounds including sex, gender and sexual orientation.⁴⁶

When seeking to understand transgender citizenship, it becomes challenging in grouping all the various expressions and identities under one homogenous group and generalise in order to achieve the goal of accessing full citizenship for transgender people.⁴⁷ Tensions become evident in the way certain types of transgender identities and/or expressions are allowed to claim social inclusion.⁴⁸ This assertion presupposes that there are various approaches to claiming transgender citizenship. The first approach is to advance universal claims to equal rights at the risk of homogenising difference.⁴⁹ The second approach is based on a participatory model that seeks to address difference but does not fundamentally alter the status *quo* that excludes transgender people.⁵⁰ Hence, Walby questions whether ‘citizenship’

⁴⁶ McEwan, C. ‘Engendering citizenship: Gendered spaces of democracy in South Africa’ (2000) 19 *Political Geography* 631 - 2. In support of this approach to citizenship, the new South African parliament rejected the then Westminster model of government and replaced it with devolution, a Bill of Rights and proportional representation in order to balance the democratic principles of majority rule and the protection of minority rights.

⁴⁷ Monroe, S. & Warren, L. ‘Transgendering citizenship’ (2004) 7(3) *Sexualities* 346.

⁴⁸ Lane, R. ‘Trans as bodily becoming: Rethinking the biological as diversity not dichotomy’ (2009) 24 *Hypatia*. Here, Lane is concerned that transsexual voices may be silenced and ultimately erased under ‘transgender’; Monroe, S. ‘Transgender politics in the UK’ (2003) 23(4) *Critical Social Policy* 445 - 7. According to the New Labour approach in conjunction with it drawing on Neoliberalism and Communitarianism, a greater emphasis has been placed on social inclusion, individual rights and responsibilities in participatory democracies that allows for minority groups such as transgender people to gain social inclusion. However, such social inclusion is limited in as far as transgender people are willing and able to uphold a gender-binaries conceptual framework. This means that gender fluid people who seeks to develop a radical transgender movement challenging the gender-binary constructs of society are unable to claim full citizenship within this model whereas transsexual persons who fit into the binary construction are able to do so; See generally Bornstein, K. *Gender Outlaw: On men, women and the rest of us* (1994); See generally Feinberg, L. *Transgender warriors: Making history from Joan of Arc to Dennis Rodman* (1996).

⁴⁹ Evans, D. *Sexual citizenship: The material construction of sexuality* (1993) ch 2; Monroe, S. ‘Transgender politics in the UK’ (2003) 23(4) *Critical Social Policy* 447; See generally Cooper, D. *Power, struggle: Feminism, sexuality and the State* (1995); See generally Plummer, K. *Telling stories: Power, change and social worlds* (1995); See generally Weeks, S. *et al. Same sex intimacies: Families of choice and other life experiences* (2004). Traditional models of citizenship masks difference, discrimination and marginalisation against the rights and of the experiences of those outside the heteronormative.

⁵⁰ Monroe, S. ‘Transgender politics in the UK’ (2003) 23(4) *Critical Social Policy* 447.

can ever be successfully claimed as universal and whether social divisions will always affect it?⁵¹

Narrowly put, *post facto* same-sex couples are located at the intersection between homosexual sexual orientation and transgender gender identity. In presenting a legal argument that protects these couples from being discriminated against, an important question to be asked is ‘how do one advance the interests of transsexual people in legally perceived homosexual relationships without limiting or destroying the rights of other transgender people with a more fluid sexual orientation, gender expression and/or identity in the process?’ In their ability to uphold the gender binary system, heterosexual identifying transsexual people may claim their ‘citizenship’ much easier than gender fluid people by way of being assimilated into the mainstream structures such as marriage that uphold heteronormativity. In order for all transgender people to be included within the ambit of social and legal protection, it would entail a process of affecting fundamental changes to the current system that upholds and protects sex and gender categorisation.⁵²

As a concept ‘citizenship’ can be defined as collection of rights and duties that determines whether or not a person or group of people are able to access socio-political membership, resources and benefits as well as membership to the politico-legal community.⁵³ Politically, ‘citizenship’ can also be defined as a public activity that concerns itself with the establishment and monitoring of boundaries between people or groups of people.⁵⁴ In looking at the Marshallian model and/or tradition of citizenship, the dominant model of claiming citizenship in western societies, there is a clear focus on the civil or legal, political and

⁵¹ Walby, S. *Gender transformations* (1997) 166 -79; Young, I.M. ‘Polity and group difference: A critique of the ideal of universal citizenship’ (1989) 99 *Ethics* 251 - 8; See generally Fraser, N. ‘Equality, difference and democracy: Recent feminist debates in the United States’ In Dean, J. *Feminism and new democracy* (1997). Young and Fraser in turn acknowledge the tensions that exist between difference and conceiving universality.

⁵² Monro, S. ‘Transgender politics in the UK’ (2003) 23(4) *Critical Social Policy* 449.

⁵³ Staeheli, L. ‘Reconstructing citizenship in Pueblo, Colorado’ (1994) *Environment and Planning* 850; See generally Turner, B. & Hamilton, P. *Citizenship: Critical concepts* eds. (1994); See generally Roche, M. *Rethinking citizenship: Welfare, ideology and change in modern society* (1992).

⁵⁴ Bacchi, C.L. & Beasley, C. ‘Citizen Bodies: Is embodied citizenship a contradiction in terms?’ (2002) 71(22) *Critical Social Policy Issue* 328.

subsequent social phases that citizenship takes.⁵⁵ However, contemporary critiques have uncovered that this model is built upon a very gendered foundation supported heavily by patriarchal assumptions.⁵⁶ Hence, in order to uphold this underlying gendered-patriarchal model of citizenship, certain mechanisms were built into society whereby certain demographics could claim full citizenship whereas others were considered lesser citizens.

Bacchie and Beasley correctly argue ‘that bodies give substance to citizenship, and that citizenship matters to bodies.’⁵⁷ The distinction between ‘citizenship’ and ‘body’ links to a greater discussion around what is considered the public realm of men being active, rational and universal; and the private realm of women being emotional, body-bound and particular.⁵⁸ The premise of this argument is found in the association of government responsibilities with the controlling of spaces in which citizen bodies operate and subsequently making decisions

⁵⁵ McEwan, C. ‘Engendering citizenship: Gendered spaces of democracy in South Africa’ (2000) 19 *Political Geography* 630. According to the author Marshall primarily focussed on social citizenship as being a product of civil-political citizenship which depended on a person being a worker in the public realm in order to claim these rights; See generally Marshall, T.H. *Class, citizenship and social development* (1965). Marshall differentiates between three levels of citizens – civil, political and social; See generally Weeks, J. ‘The sexual citizen’ (1998) 15(3) *Theory, Culture and Society*.

⁵⁶ Cattapan, A. ‘Theorising transgender citizenship in Canada’ (27 May 2009) available at <http://www.cpsa-acsp.ca/papers-2009/Cattapan.pdf> (accessed 14 July 2015). The assumptions made is that a male must be the breadwinner of a nuclear, institutionalised, heterosexual family. This negates any other potential income earners or family forms; See generally Brodie, J. ‘Putting gender back in: Women and social policy reform in Canada’ In Abu-Laban, Y. ed *Gendering the Nation-State: Canadian and Comparative Perspectives* (2008); See generally Walby, S. ‘Is citizenship gendered?’ (1994) 28(2) *Sociology* 381; See generally Lister, R. ‘Dialectics of citizenship’ (1997) 12(4) *Hypatia*.

⁵⁷ Bacchi, C.L. & Beasley, C. ‘Citizen Bodies: Is embodied citizenship a contradiction in terms?’ (2002) 7(22) 2 *Critical Social Policy Issue* 324 & 28. Body theorists are concerned with addressing broader conceptions of social forces that shape bodies, unlike political theorists that seeks to analyse the institutional components of membership in a community.

⁵⁸ Bacchi, C.L. & Beasley, C. ‘Citizen Bodies: Is embodied citizenship a contradiction in terms?’ (2002) 71(22) 2 *Critical Social Policy Issue* 329.; See McEwan, C. ‘Engendering citizenship: Gendered spaces of democracy in South Africa’ (2000) 19 *Political Geography*. According to the author, the public sphere is the sphere of justice, the space where everyone is treated equally whereas the private sphere is that of the family where citizens are allowed to act on their personal ideas and notions of morality; See generally Benhabib, S. *Situating the self: Gender, community and postmodernism in contemporary ethics* (1992); See Gilligan, C. *In a different voice: Psychological theory and women’s development* (1982); Lister, R. *Citizenship: Feminist perspective* (1997) 126. It is apparent that in addressing ‘mind over body’ politics that women’s bodies are depicted in the public realm where it is less personal, as controlling women. Examples of how this is depicted can be found in women’s status as citizen being watered-down by ‘legitimate’ practices such as female genital mutilation and women’s reproductive rights.

as to the type of support services it will render.⁵⁹ For this reason, it is important to identify how bodies are conceptualised in public policy in order to eventually look at the consequences of such conceptualisation.⁶⁰ In this way, one can seek to understand the social demarcation between full and lesser citizens that are premised on the assumptions made about bodies.⁶¹

2.4. State policing of bodies

Everywhere that trans[gender] people appear in the law, a heavy reliance on medical evidence to establish gender identity is noticeable. Try to get your birth certificate amended to change your sex designation, and you will be asked to show evidence of the surgical procedures you have undergone to change your sex. Try to change your name to a name typically associated with the [conventional] 'other gender', and in many places you will be told to resubmit your position with evidence of the medical procedures you have completed. Try to get your driver's licence sex designation changed, and again you will be required to present medical evidence. If you are trans or gender transgressive, even your ability to use a gendered bathroom without being harassed or arrested may be dependent on your ability to produce identification of your gender, which will only indicate your new gender if you have successfully submitted medical evidence to the authorities.⁶²

⁵⁹ Bacchi, C.L. & Beasley, C. 'Citizen Bodies: Is embodied citizenship a contradiction in terms?' (2002) 71(22) 2 *Critical Social Policy Issue* 325.

⁶⁰ Mulè, N.J. *et al.* 'Promoting LGBT health and wellbeing through inclusive policy development' (2009) 8(18) *International Journal for Equity in Health* available at <http://www.equityhealthj.com/content/8/1/18> (accessed on 25 February 2015). Mulè asserts that the ideology of heterosexuality manifests itself in social policy in a manner in which it becomes institutionalised and the effect is that heterosexuality is 'normalised' and 'naturalised' in marriage, reproduction and parenting; Bacchi, C.L. & Beasley, C. 'Citizen Bodies: Is embodied citizenship a contradiction in terms?' (2002) 71(22) 2 *Critical Social Policy Issue* 325; McEwan C 'Engendering citizenship: Gendered spaces of democracy in South Africa' (2000) 19 *Political Geography* 630. McEwan correctly contends that citizenship has always been constructed in masculine terms and that this has been reflected in ancient Greece through to the Enlightenment period.

⁶¹ Socias, M.E. *et al.* 'Towards full citizenship: Correlates of engagement with Gender Identity Law among transwomen in Argentina' (2014) 9(8) *PLoS ONE* 2 available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0105402> (accessed 22 September 2015). Heterosexual cisgender assumption about bodies in policy development has led to transgender people having limited access to legal and civil rights as well as social programmes in a State such as Argentina with a very progressive Gender Identity Law (which is to promote the right to self-defined gender identity and having one's identity document changed in accordance); Bacchi, C.L. & Beasley, C. 'Citizen Bodies: Is embodied citizenship a contradiction in terms?' (2002) 71(22) 2 *Critical Social Policy Issue* 325.

⁶² Spade, D. 'Resisting medicine, re/modelling gender' (2003) 15 *Berkeley Women's Law Journal* 16 - 7.

The policing of a person or couple's gender and sexuality is a direct outcome of the onus of having to produce medical evidence to access or be denied rights in almost every trans-related case and is inclusive of determining the legitimacy of a marriage involving a transgender spouse.⁶³ The importance of addressing transgender rights from the perspective of a human rights-based approach is to attain recognition of transgender rights and enforce them without dependence on surgical status or medical evidence.⁶⁴ By de-medicalising transgender gender identity, and reinterpreting it in a human rights-based discourse, the process of gender affirmation moves away from being deemed an 'illness' to being based on a basic right of all people, which is the right to self-determination.⁶⁵ Transsexuality is currently still seen as a medical disorder.⁶⁶ In reinterpreting transgender rights grounded in a human rights-based model the quest must be to provide transgender people with self-affirmation without subjecting them to limitations on how they define and emancipate themselves. People should be free to assert their own gender identity and expression without being coerced into declaring such identity involuntarily or be subjected to choosing an identity amongst a narrow set of medical or legally determined option.⁶⁷ The European Commission for Human Rights held in *Van Kuck v Germany* that the freedom to define oneself as female, if born a male, is one of the most basic essentials of self-determination.⁶⁸

The medical model has been very instrumental in obtaining rights for transgender people in order to assert their humanity. This has particularly been the case through the strategic use of

⁶³ Spade, D. 'Resisting medicine, re/modelling gender' (2003) 15 *Berkeley Women's Law Journal* 17.

⁶⁴ See generally San Francisco Human Rights Commission Compliance Guidelines for the anti-gender identity discrimination position of its Human Rights Law. The aim of the Commission is to move away from the standard of body modification (medical model) to self-determination (human rights-based model) as the core determinant of gender identity; Spade, D. 'Resisting medicine, re/modelling gender' (2003) 15 *Berkeley Women's Law Journal* 30.

⁶⁵ *Van Kuck v Germany* Appl. No 35968/97 ECHR judgement 12 June 2003 82. In deciding this matter, the European Commission on Human Rights found that the right to affirm one's gender identity is one of the basic rights of being human, that of self-determination.

⁶⁶ See generally Karasic, D. & Drescher, J. *Sexual and gender diagnoses of the Diagnostic and Statistical Manual (DSM): A reevaluation* (2012).

⁶⁷ Spade, D. 'Resisting medicine, re/modelling gender' (2003) 15 *Berkeley Women's Law Journal* 29; See generally Socías, M.E. *et al.* 'Towards full citizenship: Correlates of engagement with Gender Identity Law among transwomen in Argentina' (2014) 9 (8) *PLoS ONE* available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0105402> (accessed 22 September 2015).

