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CASE NOTE

KOS v Minister of Home Affairs and its relevance to the law of marriage in South Africa

Julia Sloth-Nielsen

Department of Public Law and Jurisprudence, University of the Western Cape, Bellville, South Africa

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1. Introduction

This article reviews the applications of three transgender persons to have their new identificatory details recorded in the relevant population registry, and to have suitably adjusted identity documents issued in consequence. However, the law of marriage seemed to stand in their way. Related issues have been raised in foreign courts, which are discussed in the second part of this article. It is argued that, although the decision in *KOS v Minister of Home Affairs*[1] was undoubtedly correct on human rights grounds, the implications of the decision affects the interplay between the law of marriage and civil unions where a sex reassignment takes place during the subsistence of an existing marriage.

1.1 The basis of the application

The first, third and fifth applicants[2] were persons who had undergone a sex change by reason of the fact that they were transgender. The Alteration of Sex Description and Sex Status Act 49 of 2003 (hereafter Alteration Act) provides for the formal recognition, recording and legal consequences of a transition from one gender to another. It allows for the alteration of the person's sex description on the birth register and for an amended birth certificate to be issued. The person is then deemed for all purposes henceforth to be a person of the altered sex description: the altered sex description operates entirely prospectively. This is confirmed by s 3(3) of the Alteration Act, which provides that the alteration does not adversely affect rights and obligations that have accrued before the alteration is recorded.[3]

CONTACT Julia Sloth-Nielsen jsloth-nielsen@uwc.ac.za Department of Public Law and Jurisprudence, University of the Western Cape, Private Bag X17, Bellville 7535, South Africa

[1] *KOS v Minister of Home Affairs* 2017 (6) SA 588 (WCC).
[2] The second, fourth and sixth applicants were respectively their lawful spouses.
[3] See in general for a discussion of this Act, C Visser & E Picarra 'Victor, Victoria or V: A constitutional perspective on transsexuality' (2012) 28 *South African Journal on Human Rights* 506. This article gives a good historical overview but does not traverse the specific issue covered in this article.

The effect of an alteration on the birth register has implications for the details recorded on the population register.[4] The Department of Home Affairs maintains the latter register in accordance with the Identification Act 68 of 1997; s 8 of this Act requires that the register contain details of person's names, dates of birth, gender and identity number.[5] If applicable, details of a person's marriage contained in the relevant marriage register are also included in the population register.

The law requires everyone over the age of sixteen to have an identification book (now card), reflecting their identificatory particulars, including a photograph. As is well known, practically, an ID is an essential *vade mecum* of everyday life in South Africa, from opening a bank account to renting or buying a property to receiving a registered parcel at the post office. Section 19 read with Chapters 4 and 5 of the Identification Act requires that if one's particulars are not correctly reflected on one's ID, an application for a revised ID document or card must be brought. Thus, anyone who has transitioned to a new gender would be obliged to apply for a new identity document reflecting their revised ID number, with a different gender-related figure code.[6] In order for that to occur, it is logical that an application under the Alteration Act would have had to precede this process of acquiring an ID document, which could then be reflective of the correct details as to gender.

The applicants, in this case, had applied for an alteration of their sex descriptions in terms of the Alteration Act but came up against a range of bureaucratic problems. In short, in *KOS*, the Department of Home Affairs regarded the alteration of their sex in the register as incompatible with the continued existence of their marriages solemnised under the Marriage Act 25 of 1961.[7] This incompatibility results from the 'marriage', after a successful application for a gender alteration, no longer being one between one man and one woman, but between two women, contrary to the provision in s 30(1) of the Marriage Act. This Act contains the well-known marriage formula ending with 'Do you, A.B., declare as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?'

It was common ground that all three couples were married, that the respective spouses were content with their spouses' transition, and all wished to remain married; further, it is axiomatic that a lawful marriage can be dissolved only by death or divorce.[8] The Alteration Act contains no requirement that an alteration can be effected only in respect of a single or divorced person (see Section 2 for the position in Germany prior to and after a constitutional challenge).

[4] This follows from s 5 of the Births and Deaths Registration Act 52 of 1992.

[5] An identity number does not reflect marital status. It does, however, reflect gender through the assignment of a gender-specific code as part of the ID number.

[6] The failure by a person who has transitioned to obtain a new identification document is a criminal offence under the Identification Act. According to the judgment in *KOS*, the word 'gender' is used in the Identification Act to the same effect as the expression 'sex description' is in the Alteration Act. Sex/gender classification in terms of the Identification Act currently operates on a binary model. Everyone is either male or female. An application would have to be brought under the Alteration Act prior to the change of gender under the identification Act (*KOS* par 6 and 7.) See s 19 read with Chapters 4 and 5 of the Identification Act.

[7] See *KOS* (n 1 above) para 13 for a summary.

[8] Divorce Act 70 of 1979 s 3–5.

Yet the Department's reading that effecting an alteration was incompatible with the existing marriage[9] had the following material result: in respect of two applicants, the application under the Alteration Act was refused due to the subsistence of the existing marriages under the Marriage Act. In respect of the third application, the Department did grant the application to change the sex description. But, at the same time, the Department deleted the details of the marriage to the applicant's wife as recorded in the population register: a kind of 'administrative divorce' was imposed upon them.[10] The population register was altered to reflect that they had never been married. The (former) wife's married name was also unilaterally changed back to her maiden name in the register. A seventh applicant, a member of a non-governmental organisation dealing with transgender issues, deposed to a previous incident of a client in 2009, where an applicant under the Alteration Act had had her marriage record dating back to 1976 changed, without her knowledge, to a civil union, purportedly solemnised in terms of the Civil Union Act 17 of 2006!

1.2 The finding of the court

As Binns Ward AJ notes, the Department's response was premised on its understanding of the current matrimonial regime established by the Marriage Act read alongside the Civil Union Act. The latter was born out of the unconstitutional discrimination against same-sex couples (as found by the Constitutional Court in *Lesbian and Gay Equality Project* v *Minister for Home Affairs* and *Minister for Home Affairs v Fourie*)[11] inherent in the restriction of civil marriages concluded in terms of the Marriage Act to one man and one woman. In curing the constitutional defect that prohibited same-sex marriage, Parliament chose not to 'read in' the gender neutral phrase 'or spouse' after 'man and wife' in the marriage formula, but to enact complementary, but separate, legislation to cure the constitutional incompatibility of the exclusion of same-sex couples from the institution of marriage. Since the Act came into force on 30 November 2006, it has been possible for same-sex couples (and heterosexual couples) to conclude a civil union, which they can call a civil partnership or a marriage.[12] Accordingly, heterosexual would-be spouses have a choice as to which Act they intend to use to solemnise their union, while same-sex couples do not.[13] The meaning of the term 'marriage' is that accorded at common law, as no definition of marriage is provided in either the Marriage Act or the Civil Union Act.[14]

The judgment ably sets out the whole saga of bureaucratic hurdles faced by each of the applicants seeking to use the mechanism of the Alteration Act, ranging from an

[9] *KOS* (n 1 above) paras 14, 15, 27 and 29.
[10] One difficulty raised by the Department was the incompatibility of its data systems to reflect the particulars of same-sex couples married under the Marriage Act: ibid para 28. This was put forward more than once by the Department, although marital status is not a component of an identification number.
[11] See generally, *Lesbian and Gay Equality Project* v *Minister for Home Affairs* 2006 (1) SA 524 (CC); *Minister for Home Affairs v Fourie* 2006 (1) SA 524 (CC).
[12] Civil Union Act s 11(1).
[13] *KOS* (n 1 above) para 23.
[14] See s 13 of the Civil Union Act, quoted in full in footnote 34 of the *KOS* judgment, to the effect that any reference to marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union.