⁶⁸ *Van Kuck v Germany* Appl. No 35968/97 ECHR judgement 12 June 2003 82.

the medical model of transsexuality in light of a pre-democratic judicial system refusing to recognise gender transitioning for the purpose of marriage, no matter what medical evidence was produced.⁶⁹ However, counter-progressively, if a person does not uphold the narrow definitions and categories provided for by the gender regulatory processes of the medical model in order to obtain gender affirmation surgery, then the backlash can be dehumanising, traumatic and ultimately impossible to complete.⁷⁰ The broader question posed with regard to a transgender person accessing gender affirmation surgery is how will this demographic be able to access protection from discrimination when both medicine and law continuously confirm the lack of understanding for the humanity and dignity of this demographic?

In relation to homosexuality and being transgender, in a new democratic dispensation based on constitutional rights, government has a responsibility to protect the bodies, integrity and autonomy of people of all sexualities and gender identities within all spaces and spheres in which these demographics operate as citizens. This presupposes that transgender and homosexual bodies must be respected in law, and in this case also family law. Transgender bodies are, and for a long time homosexual bodies were, conceptualised as being 'ill', 'sick' or 'disturbed'. They have been pathologised by way of the medical model and criminalised by the legal system.⁷¹ Consequently, at a social level they had to invisibilise themselves in order to avoid being labelled a criminal or being labelled as 'sick' or 'disturbed'. This in itself led to people of non-normative sexualities and gender identities being excluded from

⁶⁹ Spade, D. 'Resisting medicine, re/modelling gender' (2003) 15 *Berkeley Women's Law Journal* 30; See *W v W* 1976 (2) SA 308 (W). The case dealt with the determination of a post-operative female's sexual identity for the purpose of marriage and divorce. Under the circumstances, in order for a decree of divorce to be granted it first had to be proven that a valid marriage was contracted. In determining the plaintiff's sex, the court asked the question as to what the sex was of the plaintiff prior to the operation and whether such an operation indeed changed the plaintiff's sex to that of the opposite assigned at birth. If it did not then the marriage was invalid. The court followed the approach as set out in the English case of *Corbett v Corbett*; See *Corbett v Corbett* [1970] 2 All E.R. 33 (Divorce Ct.). As per *Corbett v Corbett* male chromosomes, gonads and genitalia cannot reproduce that which a naturally-born woman can. Thus, if a person fails to prove that his or her chromosomes, gonadal and genitals are that of the chosen gender, all operative interventions are ignored. Consequently, the biological constitution of a person is fixed at birth, at the latest, and this cannot be changed by either the natural development of organs associated with the opposite sex or medical or surgical intervention. Thus, the plaintiff's operation could not alter 'his' true sex. For these reasons the marriage was declared void because the plaintiff was at all times deemed to be a male who was married to another male. The judge ordered that the plaintiff has no claim for divorce and the division of the joint estate. The judge also ordered that the marriage be annulled on account that the summons be appropriately amended.

⁷⁰ Spade, D. 'Resisting medicine, re/modelling gender' (2003) 15 *Berkeley Women's Law Journal* 29.

⁷¹ See generally Vincent, L. & Camminga, C. 'Putting the "T" into South African human rights: transsexuality in the post-apartheid order' (2009) 12 *Sexualities*.

much needed government protection. In essence this culminated in them being deemed lesser citizens to heterosexual and cisgender people. It is precisely because these demographics have been left to the mercy of the medical and psychiatric fraternity that the idea of them being at the mercy of their own bodies has been reinforced to the extent that they are excluded from the so called 'normal'. By medicalising, criminalising and invisibilising bodies with non-normative sexualities and gender identities in the public realm, government has effectively divorced them of their propriety rights over their own bodies which ultimately results in them being unable to claim their full citizenship and being deprived of their political autonomy. This is in direct conflict with the State's duty not to intrude on the political autonomous control a citizen has over their body. The limitations placed on *post facto* same-sex couples are real. The adverse assumptions made about their bodies, relationships and existence are real. Henceforth, before we can imagine to transform structures such as family law, a truthful rendition of the power politics involved in relationship formation needs to be critically addressed.

2.5. Conclusion

As can be deduced from the above, a strong argument can be made that the inequality, whether it be social or legal, that *post facto* same-sex couples face today, comes as a direct result of the hegemony which the dominant gender identity and sexual orientation, cisgenderism and heterosexuality, has over the law. Evidently, its hegemony is sustained by other institutions like religion, medical discourse, culture and tradition.

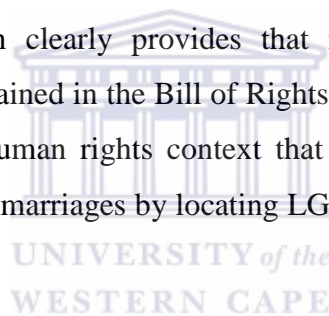
In looking at the above, it is clear that equality for people with non-normative sexual orientations and gender identities still remain elusive and may still continue to be elusive, if the aim of the law is to merely seek to socially include *post facto* same-sex couples within its narrow heteronormative and heterosexist understanding of transgender and homosexual politics. In not seeking to legally transform the law in such a way that it truly seeks to understand and respect difference it will continuously fail in its ambition of affording protection to all by ending up affording protection to the status *quo*. In discussing legal transformation, international law has been progressively, albeit slow, pushing a discourse on non-normative sexualities and gender identities. Chapter 3 outlines and discuss various international instruments as they relate to LGBTI human rights.

CHAPTER 3: INTERNATIONAL LAW: AN EVER EXPANDING RIGHTS DISCOURSE ON NON-NORMATIVE SEXUALITIES, GENDER IDENTITIES AND THE RIGHT TO MARRY AND REMAIN MARRIED

3.1. Introduction

Since the advent of democracy, South Africa has passed a kaleidoscope of progressive laws focussed on undoing the injustices of the past and empowering marginalised communities and people; as well as having developed a progressive equality jurisprudence to ensure that rights are realised or, at least, realisable. Indeed, South Africa has made many progressive strides in affording legal recognition and protection to non-normative intimate relationships.¹ However, even with these legal developments over the last 20 years, it would appear as if the debate around same-sex marriages has wrongfully ignored the challenges faced by transgender persons in South Africa despite a progressively enabling legal landscape.²

The South African Constitution clearly provides that international law be used when applicable to interpret rights contained in the Bill of Rights.³ For this reason, this chapter will focus on framing an enabling human rights context that is conducive to the stability and wellbeing of *post facto* same-sex marriages by locating LGBTI rights within the international human rights framework.



¹ The Recognition of Customary Marriages Act 120 of 1998 affords parties to polygamous customary marriages legal protection. The Civil Union Act 17 of 2006 extends legal protection to same-sex couples in monogamous relationships identical to that of opposite-sex couples under the Marriage Act. The Marriage Act now governs the union between opposite-sex couples, even though one party is a transsexual person. See Van der Merwe, L. 'Press Release: Nadia Swanepoel, transgender woman receives justice' available at http://www.iranti-org.co.za/content/Press_Releases/2014-Nadia-Swanepoel/Transwoman-gets-justice-Nadia-Swanepoel.pdf (accessed 12 October 2014); See discussions around affording legal recognition and protection to couples in domestic partnerships in *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC) and Muslim marriages available at http://www.justice.gov.za/legislation/bills/2010_muslim-marriages-bill.pdf.

² Coombs, M. 'Sexual dis-orientation: Transgender people and same-sex marriage' (1998) 8 *UCLA: Women's Law Journal* 219.

³ Constitution of the Republic of South Africa (1996). S39(1)(b) provides that when interpreting the Bill of Rights, a court, tribunal or forum—must consider international law.

3.2. International law: Not cast in stone - continuously negotiating LGBTI freedom and equality

There is a presumption amongst conservative groups and States that international law, particularly as it relates to the founding of a family and the right to marry, is prescriptive, and that a marriage can only be constituted by couples who are of the opposite sex.⁴ International law does not require states to make provision for same-sex couples to marry.⁵ However, in the absence of expressly defining what a family is, it acknowledges that families exist in diverse forms.⁶ The following section seeks to contextualise the LGBTI⁷ human rights discourse development in international law and the implications they have for developing domestic laws in South Africa that is cognisant of LGBTI people.

3.2.1. Specific rights

The emancipation of LGBTI people globally remains contested both overtly and covertly. Ideals that accompany emancipation is that of agency and autonomy. Many LGBTI people are still not able to fully live liberated lives that entitle them to standards of living and citizenship claims equal to that heterosexual cisgender people. They remain the subjects of institutional, social and legal discrimination. In addition, their dignity is continuously violated by measures that infringe their privacy, family and home. Ironically, international law seeks to protect all people. The following subsections engage various human rights critically, from an international law perspective as they relate to the experiences of *post facto* same-sex couples.

⁴ Giberga, S. (The Daily Signal) 'International jurists: Marriage is between a man and a woman' (20 March 2013) available at <http://www.dailysignal.com/2013/03/20/international-jurists-marriage-is-between-a-man-and-a-woman/>.

⁵ United Nations Human Rights Office of the High Commissioner 'Born free and Equal: sexual orientation and gender identity in international human rights law' (2012) available at <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> accessed 18 August 2014.

⁶ Corrêa, S. & Muntarhorn, V. *An activist's guide to the Yogyakarta Principles* (2010) 80; See discussions on United Nations Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC), African Charter on Human and People's Rights (ACHPR) and the Yogyakarta Principles (See 3.2.1. – 3.2.2.2.).

⁷ International Human Rights Law predominantly refers to the LGBT community. However, in this paper due recognition will be given to intersex bodies who are also marginalised and vulnerable due to not fitting the heteronormative binary mould of construction in society. Hence, this group also needs to be brought into greater visibility.

3.2.1.1. Freedom, equality, dignity and non-discrimination

Many of the international instruments South Africa is signatory to contains a non-discriminatory clause whether it uses the word ‘distinction’ in reference to ‘Otherness’ or mentions non-discrimination expressly.⁸ Non-discrimination as a human rights imperative is typically associated with the rights to freedom, equality and dignity.

The Universal Declaration of Human Rights⁹ (UDHR) provides that the application of international human rights law be guided by the principles of universality and non-discrimination.¹⁰ It emphasises the value that ‘all human beings are born free and equal in dignity and rights.’¹¹ The implication of this rights assertion is thus that LGBTI people may also invoke the right to freedom from discrimination.¹² Consequently, States such as South Africa, which are signatories to the UDHR, are therefore bound to ensure that their laws, policies and programmes are not discriminatory.¹³ Yet, in stark contradiction and perhaps at times justified, what is considered universal is regularly contested by States invoking cultural



⁸ International Covenant on Civil and Political Rights (ICCPR) resolution 2200A (XXI) adopted by the General assembly of the United Nations on 16 December 1966 and entered into force on 23 March 1976. Art2 provides that States are bound to ensuring that all individuals in its territory are able to access the rights enshrined in the ICCPR without any distinction on various listed and unlisted grounds. International Covenant on Economic, Social and Cultural Rights (ICESCR) resolution 2200A (XXI) adopted by the General Assembly of the United Nations on 16 December 1966 and entered into force on 3 January 1976. ICESCR (1966) arts2, 3 and 26. Art2 provides that: ‘The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ Art3 focuses on ‘equality’. It provides that State Parties undertake to ensure that all men and women enjoy equal benefits under the Covenant. Art26 provides that everyone is equal before the law. This article also puts a responsibility on the State to ensure that discrimination is prohibited.

⁹ Universal Declaration of Human Rights (UDHR) resolution 217 A (III) adopted by the General Assembly of the United Nations (UN) on 10 December 1948.

¹⁰ UDHR (1948), art1.

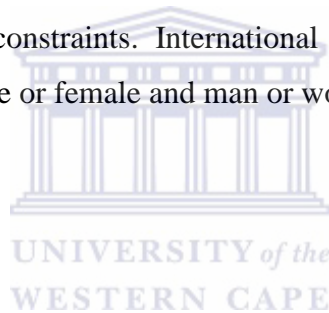
¹¹ UDHR (1948), art1.

¹² International Conference on Human Rights, Sexual Orientation and Gender Identity (2013) 45.

¹³ International Conference on Human Rights, Sexual Orientation and Gender Identity (2013) 45.

relativism and contesting what they deem as ‘western norms and values’ imposed on them.¹⁴ However, within the rights discourse for LGBTI freedom, equality, dignity and non-discrimination such contestation merely seeks to confirm oppressive positions held by States regarding non-heteronormative existence.

According to the UDHR everyone is entitled to the rights and freedoms as provided for in the Declaration without distinction¹⁵ and that everyone is equal before the law and entitled to equal protection of the law.¹⁶ Contextualising this freedom, equality, dignity and non-discrimination, it also provides that ‘men’ and ‘women’ of full age have the right to marry voluntary and found a family subject to the protection of the State.¹⁷ Such an assertion, although progressive on paper, is still unrealisable for many LGBTI people as the construction of who is entitled to make equality claims is strained by the limitations of the heteronormative conceptualisation and assumptions of rights and human existence within international law. The gendered usage of language to articulate rights and position right-bearers are indicative of such constraints. International instruments still largely refer to human beings as being either male or female and man or woman, which in turn renders



¹⁴ See generally Harris-Short, S. ‘International human rights law: Imperialism, inept and ineffective? Cultural relativism and the United Nations Convention on the rights of the child’ (2003) 25(1) *Human Rights Quarterly*; See generally Hagland, P. ‘International theory and LGBT politics: Testing the limits of a human rights-based strategy’ (1997) 3(4) *GLQ: A Journal of Lesbian and Gay Studies*; See generally Perry, M.J. ‘Are human rights universal? The relativist challenges and related matters’ (1997) 19(3) *Human Rights Quarterly*; See generally Zechenter, E.M. ‘In the name of culture: Cultural relativism and the abuse of the individual’ (1997) 53(3) *Journal of Anthropological Research*; See generally Brennan, K. ‘The influence of cultural relativism on international human rights law: Female circumcision as a case study’ (1989) 7 *Law and Inequality*.

¹⁵ UDHR (1948), art2.

¹⁶ UDHR (1948), art7.

¹⁷ UDHR (1948) arts16(1) and (2); ICCPR (1966) arts23 and 17(2). Art23 recognises the right of all men and women of marriageable age to marry and found a family and that the family is the most natural and fundamental group unit of society and henceforth entitled to State-protection. Art17(2) provides the following: ‘Everyone has the right to the protection of the law against such interference or attack’. Art17(2) indirectly puts the onus of protecting this right on the ‘law’; See White Paper on families in South Africa (2012) 31.

invisible all other sexes and genders that exist.¹⁸ These ‘Others’ would, amongst many other culturally relative and different sexes and genders, be that of intersex and transgender people. If freedom, equality and non-discrimination rights affirmation is a fundamental objective of the UDHR for all, then language usage and how language construct hierarchical identities itself needs interrogation. If not, the UDHR’s objectives will remain a pipe-dream for LGBTI people and reinforce heteronormativity as a truth, the only truth, about human existence and intimate relationships.