official telling one applicant that such an application must be illegal, to missing files and papers, to a suggestion that proof of sex reassignment surgery must first be adduced (which is not a requirement under the Alteration Act). The final straw was the requirement of proof of a divorce, on the basis that two persons of the same sex could not be married to each other under the Marriage Act. It was even suggested by an official that the couple divorce and then remarry under the Civil Union Act, as the computer programmes would not accept the gender coded ID details of two persons of the same gender married according to the Marriage Act.[15]

Among the relief applied for was an order requiring the respondent Department to alter their sex descriptions in accordance with the Alteration Act, irrespective of their marital status; an order declaring that the respondents' refusal to process their applications on the basis of their marriage under the Marriage Act was unlawful and unconstitutional; and an order directing that the deregistration of the marriage between the fifth and sixth applicant was also to be declared unlawful and unconstitutional and that the population register be altered to reflect that they are married to each other.

The respondent Department argued that the sex alteration of one partner 'converted' the marriage into a same-sex marriage; however, it averred that the law does not provide a mechanism to convert a marriage under the Marriage Act into one under the Civil Union Act. While accepting that there is nothing in the Alteration Act that touches on marital status of applicants seeking an alteration of their gender, the respondents nevertheless argued that 'the issues presented by this matter cannot be viewed in isolation solely through the lens of the Alteration Act' and that the current matter involves a question of marital status.[16] The Director General continued that the Department would have no problem were the Court to 'declare the Civil Union Act unconstitutional for its failure to recognise as a valid marriage (either in its own right or by converting a marriage concluded under the Marriage Act) the marriage of two persons who were married as a heterosexual couple under the Marriage Act, and where, subsequent to such marriage, one person to that marriage registers a sex alteration on the Birth Register pursuant to the Alteration Act'.[17] In short, the Department was of the view that under the current legislative framework, a same-sex couple cannot remain in a marriage concluded under the Marriage Act when one partner alters their legal gender.

The learned judge points neatly to the inconsistencies and flawed thinking of the Department, which tendered to restore the marriage registration of the fifth and sixth applicants, but subject to a simultaneous reversal of the sex change already recorded in the population register by virtue of the Alteration Act. This line of reasoning flies in the face of the earlier argument of the respondent Department that a same-sex couple cannot remain in a marriage under the Marriage Act, since the effect of the tendered option would be to sanction a union under the Marriage Act between two persons (now) of the same sex.

[15] To which the applicant retorted that she would not get a divorce in order to satisfy a computer system (see *KOS* (n 1 above) para 46).
[16] Ibid para 62.
[17] Ibid para 64.

In considering whether the assertion that there was indeed a legislative lacuna involving the marital status of transgendered persons was true, the Court points out that the sole criterion that the Alteration Act provides for is proof, to the reasonable satisfaction of the Director General, that the applicant has altered their sex or gender.[18] The import of the objection of the Department appeared to rest on s 30(1) of the Marriage Act, which contains the formula (set out above) to be used when solemnising a marriage. Solemnise, the Court said, meant 'duly perform (a ceremony, especially that of marriage)'. Hence, the section has no bearing on the legal effects of a marriage already solemnised. The Marriage Act also contains no provisions on the consequences of a legal marriage, as these derive from common law.[19] Nor does the Marriage Act contain any prohibition on a spouse undergoing a sex change (which, as the judge correctly notes, would violate the Constitution of the Republic of South Africa, 1996 in any event if it were to so prescribe).[20] Accordingly, there is no justification for connecting s 30(1) of the Marriage Act with the Alteration Act.

Section 29 of the Marriage Act provides for the registration of marriages solemnised under the Act. The legal and practical effect of the section, opined the judge, is to create an official record of the marriage having been solemnised as a historical fact.[21] It too has no bearing on the legal consequences of a marriage.

Turning to the Civil Union Act, the Court examines its objects as set out in the long title, and concludes that there is no parallel system of civil marriage as contended by the respondents, only two parallel systems of solemnisation and registration.[22] Accordingly, there is no scope for a 'conversion' of one form of solemnised marriage into another form of solemnised marriage. Solemnisation, in short, is a historical fact.