South Africa is a State Party to the International Covenant on Civil and Political Rights¹⁹ (ICCPR). It is bound to ensuring that all individuals in its territory are able to access the rights enshrined in the ICCPR without any distinction on various listed and unlisted grounds.²⁰ As can be deduced from the formulation of article 2 of the ICCPR, it is not a *numerous clauses*. The grounds upon which an individual may be discriminated against are open. According to a report of the United Nations High Commissioner for Human Rights, the drafters of the ICCPR left the article open intentionally for new forms of discrimination that may arise.²¹ New forms of discrimination that has been acknowledged by the Human Rights Committee is that of ‘sexual orientation’. In the communication of *Toonen v Australia*, the Human Rights Committee held that States are under an obligation to protect individuals from discrimination based on their sexual orientation.²² In mutual support, article 26 provides that

¹⁸ Ratele, K. ‘Looks: Subjectivity as commodity’ (2011) 25(4) *Agenda* 93. Language thus introduces us to the processes of exclusion and inclusion and the ways in which one thinks about the self, others and relationships. As an instrument of power language is used to legitimise certain human phenomena, relations and identities whilst at the same time rendering invisible and silencing others that should not be shown, done, revealed, expressed or enacted; See generally Duncan, N. (1993) ‘Discourses of racism’ unpublished Doctoral Dissertation, Department of Psychology, University of the Western Cape, Bellville; See generally Durrheim, K. ‘Social constructionism, discourse, and psychology’ (1997) 27 (3) *South African Journal of Psychology* . Language is directly implicated in the formation of cultural reality and is therefore not merely a representation of it. It is formative and not merely expressive of a physical reality. Hence, words and images do not only mirror the external world but help create it.

¹⁹ International Covenant on Civil and Political Rights (ICCPR) resolution 2200A (XXI) adopted by the General Assembly of the United Nations on 16 December 1966 and entered into force on 23 March 1976.

²⁰ ICCPR (1966), art2.

²¹ 19th session of the Human Rights Council ‘Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’ Agenda Item 2 of 8.

²² *Toonen v Australia* communication No. 88/1992 (CCPR/C/50/D/488/1992).

‘all are equal before the law and are entitled to equal protection of the law.’²³ This article enables the law to operate in a way that prohibits discrimination and protects individuals from various forms of discrimination including ‘sexual orientation’.

In General Comment 20, the Committee on Economic, Social and Cultural Rights observed that ‘sexual orientation’ is included under ‘other status.’²⁴ Hence, State Parties must ensure that the fact that a person’s sexual orientation differs from the norm, which is heterosexual, does not create a barrier to them accessing the rights enshrined in the Covenant.²⁵ In addition, ‘gender identity’ has also been recognised as a ground upon which a person may not be discriminated against.²⁶ In coming to this conclusion, the Committee relied upon the non-binding international instrument, the Yogyakarta Principles²⁷ as a source of guidance on the understanding of ‘sexual orientation’ and ‘gender identity’ in international human rights law.²⁸

Evidently, the Human Rights Committee in their general comments has made it apparent that States are obliged to protect everyone within their respective territories from discrimination. The fact that someone is LGBTI identifying may not be used as a ground to limit their entitlement to enjoy all the human rights which accrues to him or her equally with their heterosexual and cisgender counterparts.²⁹ In light of this, the question becomes whether *post facto* same-sex couples are able to equally enjoy their right to found an intimate personal relationship and family when compared to heterosexual and cisgender couples who remain heterosexual and cisgender for the duration of their marriage under the Marriage Act?

²³ ICCPR (1966), art26.

²⁴ 42nd session of the Committee on Economic, Social and Cultural Rights on 2 July 2009 ‘General Comment 20: Non-discrimination in economic, social and cultural rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights’ Agenda Item 3 of 10.

²⁵ International Conference on Human Rights, Sexual Orientation and Gender Identity (2013) 46.

²⁶ General Comment 20 of the Committee on Economic, Social and Cultural Rights (2 July 2009) 10; See International Conference on Human Rights, Sexual Orientation and Gender Identity (2013) 46.

²⁷ Yogyakarta Principles: principles on the application of international human rights law in relation to sexual orientation and gender identity as compiled in Indonesia March 2007; See 3.2.2.2. for further discussion.

²⁸ International Conference on Human Rights, Sexual Orientation and Gender Identity (2013) 46; It is comforting to note that there is a commitment from UN bodies to use non-binding guiding instruments such as the Yogyakarta Principles to assist in the interpretation of international human rights.

²⁹ International Conference on Human Rights, Sexual Orientation and Gender Identity (2013) 48.

3.2.1.2. Prohibition on arbitrary and unlawful interference of privacy, family, home or correspondence

The UDHR, ICCPR and ICESCR all provide that everyone has the right to be protected in law from any arbitrary and unlawful interference with his [or her] privacy, family, home or correspondence and that the State has a duty to protect the family as a natural and fundamental group unit within society.³⁰ In a General Comment on article 23, the ICCPR concluded that the definition of what constitutes a ‘family’ may differ from State to State and region to region.³¹ Bearing all these rights in mind, the UDHR also expressly states that no right contained in it may be interpreted by any State in such a way that it would destroy these rights that accrue to people.³² However, in South Africa, instead of equally offering protection to *post facto* same-sex marriages, the State have subjected them to arbitrary and irregular State interference (administration action) whose legality is challenged by this thesis, subjecting them to compulsory or forced divorces that put these couples at great risk. The State, through the actions of the Department of Home Affairs, have unwantedly imposed themselves and made adverse determinations on the lives of these married couples with no due regard to their right to privacy, family and home as envisioned by the UDHR, ICCPR and ICESCR.³³ This is a clear dereliction of their responsibility to protect and preserve the family as the fundamental group unit within society.

By reading these developments in conjunction with one another, it would seem as if a *prima facie* case exist that *post facto* same-sex marriages and families may find protection under the ICCPR should the couple fall within the territory or jurisdiction of a state that recognises

³⁰ UDHR (1948), arts12 and 16(3); ICCPR (1966). Art17(1) provides that ‘no one shall be subjected to arbitrary or unlawful interference with his [or her] privacy, family, home or correspondence, nor to unlawful attack on his [or her] honour and reputation’; ICESCR (1966). Art10(1) stipulates that State Parties must offer the widest possible protection and assistance to the family unit which is the natural and fundamental group unit of society. It also stresses the importance of the family unit in relation to the well-being of children; Convention on the Rights of the Child resolution 44/25 adopted by the General Assembly of the United Nations on 20 November 1989 and entered into force on 2 September 1990. The Convention on the Rights of the Child (CRC) reaffirms the position held by both the ICCPR and ICESCR that State Parties to the Convention recognises the family as the fundamental group in society which creates a natural environment that is conducive to the well-being of children and the family at large. Hence, this unit is entitled to protection and assistance by the State.

³¹ Corrêa, S. & Muntarhorn, V. *An activist’s guide to the Yogyakarta Principles* (2010) 80.

³² UDHR (1948), art30.

³³ Legal Resources Centre & Gender Dynamix *Briefing paper: Alteration of Sex Description and Sex Status Act No. 49 of 2003* (2014) 24.

same-sex marriages. In the case of South Africa, which recognises same-sex marriages, the question becomes: ‘Does the different sexual orientation and/or gender identity of the partners justify the coercion of *post facto* same-sex couples to divorce?’

3.2.2. Specific instruments

In positioning *post facto* same-sex marriages in South Africa, two important international instruments need discussion for the role they play in constructing an LGBTI political landscape and right discourse. They are important for two very different reasons. The African Charter on Human and People’s Rights (ACHPR), the regional binding document to which South Africa is signatory, is discussed in the context of its seemingly passive-regressive position around LGBTI rights in Africa. Juxtaposing this binding regional instrument is the non-binding most progressive international instrument, the Yogyakarta Principles, an instrument expansively addressing LGBTI rights, to which South Africa is also signatory. This section explores the relevance and importance of these two instruments in relation to *post facto* same-sex marriages in South Africa.

3.2.2.1. African Charter on Human and People’s Rights

Before discussion is rendered on the African Charter on Human and People’s Rights (ACHPR),³⁴ mention needs to be made that South Africa, being an African country, is light-years ahead of the LGBTI human rights discourse in Africa. However, the relevance of engaging this Charter is founded upon its influence in the domestic politics of States in relation to shaping ‘acceptable’ sexual and gender identities in Africa. As a regional human rights structure, mandated to protect the human rights of all people, the African Commission on Human and People’s Rights (ACmHPR)³⁵ have struggled to prove its commitment to the protection of LGBTI human rights. Analyst ascribe this to three major challenges, which include the structure of the ACHPR in itself, the reluctance amongst signatories to advance LGBTI human rights (with nations mining the texts for ways in which domestic laws can undermine the Charter) and lastly, a lack of human and financial resources.³⁶ This has

³⁴ African (Banjul) Charter on Human and People’s Rights CAB/LEG/67/3 adopted by the OAU on 27 June 1981 and entered into force 21 October 1986.

³⁵ The ACmHPR was established by virtue of the operation of art30 of the ACHPR. The Commission is mandated to protect and promote human and people’s rights and interpret the provisions of the Charter.

³⁶ Mittelstaedt, E. ‘Safeguarding the rights of sexual minorities: The incremental and legal approaches to enforcing international human rights obligations’ (2008) 9(1) *Chicago Journal of International Law* 363.

resulted in same-sex marriages not particularly having reached the top of the human rights agenda in Africa, with human rights bodies still largely being focussed on ensuring that LGBTI people are not killed, tortured or imprisoned.³⁷

The ACHPR affirms the family as the natural unit and basis for society in line with the ICCPR and ICESCR.³⁸ It also puts the onus on the State to protect families and to take care of the physical health and morale of the family. Although article 2 of the Charter provides that the criminalisation of consensual same-sex practices is not compatible with it, the Commission still has a long way to go in deciding its approach to the LGBTI human rights dilemma in Africa.³⁹

Currently, Africa, as a continent is projected to the world as being homophobic and transphobic. Sigamoney and Epprecht, however, question how knowledge about homosexuality, gender non-conformity and African identities has been and are contextually constructed.⁴⁰ However, the Coalition of African Lesbians⁴¹ (CAL) correctly recognises and seeks to address the complexities in structuring arguments around African LGBTI identities, by emphasising that Africa is diverse in its morality and that moralities are as varied as the continent is different.⁴² Hence, it would be incorrect to describe Africa as having one monolithic common morality that automatically rejects LGBTI people and their intimate relationships. It is, however, States justifying LGBTI human rights violations by invoking the

³⁷ Ettelbrick, P.L. & Shapiro, J. 'Are we on the path to liberation now?: Same-sex marriages at Home and abroad' (2004) 2(2) *Seattle J. Soc. Just.* 475.

³⁸ ACHPR, art18.

³⁹ ACHPR, art2. Article 2 provides that 'Every individual shall be entitled to the enjoyment of the rights and freedom recognised and guaranteed in the present Charter without distinction of any kind.'; Ndashe, S. 'Seeking the protection of LGBTI rights at the African Commission on Human Rights' (2011) 15 *Feminist Africa* 26.

⁴⁰ Sigamoney, V. & Epprecht, M. 'Meanings of homosexuality, same-sex sexuality, Africanness in two South African townships: An evidence-based approach for rethinking same-sex prejudice' (2013) 56(2) *African Studies Review* 83 - 4.

⁴¹ CAL is an organisation founded on the philosophy of African Radical Feminism and consist of a network of organisations that work to transform Africa into a continent where LGBT people experience the full enjoyment of their human rights. Find more information at <http://www.cal.org.za/new/?page-id=587>.

⁴² See generally Wilets, J.D. 'From divergence to convergence: A comparative and international law analysis of LGBTI rights in context of race and colonialism' (2011) 21 *Duke Journal of Comparative and International Law*.

doctrine of cultural relativism that holds strong to their oppositional human rights viewpoints, often undermining their own legitimacy.⁴³ Instead of simplistically rejecting non-heteronormative sexualities and gender identities as unAfrican, homophobic and transphobic, African governments should invest in historically understanding African sexualities and gender identities indigenously, in African contexts that existed prior to colonisation.⁴⁴

Homophobic and transphobic African governments, those who play gatekeeper to who can access human rights, should question the legacy of colonialism not merely based on the politics of race, or class, or gender etc., but also that of indoctrinating Africa's peoples to subscribe to the ideology and politics of domination that places compulsory heterosexuality, a binary sex-gender construction, homophobia, transphobia, imported belief-systems such as Christianity, Judaism and Islam as central features to capitalism.⁴⁵ In legitimising this argument, the ACmHPR, in the communication *Legal Resources Foundation v Zambia*,⁴⁶ held that limiting the rights of Others cannot solely be justified by majoritarianism (or majority morality) and popular will.⁴⁷ Ndashe thus proposes that Charter morality requires that the ACmHPR extend its protective shield to include sexual minorities.⁴⁸

The ACHPR and ACmHPR are perpetuating institutional homophobia and transphobia through their silence. Silence creates an enabling environment for people, including those in

⁴³ Wilets, J.D. 'From divergence to convergence: A comparative and international law analysis of LGBTI rights in context of race and colonialism' (2011) 21 *Duke Journal of Comparative and International Law* 632 & 35; Eskridge, W.N. Jr. 'The history of same-sex marriage' 79 *VA. L. REV.* (1993) 1419, 1437 – 46, 1453 – 69, 1510. Research has found that same-sex unions and transgender unions have historically existed at various times and in a variety of ways in societies. They existed in 19th century Nigeria and in other African societies such as the Azande, Siwah, el Garah, Basotho, Venda, Mesu, Phalaborwa and Bantu peoples.

⁴⁴ See generally Tamale, S. 'Confronting the politics of nonconforming sexualities in Africa' (2013) 56(2) *African Studies Review*; See Tamale, S. 'Researching and theorising sexualities in Africa' In Tamale, S. *African sexualities: A reader* (2011).

⁴⁵ Wilets, J.D. 'From divergence to convergence: A comparative and international law analysis of LGBTI rights in context of race and colonialism' (2011) 21 *Duke Journal of Comparative and International Law* 632; See generally Pharr, S. *Homophobia: A weapon of sexism* (1997); See generally Rich, A. 'Compulsory heterosexuality and lesbian existence' (1980) 5(4) *Signs*.

⁴⁶ *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001).

⁴⁷ Ndashe, S. 'Seeking the protection of LGBTI rights at the African Commission on Human Rights' (2011) 15 *Feminist Africa* 26.

⁴⁸ Ndashe, S. 'Seeking the protection of LGBTI rights at the African Commission on Human Rights' (2011) 15 *Feminist Africa* 26.

positions of power such as civil servants, living in seemingly progressive States such as South Africa, to exercise their power in a manner that prejudice *post facto* same-sex couples, in the name of upholding pure African sexual and gender identities.

3.2.2.2. Yogyakarta Principles: Paving the way forward in the development of an international LGBTI human rights discourse

In contrast to the ACHPR and ACmHPR's relative silence on LGBTI related matters, the Yogyakarta Principles is a set of international principles relating to sexual orientation and gender identity crafted in response to non-normative sexualities and gender identities remaining a battleground within the United Nations (UN) and global frameworks and systems.⁴⁹ This is exacerbated by certain governments standing in opposition and defiance of UN expert and political bodies who seek to advance LGBTI human rights globally.⁵⁰ In light of this contestation, it, therefore, comes as no surprise that the instrument is non-binding and serves as guidelines on how to apply international human rights law. Although it is non-binding, this instrument serves an important purpose, which is to coherently and comprehensively identify the obligations of States to respect, protect and fulfil the human rights of all persons, irrespective of their sexual orientation and gender identity.⁵¹ South Africa made representation as a States Party to the document. In its introduction, the document brilliantly provides that a person's sexual orientation and/or gender identity forms an integral part of their dignity, [self-determination] and humanity.⁵² Hence, it should never be used as grounds for discrimination.

Central to this document is its awareness about how LGBTI bodies are policed by states and societies using custom, law and violence to seek control over how LGBTI-identifying people

⁴⁹ Saiz, I. 'Bracketing sexuality: Human Rights and sexual orientation: A decade of development and denial at the UN' (2004) 7(2) *Health and Human Rights* 48.

⁵⁰ See generally Kao, G.Y. *Grounding human rights in a pluralist world* (2011); See generally Klabbers, J. & Piiparinen, T. *Normative pluralism and international law: Exploring global governance* (2013).

⁵¹ O'Flaherty, M. & Fisher, J. 'Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta Principles' (2008) 8(2) *Human Rights Law Review* 207 & 33. The Yogyakarta Principles has a tripartite function which focuses on mapping the experiences of people with diverse sexual orientations and gender identities, assisting with the articulation of LGBTI interests in international human rights law as clear as possible and spelling out the obligations of States in detail in order to implement the human rights obligation which they bare.

⁵² Yogyakarta Principles (2007), principle 6; Yogyakarta Principles (2007), principle 3. It provides that: '...each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.

experience personal relationships.⁵³ It affirms the great strides made in developing an international human rights law discourse in the international arena.⁵⁴ However, with regard to shaping a discourse that can respect and protect multiple family units including those who are formed by parents who identify as LGBTI, the system is but in its infantile stage. Ideally, one would like to see the Yogyakarta Principles become more entrenched within international law in order to vindicate LGBTI rights more authoritatively, comprehensively and effectively. However, the fact that the Committee on Economic, Social and Cultural Rights already made use of the Yogyakarta Principles is indicative that it might progressively play a bigger role in determining LGBTI rights globally, in future.⁵⁵

As a point of departure, Principle 1 affirms and expands on the current international law position under the UDHR by stating that all human beings regardless of their sexual orientation and/or gender identity are born free and equal and are entitled to the full enjoyment of their human rights.⁵⁶ In elaborating more on the substance of this principle, it is stated that States need to be proactive by integrating a pluralistic approach into its policies and decision-making that recognises the interrelatedness and indivisibility of human existence including their sexual orientation and gender identity.⁵⁷ Hence, States need to adopt appropriate legislation and other measures to ensure that discrimination based on sexual orientation and gender identity is prohibited in both the public and private sphere.⁵⁸ If measures are taken to advance the interest of the LGBTI then such measures will not be seen as discriminatory.⁵⁹ States need also to take into account other forms of discrimination that may intersect with sexual orientation and gender identity.⁶⁰

⁵³ Yogyakarta Principles (2007), principle 6.

⁵⁴ Perhaps more broadly as discussed, there should be more investment and emphasis placed on the development of various discourses around different sexualities and gender identities.

⁵⁵ See generally General Comment 20: Non-discrimination in economic, social and cultural rights (art.2, para.2 of the ICESCR).

⁵⁶ Yogyakarta Principles (2007), principle 1.

⁵⁷ Yogyakarta Principles (2007), principle 1(d).

⁵⁸ Yogyakarta Principles (2007), principle 2(c).

⁵⁹ Yogyakarta Principles (2007), principle 2(d).

⁶⁰ Yogyakarta Principles (2007), principle 2(e).

In the content of Principle 2, discrimination based on sexual orientation and gender identity is explained as taking the forms of distinguishing, excluding, restricting or preferring a person based on their sexual orientation and/or gender identity.⁶¹

Principle 24 provides that everyone has the right to found a family.⁶² In this context, a person may not be denied their right to found a family based on their sexual orientation and/or gender identity. Principle 24 includes the following aspects. Amongst other matters addressed it includes the need for the law and administration of States to ensure that no family is subjected to discrimination based on sexual orientation and/or gender identity, that the best interest of the child be a primary concern and that different-sex and same-sex couples share the same benefits and obligations in States which allow for same-sex couples to get married.

3.3. Conclusion

Many countries, in contrast to what international law provides, compromise equality and dignity for *post facto* same-sex couples, by mandating them to divorce where at least one partner undergoes gender affirmation.⁶³ South Africa is not an isolated case. What sets South Africa apart from other States has been its historical context of oppression under the regime of apartheid and its commitment and reimagining of a country where the most marginalised of people, groups and communities are able to meaningfully and dignifiedly part-take in the life of the nation.

In realising the true effect of the power politics in identity formation, Chapter 4 will analyse the South African legal landscape both historically and contemporary in order to produce a contextually viable argument for the protection of the right of *post facto* same-sex couples to remain married under the Marriage Act.

⁶¹ Yogyakarta Principles (2007).

⁶² Yogyakarta Principles (2007). Principle 6 is relatively similar to art17 of the ICCPR. It provides that: 'Everyone, regardless of their sexual orientation and gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the right to disclose or not to disclose information relating to one's sexual orientation [and] gender identity, as well as decisions and choices regarding one's own body and consensual sexual and other relations with others'; Yogyakarta Principles (2007) principle 6(f). The principle provides that: 'The State shall ensure that the right of all persons ordinarily to when, to whom and how to disclose information pertaining to their sexual orientation and gender identity, and protect all persons from being arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

⁶³ Corrêa, S. & Muntarbhorn, V. *An activist's guide to the Yogyakarta Principles* (2010) 80.

4. CHAPTER 4: DOMESTIC LEGAL DEVELOPMENTS: AN EXISTING LEGAL FRAMEWORK FOR THE ADVANCEMENT OF THE INTERESTS OF *POST FACTO* SAME-SEX MARRIAGES

4.1. Introduction

South Africa's legal landscape has not been the most accommodating to persons who identify and lives outside the heteronormative-cisgender-monogamous-Christian ideology of acceptable coupling worthy of social endorsement through marriage and the legal protection that accompanies it. The doors of marriage and the accompanying legal protection for non-normative intimate relationships has remained shut for a long period of time, with polygamous relationships and same-sex relationships (particularly cisgender same-sex relationships) only having attained legal recognition in recent times.¹ However, such legal recognition was given outside the scope of the dreadfully guarded Marriage Act. In practice, the Marriage Act still exclusively apply to heteronormative-cisgender-monogamous couples.

The challenge of inequality is located in the way it is tied up within hierarchies, that are coupled with exclusion and disadvantage, preventing 'difference' from being affirmed as a positive social feature.² This chapter focuses on a South African LGBTI human rights jurisprudence and the implication it has for advancing the interests of *post facto* same-sex couples.

4.2. Historical context

South Africa has a long, painful and pervasive history of dehumanisation based on negative stereotypes of non-dominant groups in society particularly as it relates to the relationships that exist between sexuality, gender identity, race and intimate relationships.³ When people have set beliefs on what is biological and natural this may give rise to an attack on the self-worth of groups different to the norm.⁴ Reflecting on South Africa's past, this is exactly what occurred under the apartheid regime. Apartheid systematically undermined and marginalised

¹ Recognition of Customary Marriages Act 120 of 1998; Civil Union Act 17 of 2006.

² Albertyn, C. 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 260; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), para19.

³ Ahmen, A.T. *et al.* 'Racial Discrimination and Health: Pathways and evidence' (October 2007) 126 *Indian Journal Medical Res* 318 – 27.

⁴ Ahmen, A.T. *et al.* 'Racial Discrimination and Health: Pathways and evidence' (October 2007) 126 *Indian Journal Medical Res* 318 – 27.

people in overtly discriminatory ways by passing laws prohibiting interracial marriage and same-sex consensual conduct and relationships through criminalisation.⁵ Although the form of oppression is different for both these groups, the principle of oppression works in exactly the same way by stereotyping certain people or groups of people, then enforcing prejudice against such people or groups and consequently formulating discriminatory practices against them which ultimately becomes justified through institutional mechanisms such as psychology, medicine, religion, culture and of course the law. The institutional mechanisms thus are instrumental in maintaining and reinforcing the dominant ideologies and narratives.

4.2.1. An alternative narrative: Legal position of transsexual marriages in a pre-constitutional dispensation

Under apartheid, the rights of homosexual and transsexual people, in particular, although not excluding other non-normative sexualities and gender identities, were limited to the extent that they were not allowed to assert their rights to identity and to have their intimate relationships legally protected by acquiring State recognition by operation of the Marriage Act.

An historical account of transsexual rights in South Africa indicates that prior to 1963, the Department of the Interior, now the Department of Home Affairs, altered the birth register of persons who had undergone gender affirmation surgery on account of medical intervention without having been empowered to do so in terms of the existing Act.⁶ Subsequently, the first codification of the alteration of a person's sex description came about in section 7B of the Births, Marriages and Deaths Registration Act of 1963.⁷ Section 7B legalised gender affirmation surgery retrospectively. This meant that persons who had undergone gender affirmation before 1963 could, upon recommendation by the Secretary of Health, legally assert their affirmed gender and have their sex description amended in the birth register.

⁵ Posel, D. "Getting the nation talking about sex": Reflections on the politics of sexuality and nation-building in post-apartheid South Africa' In Tamale, S. ed *African sexualities: A reader* (2011) 130.

⁶ See Births, Marriages and Deaths Registration Act 81 of 1963.

⁷ Births, Marriages and Deaths Registration Act 81 of 1963. This section provided that the secretary for the interior, now the Minister of Home Affairs, may alter a person's sex description in his or her birth register if he or she has undergone gender affirmation surgery and only if such amendment was recommended by the secretary for health, now the Minister of Health. Consequently, the alteration of sex description in a person's birth register was legalised retrospectively to include those whose birth register was altered by the department for the interior before section 7B was included in the Act.

A counter-progressive move was made in 1976 when the scope and effect of section 7B was challenged in the case of *W v W*.⁸ Relying on the 1970 English case *Corbett v Corbett*,⁹ the court held that a marriage concluded in terms of the Marriage Act between a biological (cisgender) man and a transsexual woman was invalid. Regrettably the implication of this decision was that transsexual people were excluded from the protection of the Marriage Act on account of their gender identity. The effect of *W v W* was that it took away any possibility that post-operative transsexuals could be recognised as members of their post-operative sex in South Africa.¹⁰ It took away the legal effect which section 7B could have had in that it appeared to provide that gender affirmation surgery was not *contra bonos mores* and that it was intended to recognise transsexuals for all aspects of South African law.

It has been stated that ‘the court takes a fatalistic approach by ignoring the real effects of human, social and physical development by adopting a mere biological approach to sex.’¹¹

⁸ See *W v W* 1976 2 SA 308 (W). The case dealt with the determination of a post-operative female person’s sexual identity for the purpose of marriage and divorce. It should be noted that in order for a decree of divorce to be granted it must first be proven that a valid marriage was contracted. The court’s reasoning was that at the time when the ‘purported’ marriage was concluded, a marriage was constituted as a union between a [biological] man and woman. Their marriage therefore depended on whether the plaintiff was a biological woman at the time the marriage was concluded. The law did not allow for persons of the same [biological] sex to get married. In determining the plaintiff’s sex, the court asked the question as to what the sex was of the plaintiff prior to the operation and whether such an operation in deed changed the plaintiff’s sex to that of the opposite assigned at birth. If it did not then the marriage was invalid. It concluded that the criteria for the purpose of marriage must be biologically based on the essential heterosexual character of a marriage in terms of the English case of *Corbett v Corbett* (1970) 2 All E.R. 33 (P.D.A.) 48.

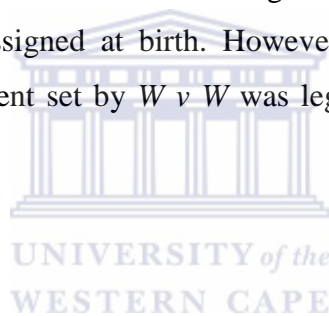
⁹ *Corbett v Corbett* (1970) 2 All E.R. 33 (P.D.A.) 48. As per *Corbett v Corbett* male chromosomes, gonads and genitalia cannot reproduce that which a naturally-born woman can. Thus, if a person fails to prove that his or her chromosomes, gonadal and genitals are that of the chosen gender, all operative interventions are ignored. Consequently, the biological constitution of a person is fixed at birth, at the latest, and this cannot be changed by either the natural development of organs associated with the opposite sex or medical or surgical intervention. Thus, the plaintiff’s operation could not alter ‘his’ true sex. For these reasons the marriage was declared void because the plaintiff was at all times deemed to be a male who was married to another male. The judge ordered that the plaintiff has no claim for divorce and the division of the joint estate. The judge also ordered that the marriage be annulled on account that the summons be appropriately amended; The precedent set by *W v W* was reaffirmed in the 1981 case of *Sims v Sims* 1981 (4) SA 186 (D). In the case a divorce action was brought by the husband against his purported wife. He alleged that the defendant was at all material times a male and that a valid civil marriage could only be validly concluded if the parties the marriage was respectively one man and one woman. Two persons of the same sex could not legally be married. Thus, no valid marriage was concluded. The court held that the purported marriage was null and void.