The refusal to process the applications of the first and third applicants under the Alteration Act was, therefore, found to be in contravention of the Promotion of Administrative Justice Act 3 of 2000.[23] The alteration of the marriage records of the fifth and sixth applicants was found to have no basis in law, and was set aside for being in breach of the doctrine of legality.[24] The order confirmed the constitutional invalidity of the respondent's actions in that they violated the applicants' rights to equality and to dignity.[25] The Department was ordered to consider the applications under the Alteration Act of the first and third applicants, and to reinstate on the population register the details of the marriage previously solemnised in respect of the fifth and sixth applicants.[26]

[18] Ibid para 73.
[19] And are the same for marriages or civil partnerships concluded under the Civil Union Act.
[20] *KOS* (n 1 above) para 82.
[21] Ibid para 83.
[22] Ibid para 85.
[23] Ibid para 87.
[24] Ibid para 88.
[25] These rights are not discussed in the judgment. However, drawing from the *Gay and Lesbian Equality* case (n 11 above), differential treatment will constitute unfair discrimination when the affected group suffers from pre-existing disadvantage, vulnerability, stereotyping or prejudice. These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, they would often have a history of not having been given equal concern, respect and consideration (at para 66 E-F). Dignity is impugned, as non-recognition of their right to family life perpetuates and reinforces existing prejudice against homosexual people (and the same would be the case for transgender persons).
[26] In March 2019, it was confirmed by the advocate who acted for the applicants that the Department had at that point not yet complied with the order of the court.

2. Consideration of foreign case law

In Germany, the position until 2008 was that in order for a person's altered gender to be officially recorded (as opposed to just a change of name, which was a kind of soft option under the law),[27] proof of divorce and of an inability to procreate (infertility) had to be furnished to the authorities. This was ruled unconstitutional by the German Constitutional Court,[28] in that the requirement of divorce prior to a change of gender being recorded was a violation of the right to equality. The applicant, who was born in 1929, had been married for 56 years. His marriage produced three children. He had felt that he belonged to the female gender for a long time. Since 2001, he had held a forename typically gendered as a female one on the basis of a court ruling according to the Transsexuals Act (TSG) of 1980. He underwent a sex-change operation in 2002. Following this, he applied for a determination according to the Transsexuals Act that he is to be deemed female. According to § 8.1 no. 2 TSG, however, the determination and legal recognition of the other gender affiliation was contingent on the person concerned not being married. The applicant and his spouse, however, did not intend to divorce, since their longstanding relationship was intact. In fact, they enjoyed considerable companionship together, and provided mutual psycho-social support.

In response to a submission by the Schöneberg Local Court (Amtsgericht), which considered itself to be prevented from complying with the applicant's application in light of the statutory requirement of applicants having to be unmarried, the First Senate of the Federal Constitutional Court reached the conclusion that § 8.1 no. 2 TSG was unconstitutional. It found that it was unreasonable to expect the legal recognition of the altered gender of a married transgender person to be conditional on them divorcing their spouse, with whom they are united by law, and with whom they wish to remain together, without being enabled to continue their marriage partnership. It imposes on a married transsexual who only discovered their transsexuality during the subsistence of an existing marriage, and who had undergone sex reassignment surgery, restrictions in asserting and exercising their right to be recognised as belonging to a different gender than the one assigned to them at birth.[29] This burdens them with the alternative of either maintaining their marriage, despite a physical sex change already having taken place, or not to receive legal recognition of their new gender identity. Alternatively, they would have to divorce in order to receive legal recognition, even if the spouses wished to remain united by marriage. The burden imposed by the requirement of divorce was held to be disproportionate and therefore unconstitutional,[30] and the legislature was instructed to remedy the unconstitutional situation by 1 August 2009.