¹⁰ See South African Law Commission (Project 52) *Report on the investigation into the legal consequences of sexual realignment and related matters* (1995) 18.

¹¹ Smith, O.K. ‘Transsexualism, sex reassignment surgery, and the law’ (1971) *Cornell Law Review* 963.

This excludes the essence of what constitutes human existence and the ability to affect one's own destiny. Thus, a marriage should not be declared void unless it never existed in the minds of the parties.¹²

Subsequently, in 1992, the Births and Deaths Registration Act¹³ repealed the Births, Marriages and Deaths Registration Act of 1963.¹⁴ It made no provision for the recognition of a persons affirmed sex. This vacuum created in the law by omitting transsexual people is indicative of the little importance lawmakers place on the lives of people from non-normative sexualities and gender identities. In 1993, section 33(3) was inserted into the Births and Deaths Registration Act.¹⁵ It provided that if a person was in the process of undergoing gender affirmation surgery before the commencement of the new Act, that he or she may apply upon completion of such surgery to have his or her sex amended in the birth register under section 7B of the old Act. The legal effect of this section was that transsexual people could once more amend their sex status in the birth register and be recognised as a person of the opposite sex to their sex assigned at birth. However, even with this affirmation, no evidence suggest that the precedent set by *W v W* was legally contested between 1976 and 1993.



¹² Smith, O.K. 'Transsexualism, sex reassignment surgery, and the law' (1971) *Cornell Law Review* 1007 – 8. This applies to both transsexual and other types of marriages. Yet, even though this seem to have been the intention of the legislature, the question could even be posed here already as to whether or not the legislature intended that couples who were married at the time under the Marriage Act could claim legal protection for their marriage if one underwent gender affirmation surgery and had their birth register amended, conforming the marriage to a same sex marriage? In such a case would gender affirmation surgery and an amendment to one's birth register have constituted an act *contra bonos mores* for the purpose of marriage? Such a determination at the time would have been vital as to establish the position of spouses to such a marriage. *W v W* established that based on biology a trans-person would still be seen as a person of his or her assigned biological sex at birth and not the affirmed sex. Thus, if he or she had to marry someone of his or her birth sex, the purported marriage would have been void because it would conform to a same-sex union. Inversely so, the question becomes would the regime at the time then have acknowledged that a *post facto* homosexual marriage due to gender affirmation surgery, having been entered initially by two opposite sex biological bodies, would remain legally married as *W v W* rejects a persons affirmed sex.

¹³ Births and Deaths Registration Act 51 of 1992. S7 of the new Act made no provision for the alteration and recognition of a person's sex description if persons underwent gender affirmation surgery. Section 7B was not re-enacted in the new Act. Therefore, if a person was in the process of gender affirmation surgery, he or she could not legally affect an amendment to his or her birth register.

¹⁴ South African Law Commission (Project 52) *Report on the investigation into the legal consequences of sexual realignment and related matters* (1995) 18.

¹⁵ Births and Deaths Registration Act 51 of 1992.

Bearing all these legal developments in mind, no relevant information pertaining to the invalidation of *post facto* same-sex marriages was apparent during the period 1963 up until 1994. The lack of formal entries or codification can be ascribed to various reasons. However, it does not indicate that *post facto* same-sex couples were not subjected to compulsory or forced divorces during apartheid at the instance of the Department of the Interior. Only in 1995 did the South African Law Commission publish a report that specifically addressed the legal position of *post facto* same-sex couples.¹⁶

The report states that ‘a spouse undergoing sex change procedure(s) must be seen as attempting to bring the existing marriage to an end.’¹⁷ It recommends that a party may successfully seek a divorce on account of the other spouse undergoing gender affirmation surgery during the marriage because the gender affirmation surgery should be seen as an attempt to terminate the existing marriage.¹⁸ It was also recommended that a sex change not be allowed during the subsistence of a marriage especially when such marriage had produced children.¹⁹ Very direct, yet, these narrow assertions do not address whether a *post facto* same-sex marriage is, or ought to be, valid when both the cisgender and transsexual spouse want to remain married. It also does not address whether the State automatically acquires a right to invalidate such a marriage or whether the State can force or compel such a couple to apply for a divorce decree.

It is evident upon scrutinising the complexities around sexualities and gender identities that the lengthy report makes recommendations based upon heteronormative, cisgender, monogamous and conservative assumptions around the nuclear family. These recommendations have been and seemingly remain detrimental to the stability and wellbeing of *post facto* same-sex marriages and parties by negating the real effects that a compulsory or forced divorce may have on the spouses. It makes a determination on the status of the marriage but makes no recommendations on how to mitigate the adverse effects that comes

¹⁶ See South African Law Commission (Project 52) *Report on the investigation into the legal consequences of sexual realignment and related matters* (1995).

¹⁷ South African Law Commission (Project 52) *Report on the investigation into the legal consequences of sexual realignment and related matters* (1995) 26.

¹⁸ South African Law Commission (Project 52) *Report on the investigation into the legal consequences of sexual realignment and related matters* (1995) 26.

¹⁹ South African Law Commission (Project 52) *Report on the investigation into the legal consequences of sexual realignment and related matters* (1995) 2 & 26.

part and parcel thereto. For one, it does not indicate whether the marriage is void *ab initio*, whether from the moment the transsexual spouse realises his or her cross-gender identity or whether from the moment he or she embarks on a journey of realigning their sex with their gender identity. The report fails to discuss the nuanced intricacies coincidental to positioning transsexuality within the law. What it has however done is to rigidly juxtapose transsexuality with the law, leaving little space for flexibility and (re)negotiation.

From being legally invisible, to obtaining limited legal recognition, to being blatantly omitted, and ones again included, and then again being provided with vague possibilities, it is clear that the lived realities of transsexual people were left at the mercy of the State who exercised its power adversely and inconsistently just because it could, without due regard as to the adverse impact it had on transsexual people. However, even though the past indicates a narrative of struggle, humiliation and inhumane treatment; the present and the future looks a bit more promising under an ever evolving international human rights framework and progressive domestic legislation inspired by a superbly drafted Constitution.

4.3. South African Constitution: A safety-net for the marginalised

Forcing or coercing *post facto* same-sex couples to divorce under the Marriage Act and having their union reregistered under the Civil Union Act brings about various ethical and constitutional issues.

4.3.1. Transformation and ideological contestations

‘Gay’ rights activists and advocates alike have found themselves in an ideological tug of war. On the one end there has been a strong fight for marriage equality in which civil unions and domestic partnerships for same-sex couples have been outrightly rejected as an ineffective substitute for marriage relegating same-sex couples to second-class citizenship.²⁰ On the other end, same-sex couples have endorsed civil unions and domestic partnerships as an alternative to marriage as an institution separate to the oppressive history of traditional marriage. The context of this thesis is founded on neither ideologies nor positions as mentioned above but premised solely on the protection of a marriage that *post facto* same-sex couples wish to continue in terms of the Marriage Act.

²⁰ Persad, G. ‘What marriage law can learn from citizenship law (and vice versa)’ (2013) 22 *Law & Sexuality* 109.

*...the idea of transformation is a politically and legally contested space in which the possibilities of substantive equality/transformation are limited by “inclusionary” approaches and remedies or bolstered by those that are truly “transformatory.”*²¹

The above statement presupposes that should an individual or a group of people be excluded from legal protection due to the operation of a particular status *quo* that the substantive equality which is sought will be limited to the extent that the status *quo* is able to include the excluded into its ambit without materially being affected. In this manner, the status *quo* subjects the ‘difference’ to assimilation and hence is not subjected to transformation. Alternatively, transformation could also mean radically dismantling the status *quo* in its entirety but this may come at a different cost for minority groups.

It also correctly holds that social inclusion does not necessarily amount to social transformation. More likely social inclusion tends to undermine social transformation by pulling some closer to the status *quo* whilst pushing the margins further for those perceived to have a more transgressive agenda. The question being, who of the marginalised are offered inclusion, why and at what expense?

American advocates have unsuccessfully argued that in order to attain greater rights for more people, the institution of marriage must be dismantled in its entirety.²² However, others have argued that obtaining access to the institution of marriage is much more reasonable in order to obtain rights. Hence, the intense mobilisation for same-sex marriage rights equal to that of opposite-sex couples all around the world, including South Africa, comes as no surprise. What does come as a surprise, is the ease with which normative gay and lesbian couples have been able to disassociate their struggles from other LGBTI relations that are more transgressive when critically reflecting on the status *quo*. Persad questions whether one can pursue access to a status such as marriage within the confines of the status *quo* while

²¹ Albertyn, C. ‘Substantive equality and transformation in South Africa’ (2007) 23 *SAJHR* 257; See generally Botha, H. ‘Metaphoric reasoning and transformative constitutionalism’ 2002 *TSAR* 612, 2003 *TSAR* 20; See generally Van der Walt, J. *Law and sacrifice: Towards a post-apartheid theory of law* (2005). According to Botha and Van der Walt ‘transformation’ is a permanent ideal and constantly explores, accepts and rejects new ways of being.

²² Persad, G. ‘What marriage law can learn from citizenship law (and vice versa)’ (2013) 22 *Law & Sexuality* 105.

simultaneously advocating for the expansion of rights differently for others on the outside.²³ It is with this ideological conflict that this thesis has been particularly challenging to write.

4.3.2. The rights to equality, dignity and freedom

The South African Constitution affirms the democratic values of human dignity, equality and freedom.²⁴

4.3.2.1. Right to equality

The equality clause expressly lists 'sexual orientation' as a ground upon which a person may not be discriminated against.²⁵ In addition, 'gender identity' has been affirmed by way of the Alteration of Sex Description and Sex Status Act as an unlisted ground upon which a person may not be discriminated.²⁶ Consequently, section 9(2) provides that equality includes the full and equal enjoyment of all rights and freedoms.²⁷ By extension, the right to found a family is not expressly protected by the Constitution but by virtue of claiming one's right to equality and dignity.²⁸ According to the Constitution if a person is being discriminated against based on a listed ground it gives rise to an automatic claim of unfair discrimination unless it is proven to be fair.²⁹ The fact that *post facto* same-sex couples are coerced into obtaining a decree of divorce under the Marriage Act and 'remarry' under the Civil Union Act begs the question of whether such an action upholds the right and value of marriage

²³ Persad, G. 'What marriage law can learn from citizenship law (and vice versa)' (2013) 22 *Law & Sexuality* 105.

²⁴ Constitution of the Republic of South Africa (1996), s7(1).

²⁵ Constitution of the Republic of South Africa (1996), s9(3). The section provides that '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'.

²⁶ Alteration of Sex Description and Sex Status Act 49 of 2003, s3(2). After having had his or her sex description altered legally the person is deemed for all purposes of the law to be a person of the altered sex. This may be the case irrespective of the physical embodiment of the person still resembling that of a typical male-born person. Hence, a person may not be discriminated against based on his or her 'gender identity'.

²⁷ Constitution of the Republic of South Africa (1996), s9(2).

²⁸ See generally Sloth-Nielsen, J. & Van Heerden, B. 'The constitutional family: Developments in South African family law and jurisprudence under the 1996 Constitution' (2003) 17(2) *Journal of Law, Policy and the Family*.

²⁹ Constitution of the Republic of South Africa (1996), s9(5).

‘equality’ since heterosexual couples married under the Marriage Act are not burdened to do the same. Such action stands in stark contradiction with South Africa’s equality jurisprudence.

In *Brink v Kitshoff* the Constitutional Court held that in cases dealing with substantive equality, that it is a requirement to consider the impact of constitutionally relevant differentiation on the complainant by taking into account the contextual circumstances of the complainant.³⁰ Hence, De Vos correctly argues that the contextual or remedial approach taken by courts must steer away from creating and maintaining legal and structural inequalities between individuals and groups of people based on difference.³¹

In addressing respect for difference and the advancement of the right to equality, the court held in *National Coalition for Gay and Lesbian Equality v Minister of Justice* that:

*...what the Constitution requires is that the law and public institutions acknowledges the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of differences what becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.*³²

The above quote brings about a critical reflection on what it means to assert a right to marriage equality for all. Many activists have argued that the goal of achieving marriage equality for same-sex couples entailed submitting to being assimilated into mainstream institutions.³³ In order to engage the concept of the constitutional family and the variations of

³⁰ *Brink v Kitshoff* 1996 (4) SA 197 (CC) para44; See generally *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para20. In this case, Langa J provides that discrimination cannot be assessed in a vacuum but should be contextualised; De Vos, P. ‘Same-sex sexual desire and the re-imagining of the South African family’ (2004) 20 *SAJHR* 185.

³¹ De Vos, P. ‘Same-sex sexual desire and the re-imagining of the South African family’ (2004) 20 *SAJHR* 185.

³² *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para134.

³³ Persad, G. ‘What marriage law can learn from citizenship law (and vice versa)’ (2013) 22 *Law & Sexuality* 112; Schacter, J.S. ‘The Other same-sex marriage debate’ (2009) 84 *CHI.-KENT L. REV.* 379, 387 – 93. Schacter provides a history of the debate over whether to pursue same-sex marriage and summarising the arguments of marriage sceptics Paula Ettelbrick and Michael Warner.

family formations that are coincidental thereto, lawmakers and law interpreters must critically reflect and question to what extent the existing social binary construction of sex, gender, sexual orientation and gender identity undermine the variability of human beings and their right to substantive equality. Agreeably, what is the norm does not presuppose that it is normal. Such an assertion plays into the domain of power and politics as addressed by Foucault. The South African Constitution is particularly clear on affirming the rights to freedom, dignity and equality in the context of the politics of power between those considering themselves to be superior and worthy of preservation in relation to those considered to be and positioned as marginalised and disposable. However, the politics of power is pervasive and insidious in the preservation of social hierarchies that are reinforced with legal doctrine. For this reason, attention is drawn to the role the law plays in reinforcing social hierarchies, especially when addressing sexual and gender transformational imperatives. Though desperately seeking to be progressive or, at least, seeking to appear progressive, lawmakers often fall into a normative trap that is rooted in the ideals of the status quo. For non-normative sexual and gender identities, this has meant being subjected to the construction and effects of homonormativity, largely modelled on heteronormativity.

4.3.2.2. Right to dignity

Section 10 of the Constitution provides that everyone has the right to claim protection and respect for their inherent human dignity.³⁴ Since human dignity is a vague value it must be assessed in light of certain factors as expressed in the Constitutional Court judgement of *Harksen v Lane*.³⁵

Harksen v Lane lists factors to assess the extent to which a person's dignity has been violated. First, the court looked at the position of the complainant in society. The fact that *post facto* same-sex couples are forced or compelled to apply for a divorce decree on account of one spouse affirming their gender identity is indicative that the couple is being

³⁴ Constitution of the Republic of South Africa (1996), s10.

³⁵ *Harksen v Lane* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997); De Vos, P. 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *SAJHR* 184. De Vos points out that the Constitutional Court of South Africa uses a discourse of 'substantive equality' that takes into account the structural inequalities in society that contributes to the economic, political and social positioning of people and groups; See generally Albertyn, C. & Goldblatt, B. 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248 & 50; Jagwanth, S. 'What is the difference? Group categorisation in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC)' (1999) *SAJR* 201.

marginalised. These couples embody the historical oppression that LGBTI people have experienced, and are still experiencing as is evident from the South African Human Rights Commissions Report of 2012.³⁶ They factually prove that *post facto* same-sex couples occupy a particularly adverse social position.

Secondly, it determined what the nature of the discriminatory law or action, in this case action, is. The nature of the discriminatory action (practice) amount to exclusion because the Department of Home Affairs exclusively pursues this line of action that arbitrarily excludes couples from the protection of the Marriage Act if they affirm a non-normative sexual and gender identity.

Thirdly, the court provided that the purpose of the discrimination had to be ascertained to provide context. It would appear, in the absence of valid justifications, that the purpose of the discrimination is to protect the holy, pure and sacret institution of marriage for ‘normal’ heterosexual, cisgender and monogamous people from those ‘social dissidents’ that by default of their existence do not embody these ideals.

Lastly, the court stated that the extent to which the right of the complainant was impaired was another factor to be considered. The administrative action by the Department of Home Affairs of forcing or compelling married couples, who have the intention to remain married, to commit perjury (by stating in a court of law that their marriage has broken down irretrievably and then having to carry the legal and social consequences of such an assertion) stands in direct contrast to section 3(3) of the Alteration of Sex Description and Sex Status Act. Section 3(3) presupposes that a *post facto* same-sex couple may remain married as gender affirmation does not adversely affect the rights which accrued to a transsexual person before such affirmation, afterwards. The fact that the couple is denied protection under section 3(3) is evident of the extent to which the couple’s right to dignity, equality, freedom and to remain married has been impaired.

4.3.2.3. Right to freedom

Section 12(2)(b) expressly provides that a person has the right to the freedom and security of their person which consists of the right to bodily and psychological integrity and includes the

³⁶ South African Human Rights Commission *Equality Report* (2012) 56.

right to security in and control over their body.³⁷ This right links up with the right to dignity and the right to privacy.³⁸ Divorce proceedings can be quite challenging on the parties involved and the family unit as a whole. It literally dismantles the protections offered by marriage. It involves various interests which include their financial position, children³⁹ and the associated psychological trauma that may accompany on account of the myriad of uncertainties. By unduly subjecting *post facto* same-sex couples to these experiences is a direct attack on the psychological integrity and dignity of the family unit and the parties involved.

In analysing the rights which *post facto* same-sex couples are entitled to in the preservation of their family unit, it would seem as if the Department of Home Affairs is making adverse determinations that place these couples in a precarious position of choosing between the right to self-determination and affirmation and the right to found a family. The fact that these couples are put at risk legally due to the dismantling of the family unit at the instance of the State sends a strong message in a constitutional democracy that certain bodies and relationships matter more than others. This is ironic as South Africa's Constitution and subordinate laws expressly aim to protect the most marginalised people and communities from socially dominant groups and ideologies.

4.4. South African legislation

For the purpose of this thesis four vital pieces of legislation will be discussed in light of a *post facto* same-sex couple's right to remain married under the Marriage Act. These include the Marriage Act,⁴⁰ Divorce Act⁴¹ (and briefly focusing on the ways in which a marriage may

³⁷ Constitution of the Republic of South Africa (1996).

³⁸ Constitution of the Republic of South Africa (1996), s14. S14 encompasses a person's right to privacy.

³⁹ Constitution of the Republic of South Africa (1996), s28. According to section 28, the best interest of the child is of paramount importance in every matter concerning the child. When the parents of a child to a marriage under the Marriage Act are required to divorce from under the Marriage Act the questions become does this have an impact on the best interest of the child and how, if so, does it affect the child?

⁴⁰ Marriage Act 25 of 1961.

⁴¹ Divorce Act 70 of 1979.

be dissolved), Alteration of Sex Description and Sex Status Act⁴² and Promotion of Administrative Justice Act.⁴³

4.4.1. Marriage Act

In 2001, the South African Law Commission launched a report reviewing the Marriage Act.⁴⁴ The objective of the report was directed at establishing the adequacy of provisions of the Marriage Act and considered whether certain provisions had to be amended and if so how such amendments would be affected in order to align the Marriage Act with the South African Constitution.⁴⁵ In addressing the wide proliferation and fragmentation of marriage rights in South Africa, the Commission recommended that the Marriage Act be consolidated in order to address and make provision for civil, religious and customary marriages in future under one Marriage Act.⁴⁶ However, contrary to this not much focus has been placed by the legislature and the judiciary in progressively working towards a unified piece of legislation that recognises different forms of intimate relationships whether it be marriage, unions, life partnerships or domestic partnerships. In contrast, the legislature has in effect fragmented marriage law in South Africa further and subjected itself to employ the apartheid doctrine of 'separate but equal' by promulgating the Civil Union Act.

⁴² Promotion of Administrative Justice Act 3 of 2000.

⁴³ Alteration of Sex Description and Sex Status Act 49 of 2003.

⁴⁴ South African Law Commission (Project 109) *Report on the review of the Marriage Act 25 of 1961* (May 2001).

⁴⁵ South African Law Commission (Project 109) *Report on the review of the Marriage Act 25 of 1961* (May 2001) XV and 1. Observations made in the report suggested that marriage be looked at holistically and not piecemeal as was recommended with investigations launched into Customary Marriages under the South African Law Commission (Project 90) *Report on Customary Marriages and the harmonisation of the Common Law and the Indigenous Law* (August 1998), South African Law Commission (Project 59) *Issue Paper 15 on Islamic marriages and related matters* (May 2000) and South African Law Commission (Project 118) *Issue Paper 17 on Domestic Partnerships* (November 2001).

⁴⁶ South African Law Commission (Project 109) *Report on the review of the Marriage Act 25 of 1961* (May 2001) 1, 5 and 8. Another suggestion tabled was that of repealing the existing Marriage Act and the promulgation of a new Marriage Act containing all the requirements of a civil marriage that is user-friendly. Whether this recommendation aims to be inclusive of all forms of intimate relationships as far as possible is unclear. In achieving an holistic Marriage Act the Gender Research Project recommended that i) a single form of marriage be created whose formalities should be covered by the Marriage Act. This recommendation is quite overly simplistic and ignores the vast differences that exist between various intimate relationships. Correctly, ii) defining a marriage in gender neutral terms is a progressive step forward in bringing legal certainty to many outside the heteronormative-cisgender-patriarchal mould in which marriage have been structured traditionally. iii) That all previously disadvantaged forms of marriages such as Customary marriage and Muslim marriage be recognised is also in line with the aims of this thesis.

The definition of a marriage legally concluded for the purpose of the Marriage Act traditionally was that of ‘a voluntary union between a man and a woman to the exclusion of all others before it was invalidated, in as far as it unfairly discriminated against same-sex couples who wished to get married, by the Constitutional Court in *Minister of Home Affairs v Fourie*.⁴⁷ Currently, in practice, same-sex couples are not allowed to marry in terms of the Marriage Act because of the Civil Union Act having acquired that purpose particularly for same-sex couples. *Post facto* same-sex couples problematise the simplistic understanding of the purpose of these two Acts.

In order to determine whether *post facto* same-sex couples have a right to remain married, this section focuses on an overview of the requirements for the conclusion of a valid civil marriage in terms of the Marriage Act. The first requirement is that both parties must have the legal capacity to marry one another at the time the marriage is concluded.⁴⁸ This would mean that the parties must be of the opposite sex legally and of marriageable age when concluding the marriage.⁴⁹ In the case of *post facto* same-sex couples this is legally the case. For all intents and purposes the couple, at the time when the marriage was concluded, was both *de facto* and *de jure* an opposite-sex couple of marriageable age.

Secondly, the requirement of consensus must be met. This requirement is met when the parties expressly affirm their intention to accept one another as a spouse.⁵⁰ The requirement of consensus can only be negated if the minds of the parties never met based on a material mistake as to the person’s identity (*error in personam*) or the nature of the juristic act (*error in negotio*). The context of this thesis is premised on the fact that the one spouse becomes aware of the *post facto* transgender gender identity of the other spouse and asserts that he or she still wants to remain married to the person. Hence, the cisgender spouse expressly consents to accepting the transgender partner as a spouse. Any claim which the cisgender

⁴⁷ *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

⁴⁸ Skelton, A. *et al. Family law in South Africa* (2010) 34 - 44.

⁴⁹ Skelton, A. *et al. Family Law in South Africa* (2010) 36. In practice a person’s ‘sex’ may give rise to couples having relative incapacity to get married if they are of the same sex legally. The legislature stepped in to remedy situations for transsexual people who want to marry a cisgender person but it has not expressly done so for persons who transitioned after they got married.

⁵⁰ Skelton, A. *et al. Family law in South Africa* (2010) 45 – 9.

spouse could have depended on to have the marriage set aside based on material mistake loses application.

Another ground to invalidate consensus at the instance of the ‘innocent’ party is misrepresentation.⁵¹ However, the ground of misrepresentation is very contentious in light of social sciences arguments that sexuality, gender identification and sexual orientation are complex by their very nature, especially when one seeks an understanding in hard and fast rules. It would be a fallacy to claim that the spouse misrepresented him or herself as a person of the opposite sex when the spouse later affirm the same-sexed body as the spouse whom he or she married. Misrepresentation renders a marriage voidable at the instance of the misled party which means that if the misled party does not want to have the marriage set aside that he or she should not automatically lose the right to remain married in terms of the Marriage Act because society and the law are inconvenienced at the instance of having a *post facto* same-sex marriage governed by the Marriage Act. The exercise of rigid discretion on the part of officials within the Department of Home Affairs and the framing of the law bring into question the objectivity of the law, its agents and what they seek to achieve.

Thirdly, lawfulness requires that the marriage complies with all the legal requirements either before or at the time when the marriage is concluded.⁵² It does not mention anything to the effect that certain requirements must continue to be met after the conclusion of the marriage. In fact, the lawfulness legal requirement of a marriage being between a man and a woman was invalidated in the case of *Minister of Home Affairs v Fourie*.⁵³ Lastly, all prescribed formalities must have been met when the marriage was concluded in order for a valid marriage to have come into legal existence.

The overall issue relating to the status of a *post facto* same-sex marriage is premised on events that occurred subsequent to the conclusion of the marriage. Therefore, the question to be addressed is whether the events that occurred after the legal conclusion of the marriage have any adverse effect on the lawfulness of the marriage.

⁵¹ Skelton, A. *et al. Family law in South Africa* (2010) 46.

⁵² Cronje, D.S.P. & Heaton, J. *South African Family Law* (2010) 27.

⁵³ *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

The Gender Research Project correctly argued in its submission to the South African Law Commission's Report on the review of the Marriage Act, that if the aim and foundation of family law is to protect 'vulnerable' family members from disadvantage, then the current emphasis in the law which links many protections to the institution of marriage needs serious reconsideration and interrogation.⁵⁴ Hence, the recommendation made is that legal protection of families should thus be based on the functionality of the family and not based on how the family fits into a model of the nuclear, monogamous, heteronormative family form.⁵⁵ Hence, the effect of the dissenting judgement by O'Reagan in *Minister of Home Affairs v Fourie* would have been the appropriate course of action and would have resulted in a greater safeguard legislatively for all by utilising gender neutral language in the Marriage Act as a starting point.⁵⁶

4.4.2. Divorce Act and ways of dissolving a marriage

A marriage that has been legally concluded can only be dissolved in one of three ways. It can be dissolved by way of death of at least one spouse, or by having the marriage annulled due to it being voidable or by way of divorce.⁵⁷

To the exclusion of dissolution by death, a marriage can only be dissolved at the instance of at least one party voluntarily, unless declared void by a court of law based on some or other illegality. The mere fact that a *post facto* same-sex marriage appear to be irregular does not mean that it is or ought to be classified as invalid or illegal. Since one of the parties in the context of this paper has not been declared dead, the marriage cannot dissolve by way of death. Due to the fact that both spouses choose to remain married, even in light of the one being able to potentially rely on the ground of misrepresentation in order to negate the requirement of consensus, there is no legal ground upon which the marriage can be annulled legally without the consent of the presumed misled spouse. To this, since neither spouses want to get divorced, no legal grounds would appear to exist that justifies the dissolution of

⁵⁴ South African Law Commission (Project 109) *Report on the review of the Marriage Act 25 of 1961* (May 2001) 8.

⁵⁵ South African Law Commission (Project 109) *Report on the review of the Marriage Act 25 of 1961* (May 2001) 8.

⁵⁶ See dissenting judgement of O'Reagan J in *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

⁵⁷ Cronje, D.S.P. & Heaton, J. *South African Family Law* (2010) 27.

the marriage. In fact, the effect of being coerced to divorce negates the consent given to such divorce proceedings.

4.4.3. Alteration of Sex Description and Sex Status Act

Hofman argues that ‘only those bodies that fit the [binary] schema “matters”...’⁵⁸ This thesis critically questions, whilst at the same time being conscious of the gender dysphoria transsexual people are diagnosed with, the notion that the Alteration of Sex Description and Sex Status Act (Act 49) positions transsexual persons legally to fit the binary mould, by virtue of affirming them as the opposite sex. The Act, although progressive by allowing transsexual people to exercise their right to self-determination and agency, should be questioned for its narrow binary construction that excludes gender non-conforming and intersex bodies from the ambit of ‘mattering’ meaningfully in law.

The Alteration of Sex Description and Sex Status Act was passed by parliament to legally recognise the affirmed sex of a person due to gender affirmation surgery. The effect of the Act is that a person would for all legal purposes, at least, be recognised as a person of the affirmed sex.