As mentioned, under the same law (TSG) it was also required, among other things, that an applicant for alteration of a sex status must have undergone a surgical procedure that alters their external sexual characteristics, and through which a clear

[27] The distinction between the 'small' solution and the 'big' solution is described in BVerfGE 128, 109 (2011) (Federal Constitutional Court of Germany) para 29). See further A Dutta 'Germany' in J Sherpe (ed) *The Legal Status of Transgender Persons* (2015) 207.
[28] BVerfGE 121, 175 (2008) (Federal Constitutional Court of Germany).
[29] Ibid para 41, 53, 54 and 60.
[30] Ibid para 46.

approximation with the appearance associated with the required sex is achieved. Applicants were also required to provide proof of infertility. However, the relationship between that person and their parents and descendants would remain unaltered. This position changed in 2011 in a second Constitutional Court case.[31]

The complainant in the intersex case, who was 62 years old at the time of the hearing, was assigned male at birth and later came to identify herself as female. Her sexual orientation was that of a female homosexual, and she was living in a partnership with a woman. In accordance with § 1 TSG, she changed to one that she felt affirmed her gender. No change of civil status (big solution) had taken place because the necessary surgery had not been performed. Together with her partner, she applied for the registration of a civil partnership, which was refused by the registrar on the grounds that a civil partnership was exclusively reserved for two parties of the same gender. The Local Court (Amtsgericht) confirmed the decision, arguing that the only possibility open to the parties concerned was that of entering into a marriage, because the complainant's recognition as a woman under the law of civil status required sex reassignment surgery.

The complainant essentially challenged a violation of her general right of personality in its manifestation as the right to gender self-determination. She argued that she wanted to enter into a civil partnership as a woman, whose partner is a woman. She further argued that it is unreasonable to expect of her to enter into a marriage because, as a consequence, she would legally be regarded as a man. Furthermore, her name change, to one typically associated with the female gender, would disclose that one of the two women in the partnership is transsexual, which would make it impossible to live an inconspicuous life free from discrimination in the new role. Due to her age, sex reassignment surgery would involve incalculable health risks.

The German Constitutional Court ruled that a person did not need either sex reassignment surgery or sterilisation in order to legally change their gender.[32] The Court held that these two requirements, too, were unconstitutional, as they imposed an excessive burden on transsexual persons to undergo surgery and to tolerate health detriments, even if this is not indicated in their respective case, and when it is not necessary for ascertaining the permanent nature of the transsexuality.[33]

Related matters have surfaced in other forums too. In 2014, the European Court on Human Rights was faced with a challenge based on an alleged breach of the right to respect for family and private life under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR) (1950) in *Hämäläinen v Finland*.[34] Under Finnish law, same-sex couples are not permitted to marry although they may contract a civil partnership, marriage being reserved for relationships between one man and one woman. The applicant, who was assigned male at birth, married (in 1996), and the couple had a child; thereafter, the applicant had transitioned to female. She underwent sex reassignment surgery and changed her first

[31] BVerfGE 128 (n 28 above). For further discussion see Dutta (n 27 above) 214–215 and H Botha 'Beyond sexual binaries? The German federal constitutional court and the rights of intersex people' (2018) 21 *Potchefstroom Electronic Law Journal* 1, 7.
[32] Dutta (n 27 above) 214.
[33] Hormone therapy is a recognised way of altering some of the external appearances of one's gender.
[34] *Hämäläinen v Finland* 2014 ECHR 787.

name. However, she was unable to change her identity number to a female one without getting divorced, or without her wife consenting to transforming the marriage into a civil partnership. But the applicant and her spouse wished to remain married, as divorce was against their religion, and they were of the view that a civil partnership did not provide the same security as a marriage. It was alleged that this was a violation of art 8 (right to private and family life) read with art 14 (prohibition of discrimination) of the ECHR. At stake was the question whether there was a positive obligation upon the state to provide a procedure to enable the applicant to have her new gender legally recognised, while remaining married.