Section 3(3) of the Act provides that the ‘rights and obligations that have accrued to such person before the alteration of his or her sex description are not adversely affected by the alteration.’⁵⁹ This is a watered-down version from the 1992 Amendment Act that stipulated that ‘no existing rights and obligations that have been acquired by or accrued to the applicant before the alteration of the sex description shall be abolished by the alteration.’⁶⁰ Currently, the purpose of this section is quite unclear and its application quite vague. Many questions can be asked. Was this a mere token inclusion? Was it included to protect third parties and ‘innocent’ or ‘misled’ spouses from the ‘so-called’ legal deception that may be brought about by transsexual people? Was it included to protect the interests of transsexual people in order for them not to be treated differently by virtue of losing their legal subjectivity completely? Currently, it appears as if the purpose of the section is more focussed on protecting external

⁵⁸ Hofman, D.L.C. ‘Male, Female, and Other: How science, medicine and the law treat the intersexed, and the implications for a sex-dependent law’ (2012) 21 *Tulane Journal of Law and Sexuality* 5.

⁵⁹ Alteration of Sex Description and Sex Status Act 49 of 2003.

⁶⁰ Amendment Act 51 of 1992 which amended the Births and Deaths Registration Act 51 of 1992 through insertion of s24A.

parties from being prejudiced by the gender affirmation process than it is about protecting transsexual people from social and structural prejudice embodied in policies and laws. The price paid by *post facto* same-sex couples when they are subjected to forced or compulsory divorces is that when individuals and couples claim their autonomy and agency outside the norms of society, they are subjected to social punishment and relegated to the margins.

When the State positions *post facto* same-sex marriages as invalid under the Marriage Act and justifies the invalidation with the Civil Union Act that is available for same-sex couples, it is illustrative of the blatant disregard that the State has for its legal obligation to protect and preserve the family unit and the right to remain married which accrues to the couple.

4.4.4. Claiming the right to just administration action

The Promotion of Administration Justice Act burdens the State with the onus of having to give effect to administration action that is lawful, reasonable and procedurally fair in light of having to provide written reasons for administration action taken.⁶¹ Section 33 of the South African Constitution asserts this right and provides that everyone whose rights have been adversely affected by administration action has the right to be furnished with written reasons.⁶² Currently, no evidence suggest that *post facto* same-sex couples are furnished with written reasons as to why they need to divorce.

Aligned with section 33(1) and (2) of the Constitution and the preamble of the Promotion of Administration Justice Act is section 3(3) of the Alteration of Sex Description and Sex Status Act which provides that a person's rights shall not be adversely affected by an affirmation of gender. However, subjecting couples to compulsory or forced divorces does amount to questionable administration action that adversely affects them. The termination of marriage is no simple inconvenience associated with an affirmation of gender. It gives rise to many legal implications and places couples in adverse positions which were in no way their choice. The institute of marriage brings about a kaleidoscope of protections, tangible and intangible as well as social and economic. On account of administration action taken by the Department of Home Affairs, *post facto* same-sex couples are subjected to an experience of being positioned

⁶¹ Promotion of Administration Justice Act 3 of 2000.

⁶² Constitution of South Africa, ss33(1) - (3).

as second-class citizens on account of their 'deviant' sexual orientation and gender identity.⁶³ Such action is particularly questionable when contextualised within South Africa's past and unjust, unreasonable and unfair administrative action that were legitimised giving rise to the policing of bodies. It cruelly legalised and validated who could marry whom under apartheid with the inception of the Prohibition of Mixed Marriages Act with the aim of 'protecting' the 'pure', 'sacred' white race from the 'abhorrent' non-white races.⁶⁴

Currently, there is great uncertainty as to the lawfulness of subjecting *post facto* same-sex couples to compulsory or forced divorces, in the absence of an express empowering provision supporting such action. This practice of compelling *post facto* same-sex couples to appear before a court of law and lie, stating that their marriage has broken down irretrievably, suggests that officials at the Department of Home Affairs are not acting within the ambit of an empowering position. This causes for great suspicion since it can be argued that the couple has a *prima facie* right to remain married under the Marriage Act and that they are currently denied the benefit of exercising this right. In light of this, a departure from such right needs to be evaluated to establish whether the deprivation of such right is justified. Currently, nothing suggest that such action is justified, reasonable and fair. Hence, the question thus becomes 'what are the reasons for the administrative action?'

In establishing the lawfulness, reasonableness and fairness of the said administrative action, perhaps the matter should be put to judicial review in terms of section 6 of Promotion of Administrative Justice Act to determine the nature and scope of the right to remain married in light of the exercise of presumably unjust, unfair and unreasonable administration action.

4.5. Conclusion

Much like institutional racism was the driving force behind dividing a country based on race so too is institutionalised homophobia, transphobia, biphobia and sexism, even in a democratic dispensation, also the driving force behind perpetuating discrimination against marginalised populations. Laws and statutes affect marginalised populations by mostly only making provision for the general rule, a heteronormative and cisgender society and not

⁶³ Promotion of Administrative Justice Act 3 of 2000. S1(a) defines 'administration action' as any decision taken or failure to take a decision by an organ of State, natural or juristic person when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct, external legal effect.

⁶⁴ Prohibition of Mixed Marriage Act 55 of 1949.

catering for the needs of people who do not find expression in this. Institutional discrimination is encompassed in laws and statutes.⁶⁵ This is evident by virtue of both the Marriage Act and Civil Union Act seeking to achieve the same goal legally. Having two separate pieces of legislation seeking to achieve the same legal objective is an indication that there is segregation within our marriage law. Hence, there is a need for the democratic programme to become more vested and dedicated to empowering and liberating populations at risk of marginalisation by enacting and applying laws that promotes constitutional imperatives and eradicate the legal risks they are exposed to.

None of the requirements for the conclusion and existence of a valid civil marriage in terms of the Marriage Act suggest that the marriage of a *post facto* same-sex couples is invalid or unlawful. The Divorce Act is silent in that it does not provide guidance on the dissolution of marriage outside its scope of dissolution by death, voluntary divorce and annulment by a court based on it being void. *Post facto* same-sex marriages cannot be considered void as they met all the requirements of a valid marriage at the moment it was concluded. Although, perhaps, voidable, the cisgender spouse waives their claim to have the marriage set aside as voidable by assenting to the union as is. These determinations, coupled with the effect of section 3(3) of the Alteration of Sex Description and Sex Status Act as well as the Promotion of Administration Justice Act, provides a solid foundation upon which *post facto* same-sex couples can claim their right to remain married in terms of the Marriage Act.

In ascertaining how the law of marriage can mitigate the legal and social risks *post facto* same-sex couples are exposed to, Chapter 5 concludes this thesis by advancing certain recommendations on how the law can enhance its responses to the needs of people and couples embodying non-normative sexualities and gender identities.

⁶⁵ Jacobson, C.K., Amoateng, A.Y. & Heaton, T.B. 'Inter-racial marriages in South Africa' (2004) 35(3) *Journal of Comparative Family Studies* 444 – 45. 'Since the transition to the new government, South Africa has been exposed to more tolerant treatment of race. This has occurred through mechanisms such as the media, the Truth and Reconciliation Commission, and supportive leadership.'

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

One of the greatest challenges experienced whilst compiling this thesis, is that of escaping what seems to be an inevitable heteronormative trap, particularly as it relates to the traditional binary construction of sex and gender, in arguing that *post facto* same-sex couples have a right to remain married under the Marriage Act. Arguing for the recognition and protection for *post facto* same-sex couples is strained by the law of marriage that has been constructed using normative heterosexual values that rigidly codes marriage under the Marriage Act.

Within the limited legal scope, radical legal transformation in the law of marriage is strained in claiming practical relief for *post facto* same-sex couples. The reliance on the legal certainty that the Alteration of Sex Description and Sex Status Act brings about in reclassifying a transsexual person and his or her sex as a fixity in the scope of the traditional binary sexes and potentially reinforcing this oppressive ideology, in turn, is a necessary compromise for practical relief in the short term. This argument, in turn, does tend to undermine a broader transformational politic for transgender people in the long term when viewed from the margins. However, an argument can also be made that by virtue of asserting the right to remain married, that *post facto* same-sex couples are challenging the heteronormative status *quo* and that it has the potential of unlocking a different debate around the trajectory of South Africa's fragmented marriage law system and the implications it has for promoting inclusivity, equality, dignity and transformation for all people.

5.2. Politics of difference: Paving a way forward despite the status *quo*

McFadden argues that “thorough state sponsored and endorsed practices of heterosexual marriage; cultural and traditional conventions; gendered identities deny people personhood and all aspects of human integrity.”¹ To this, Hofman correctly argues that the law is parochial and often struggles to catch up and respond to new truths about sex, gender, sexuality and identity revealed by science.² Hence, it runs the risk of constructing that which

¹ McFadden, P. ‘Challenging empowerment’ (2010) 53 (2) *Society for International Development* 163.

² Hofman, D.L.C. ‘Male, Female and Other: How science, medicine and law treat the intersexed, and the implications for a sex-dependent law’ (2012) 21 *Tulane Journal of Law and Sexuality* 2; Greenberg, J.A. ‘Defining male and female: Intersectionality and the collision between law and biology’ (1999) 41 *ARIZ. L. REV.* 265, 267 – 68.

it perceives as exceptional, such as *post facto* same-sex marriages, as ‘abnormal’ or ‘deviant’. Consequently, this provides a warped justification for compulsory or forced divorces.

In advocating for transformation and legal recognition with the intention of providing legal protection to parties with non-normative sexualities and gender identities in intimate relationships, legal reformation has conflated the complexities of human intimate relationships to a hegemonic binary of opposite-sex and same-sex intimate relationships.³ The consequences are therefore dire for *post facto* same-sex couples who problematise this false dichotomy using Queer Theory, Feminist critique and Transgender Theory as instruments of analysis.⁴ Such false dichotomy becomes evident in ‘bureaucratic blunders’ such as compulsory or forced divorces that transsexual people are unnecessarily and unduly exposed to.⁵

The institution of marriage, falling under the branch of family law, occupies significant importance in South African society. According to Sachs J, its importance is located in the central role it plays and the consequences it gives rise to in South Africa.⁶ In centrally locating the institution of marriage within South African society, Sachs J, although critical of its exclusionary nature and advocating for the vindication of marriage rights for same-sex couples, still finds himself challenged by the dexterity of heteronormativity.⁷ He is confined to arguing for same-sex marriage only in as far as it relates to it mimicking heterosexual

³ Parliamentary Monitoring Group ‘Minutes: Home Affairs portfolio committee on Alteration of Sex Description and Sex Status Bill: Hearings’ (9 September 2003) available at <http://pmg.org.za/committee-meeting/2832/>. Discussions leading up the passing of the Civil Union Act by Parliament in 2007 is indicative of a process that was dominated by gay and lesbian politics to the detriment of transgender and intersex people. Consequently, the crafting of legal protection for same-sex couples has been coded with heteronormative and cisgender values.

⁴ See Chapter 2 for theoretical framework.

⁵ Legal Resources Centre & Gender Dynamix *Briefing paper: Alteration of Sex Description and Sex Status Act No. 49 of 2003* (2014) 24. The briefing paper identifies forced divorces for *post facto* same-sex couples as being directly tied to the ineffectual implementation of Act 49 in light of the strained interpretation and provisioning of the Marriage Act as well as the lack of recognition extended to the Divorce Act 70 of 1979 in guiding the dissolution of marriage process.

⁶ See generally Sachs, A. *The soft vengeance of a freedom fighter* (2011); *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC) para72; Barnard-Naudè, J. & De Vos, P. ‘Disturbing heteronormativity: The “queer” jurisprudence of Albie Sachs’ (2010) *SAPL* 221.

⁷ *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC) para72. Sachs J held that to deny same-sex couples the choice of getting married was to negate their right to self-determination in a very profound way; Barnard-Naudè, J. & De Vos, P. ‘Disturbing heteronormativity: The “queer” jurisprudence of Albie Sachs’ (2010) *SAPL* 212; See generally Robson, R. ‘Sexual democracy’ (2007) 23 *SAJHR*.

marriage. However, such limitation is to be expected since Johnson correctly argues that citizenship in itself is heteronormatively conceptualised and ultimately forms the foundation for the political system and associated discourses such as the law that resultantly undermine marginalised and oppressed people who fail to conform to this ideal.⁸ This argument is supported by Barnard-Naudè and De Vos who argue that the dexterity of heteronormativity operates in such a way that it lends itself to being disturbed, but still coerces those disturbing it to yield to its disciplinary power and knowledge.⁹ However, this does not presume that the law of marriage, in as far as it relates to the disturbance of the insidious status *quo* protected by the Marriage Act, cannot be transformed to extend legal protection to *post facto* same-sex couples. In effect, by transforming the construction of the institute of marriage from within the confines of the Marriage Act can possibly initiate a process of dismantling the hegemonic nature of the heteronormatively ideal marriage, to be untouched and unfettered with by ‘social dissidents’.

From inequality to a place of substantive equality, from being positioned as ‘abnormal’ and ‘deviant’ to asserting difference without being subjected to second-class citizenship, to dismantling sex and gender binaries, the law of marriage still has a long way to go in realising the ideal of a democratic South Africa that has broken all ties with its oppressive past. Modiri correctly argues that despite a progressive Constitution, arguably the finest in the world that is committed to democracy, transformation, substantive equality, social reconciliation and plurality, that purposive interpretation continues to be trapped within the legal doctrines of formalism and legalism.¹⁰ Currently, the collective imagination of South Africa is inherently gendered and hierarchical as it is premised on a collective of families that ascribe to compulsory heterosexuality and patriarchy.¹¹ Hence, what it still represents, is that relationships and individual bodies be structured around these ideologies. Due to the operation of these dominant norms *post facto* same-sex marriages are positioned as disruptive

⁸ Johnson, C. ‘Heteronormative citizenship and the politics of passing’ (2002) *Sexualities* 317.

⁹ Barnard-Naudè, J. & De Vos, P. ‘Disturbing heteronormativity: The “queer” jurisprudence of Albie Sachs’ (2010) *SAPL* 234.

¹⁰ Modiri, J.M. ‘Transformation, tension and transgression: Reflections on the culture and ideology of South African legal education’ (2013) 3 *STELL LR* 406; Klare, K. ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* 165; Van Marle, K. ‘Revisiting the politics of post-apartheid constitutional interpretation’ (2003) *TSAR* 549; Davis, D.M. ‘Transformation: The constitutional promise and reality’ (2010) 26 *SAJHR* 85.

¹¹ Schuhmann, A. ‘Taming transgressions: South African nation building and “body politics”’ (2010) 24(83) *Agenda* 97.

relationships to be positioned as something there, perhaps under the Civil Union Act, in order to protect and preserve the so-called sacred traditional marriage under the Marriage Act for heterosexual unions.

Queer Theory, Transgender Theory and Feminist critique expose critically and truthfully that the law itself has never been neutral or apolitical and has been instrumental in regulating the divide between the good 'normal' citizen and bad 'deviant' bodies.¹² The construction of human existence and the validation of certain human bodies and relationships has been intensely influenced by the dominant ideology of the 21st century, that of neo-liberalism in a late capitalist society such as South Africa. Braidotti correctly argues that late capitalism appears to be a system that promotes radical politics in order to advance the interests of the marginalised without including and allowing for their material participation throughout the process.¹³ Thus, the Department of Home Affairs (the State) can make adverse decisions about non-normative bodies 'in their best interests' without positively impacting their lived realities as the case currently presents for *post facto* same-sex couples. The appearance of advancement in actual fact results in disenfranchising the couple at the instance of a bureaucratic disciplinary social order. Instead of minimising injustice, inequality and exclusion it acts as a vehicle to proliferate these by constructing the law as neutral, objective and apolitical.¹⁴ Thus, ironically, the law is intricately tied up with this ideology by seeking to advance the interests of the couple within a model of justice defined within the ambit of a conservative legal culture inhibited by other dominant ideologies such as patriarchy and heteronormativity that seek to marginalise particular bodies for its continued dominant existence.

The ideology of patriarchy is deeply imbedded in both Western and African cultures.¹⁵ South Africa is no exception. Patriarchy is irrevocably enmeshed with Afrocentric cultures in South

¹² Modiri, J.M. 'Transformation, tension and transgression: Reflections on the culture and ideology of South African legal education' (2013) 3 *STELL LR* 456.

¹³ Martinsson, L. & Reimers, E. eds *Norm-struggles: Sexualities and contentions* (2010) 69.

¹⁴ Modiri, J.M. 'Transformation, tension and transgression: Reflections on the culture and ideology of South African legal education' (2013) 3 *STELL LR* 455 to 7; Brown, W. 'Wounded attachments' (1993) 21 *Political Theory* 390.

¹⁵ Coetzee, D. 'South African education and the ideology of patriarchy' 2001 *South African Journal of Education* 21(4) 300; See generally Van der Walt, B.J. *The Liberating Message — A Christian Worldview for Africa* (1994).

Africa.¹⁶ In return patriarchy calls upon another powerful ideology, ‘compulsory heterosexuality’, to condition society using State functionaries as agents. Supporting ‘compulsory heterosexuality’ is the idea that a person’s gender is predetermined by their sex assigned at birth, which results in cisgenderism being the only legitimate gender identity that people ought to subscribe to. Consequently, the result of ‘compulsory heterosexuality’ is a culture or society that constructs its citizens in relation to men, heterosexuality and cisgenderism as an ideal that all human beings should aspire to.¹⁷

In order to understand how the law interacts or can interact with marginalised bodies, people and communities, it is important to understand the historical context and current realities within which *post facto* same-sex couples find themselves, in relation to the possible future(s) that the law is able to carve out for them.¹⁸ This is a necessary measure as it maximises the possibility of a livable life with the least amount of structural and policy challenges as opposed to the possibility of living an unbearable life which in turn results to a social or literal death of personhood.¹⁹

5.3. Recommendations

This section advances certain recommendations in support of *post facto* same-sex couples retaining their right to remain married under the Marriage Act, irrespective of their sexual orientation and/or gender identity. These recommendations include how language construct bodies, an interrogation of the legal gaze(s), how transformation is viewed or ought to be viewed and questioning the State’s use of power.

5.3.1. Language as a tool of oppression

The linguistic processes through which diverse and different human bodies and relationships are conceptualised and how they acquire meaning is a site of great struggle. This has been

¹⁶ Coetzee, D. ‘South African education and the ideology of patriarchy’ (2001) *South African Journal of Education* 21(4) 300; See generally Van der Walt, B.J. *The Liberating Message — A Christian Worldview for Africa* (1994).

¹⁷ Race, geographical location and bodily ability are also other determining factors in constructing dominant identities. In this way the dominant identity relating to human existence is that of a white, cisgender, heterosexual, able-bodied male preferably of Western origin.

¹⁸ Butler, J. *Undoing Gender* (2004) 8; Husakouskaya, N. ‘Rethinking gender and human rights through transgender and intersex experiences in South Africa’ (2013) 27(4) *Agenda* 10.

¹⁹ Butler, J. *Undoing Gender* (2004) 8; Husakouskaya, N. ‘Rethinking gender and human rights through transgender and intersex experiences in South Africa’ (2013) 27(4) *Agenda* 10.

illustrated by the myriad of queer judgments, particularly as reasoned by Sachs J, that has been framed, although at times radically, mostly within the confines of the heteronormative, monogamous and neo-liberal and capitalist status *quo*. When viewing rights accruing and realisable to same-sex couples, the struggle has benefited those who has been able to prove their ‘sameness’ to the dominant status *quo* and those predominantly in a comfortable socio-economic position, which is not a reality for most people with a non-normative sexuality and/or gender identity. Hence, an argument can be made that the rights won through the struggle has been framed linguistically neutral in a way that provides freedom and equality to those who are not too different and socio-economically powerful. In other words the law thus protects the ‘good and not too far removed “gay” citizen.’

There is thus a need for the law to be critically (re)evaluated, particularly as it relates to how language construct rights and constitute bodies as ‘good’ and ‘bad’. When language has been used in service of the dominant status *quo*, the question becomes how do drafters of laws overcome the inevitable traps of patriarchy, heteronormativity and socio-economic privilege, that the status *quo* presents, in the pursuit of incorporating difference into the letter of the law in a transformatory way that positively impacts the lives of non-normative people equitably and meaningfully in line with that of the norm.

5.3.2. Interrogating the legal gaze(s) in the law of marriage

If the aim of the law is to reconcile ‘sameness’ and ‘difference’, the question becomes how does the law do this without compromising a transformatory politic to equitably incorporate difference. When engaging with the letter of the law, it is important to understand that whoever interprets language (the law), attach meaning to words and produce a particular legal gaze as a tool to understand human bodies, human existence and human relationships. As mentioned above, the law has never been neutral, objective or apolitical. The law, both international and domestic law (statutes and case law), interpolates *post facto* same-sex marriages and subjectivities in very particular ways. Involving aspects of actual or perceived homosexual sexual orientation and transgender gender identity simultaneously, the scope for various fixed ways of gazing upon such relationships with the aim of boxing is great. It is for this reason that the Department of Home Affairs is currently ‘regulating’ (or rather policing), legitimising and reinforcing the dominant status *quo* by overtly making visible the divide between what it deems as ‘normal’ and ‘abnormal’.

5.3.3. Differentiating between social inclusion, substantive equality and social transformation

Social inclusion does not necessarily amount to social transformation. It does not necessarily apply the transformation imperatives that substantive equality proposes.

In contrast to mere formal recognition in law, presupposing social inclusion, substantive equality has four primary characteristics which includes having to understand inequality contextually within a particular society linked to its history, the impact which the inequality has on a complainant, recognising that difference is a positive feature within a society; and understanding the purpose of a right coupled with its concerns premised on remedying systematic subordination or disadvantage.²⁰ In addition to these four primary characteristics, another characteristic that can be linked to transformative substantive equality is the ability to affirm or at least imagine a future society that has been transformed through substantive equality.²¹ Such transformation must, however, be practically possible through desired remedies and informed by normative values.²² By virtue of these characteristics, a necessary retreat away from legal formalism would occur as the law will be understood as a product of social relations informed by a transformative agenda.²³

Post facto same-sex couples have both historically and contemporarily occupied a space of inequality. South Africa's history illustrates the struggle people with non-normative sexualities and gender identities faces, respectively. It is, however, silent on the unique and compounded oppression faced by *post facto* same-sex couples as they are affected by both struggles simultaneously. The impact of such compounded discrimination is aggravated by virtue of a system that applies particular ideologies seeking to marginalise them by all means, as is noticeable on account of the administration action taken by the Department of Home Affairs. This particular administration action also indicates that the State does not seek to remedy the systematic subordination or disadvantaged suffered by *post facto* same-sex couples. In actuality, it perpetuates and aggravates the legal position. Hence, it rejects the

²⁰ Albertyn, C. 'Substantive equality and transformation in South Africa' 2007 (23) *SAJHR* 258; See generally Rhode, D. 'The politics of paradigms' In Bock, G. & James, S. *Beyond inequality and difference* (1992) 149.

²¹ Albertyn, C. 'Substantive equality and transformation in South Africa' 2007 (23) *SAJHR* 258.

²² Albertyn, C. 'Substantive equality and transformation in South Africa' 2007 (23) *SAJHR* 258.

²³ Albertyn, C. 'Substantive equality and transformation in South Africa' 2007 (23) *SAJHR* 258.

application of substantive equality and affirmation of difference as a positive social feature by positioning *post facto* same-sex couples away from the centre.

5.3.4. Non-normative sexualities and gender identities and relationships with the State

The State is constitutionally obliged to align its processes with constitutional imperatives as opposed to adopting a Christian morality, particularly where the application of such morality compromises the rights of ‘Others’. In a modern democratic State, there should be a clear demarcation and separation between State and religion.

On account of the provisions made in the Promotion of Administration Justice Act, it appears as if the Department of Home Affairs is making adverse determinations about the relationship status of *post facto* same-sex couples without being empowered to do so, in a manner that is unconstitutional. The decision-making processes are indicative of the dominant ideologies as mentioned above, being in full operation. For this reason, the Department of Home Affairs needs to interrogate its relationship with conservative identity politics and discourses that limitedly validates non-normativity in as far as it aspires to embody the heteronormative status *quo*. Perhaps not the intention, but the effect of subjecting *post facto* same-sex marriages to compulsory or forced divorces is that of overt discrimination, unequal treatment and attack on the couple’s dignity.

5.3.5. Functional model

In *Fitzpatrick v Sterling Housing Association Ltd*²⁴ The court handed down a very homo(normative) judgment. It held, in response to the legitimacy of a same-sex relationship, that:

The test has to be whether the relationship of the appellant to the deceased was one where there is at least a broadly recognisable de facto familial nexus. I would not define that familial nexus in terms of its structures and components: I would rather focus on familial functions. The question is more on what a family does than what a family is. The family unit is a social organisation which functions through its linking its members closely together. The functions may be procreative, sexual, social, economic, emotional. The list is not exhaustive. Not all families function the same way.

Post facto same-sex couples destabilise the existing taxonomic classification systems of

²⁴ *Fitzpatrick v Sterling Housing Association Ltd* [1997] 4 All ER 991 (CA) ([1998] 2 WLR 225).

identity by airing socio-legal dilemmas that is long overdue.²⁵ De Vos argues that the legal regulation of intimate relationships move away from the marriage model to a functional model that addresses the unequal power relations in intimate relationships as presented by *Fitzpatrick v Sterling Housing Association*.²⁶ Both South African law and international law emphasise that families differ and comes in various forms. Both systems stress the importance of protecting family formations and advocates against States disintegrating family units. These systems put the responsibility on the South African State to actively protect and preserve families, including *post facto* same-sex marriages.

With South Africa's commitment to equality, dignity and freedom of all people in all sectors of the nation, there is a clear commitment to protect existing family units, including *post facto* same-sex families. Nothing in the law appears to want to retract from existing protections which are provided for by valid secular institutions that protect families, such as marriage. Hence, by promoting the inclusion of *post facto* same-sex couples under the Marriage Act, South Africa can start re-imagining a more comprehensive 'marriage' law that recognises all forms of intimate relationships in a way that dignifiedly unites the various fragmented pieces of legislation governing intimate relationships.

5.4. Conclusion

Post facto same-sex couples have a right to remain married under the Marriage Act as they would have remained married unquestionably had it not been for the gender affirmation of one spouse. The State forcing a couple to apply for a divorce decree in cases where a marriage exists *de facto* and *de jure* is unconstitutional. Such action blatantly disregards the couple's constitutional rights to dignity, substantive equality and freedom to determine their own destiny. Instead of facilitating a smooth transition within the law for both the transsexual and cisgender spouse and their marriage, the Department of Home Affairs has opted to subject them and their relationship to undue strain which stands stark contradiction to the States obligation to protect and preserve family units.

The remedial mechanism of forced divorces and subsequent remarriage in terms of the Civil Union Act disregard the constitutional rights of spouses to *post facto* same-sex marriages. In order to promote substantive equality and transformation lawmakers and interpreters need to

²⁵ *Fitzpatrick v Sterling Housing Association Ltd* (1997) 4 All ER 991 (CA) ([1998] 2 WLR 225).

²⁶ Pfeffer, C.A. 'Normative resistance and inventive pragmatism: Negotiating structure and agency in transgender families' (August 2012) *Gender & Society* 574.

take into account existing legislation such as the Alteration of Sex Description and Sex Status Act in addition to the existing equality jurisprudence on same-sex marriages in order to produce an outcome that preserve the integrity of *post facto* same-sex couples.

Whilst the law concerns itself with longer term imperatives on the trajectory of marriage law in South Africa, it is important to consider immediate and short-term remedies that are constitutionally sound in which to protect the dignity and freedom of these couples. This becomes possible when the State refrains from imposing itself as agent and defenders of heteronormativity, cisgender privilege and patriarchy.

Inequality is changeable because it is socially constructed. Transformation is possible when a system invest time and effort into understanding and respecting difference. The State is able to understand how to respect and protect *post facto* same-sex couples when it abandons heteronormativity, cisgender and patriarchy as its lens of analysis. The mere fact that the marriage status of *post facto* same-sex couples are brought into question and relegated to the margins, under the Civil Union Act, is indicative of the hegemony patriarchy, heteronormativity and cisgenderism has over the law and within society at large. The State, law makers and interpreters need to take more vigorous ownership of their roles in affecting transformation for all in a dignified manner without subjecting marginalised groups to further marginalisation through their actions.

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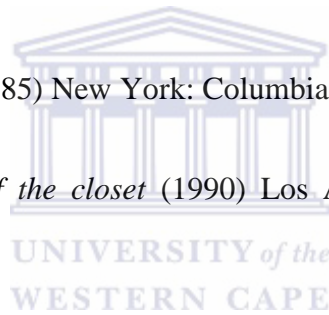
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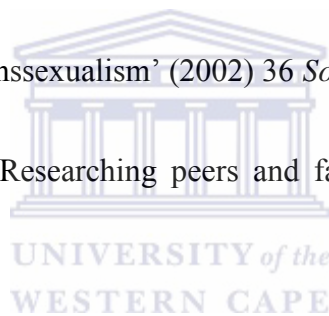
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