The starting point for the European Court was to reiterate that the ECHR did not impose an obligation on the member states to allow same-sex marriage. Therefore, the consequent regulation of any effect of a change of gender in the context of marriage would fall within the margin of appreciation of the state. This is due to the lack of consensus in Europe on allowing same-sex marriage and a lack of consensus among those states that do allow same-sex marriage as to what the effects of a gender transition in the context of a pre-existing marriage would be.

The main complaint raised by the applicant was directed at the possibility of converting the marriage to a civil partnership (leaving aside maintaining the status quo, or getting divorced). According to the Court, under Finnish law, the conversion was automatic once the other spouse's consent had been provided. The requirement of her consent was intended to protect her from unilateral decisions taken by the other spouse. Nor, the Court found, were any other rights (pension rights, for instance) affected by a conversion. The child already born of the marriage would not have any pre-existing rights related to care, custody or maintenance prejudiced – for this reason, there would be no implications for the applicant's right to family life were the marriage to be converted. And, since the genuine possibility of conversion existed, the Court could not find that the Finnish system was deficient from the point of view of the state's positive obligation, nor that the precondition of consent to conversion was disproportionate. Hence, no violation was found, and the application was dismissed.

A court in the Netherlands has also encountered a challenge based on art 8 of the ECHR and a transgender person transitioning in a subsisting marriage.[35] In this case, the couple had been married since 1985, and the spouse had transitioned to the male gender. In 2013, the Limburg court had ordered an alteration of the birth certificate to reflect his male gender. In that court order, too, the first names of the applicant were altered to better reflect the gender with which he identified.

A subsequent complaint in 2015 was founded on the refusal of the authorities to effect an *ex post facto* change to the original marriage certificate to reflect the new situation. The refusal of the authorities was based on the applicable article of the Dutch Civil Code,[36] which referred expressly to the possibility of alteration of gender on birth certificates, but not to marriage certificates.[37] Countering this, the applicant stated that, with his request, he did not intend to add to the marriage certificate a later reference

[35] C/03/200177 (Court of Limburg).
[36] Article 1. 28c of the Dutch Civil Code.
[37] Dutch law had been changed to allow educational certificates and diplomas already awarded to be altered ex post facto to reflect the new name assigned to a person who had transitioned to a new gender (in 2013).

concerning the change of his sex, but that he wanted to have his sex changed on the marriage certificate itself. Because there is now a marriage between two men, that must be respected on the basis of art 8 of the ECHR, he averred, and the marriage certificate should be changed in accordance with this factual situation.

In its assessment, the Court noted that Dutch law has a closed system of civil status documents, and officials are bound to give effect to the express wording of the Civil Code.[38] While there is provision for a court, at the request of an interested party, to order the correction of a deed in the registers of civil status, or subsequent mention that is incomplete or contains a mistake, there can be no question of a mistake regarding the designation of the applicant in the marriage certificate as 'bride' and 'daughter of', when the applicant at the time of the original marriage had at least the external sex characteristics often associated with the category of female.

Referring expressly to the regime created in the Civil Code as an *ex nunc* one (not of retrospective operation, as deliberately decided at the time of amendments relating to alteration of gender in 2013 for reasons of legal certainty and because the interests of third parties, including the children of transgender people, could be affected),[39] the Court cited the changes to educational diplomas and birth certificates as ones that the legislator had explicitly considered, while preserving the principle that the consequences for transgender persons arising from the part of the Civil Code that concerns private and family law do not have retroactive effect. In this light, the Court held that it would go far beyond the scope of its mandate to develop the law if the Court allowed the petition. The Legislature had considered and pronounced on the prospective nature of gender alteration in the context of private and family law. The Court was of the view that the legislative scheme adopted was in compliance with the 2010 European Committee of Minister's recommendation that full legal recognition of transgender people's documentation is necessary to the extent that 'officiële sleuteldocumenten, zoals school- en werkdiploma's, op een snelle, transparante en toegankelijke manier kunnen worden bijgesteld'.[40] Hence the claim to a human rights violation was not sustained.

3. Discussion of issues raised by the cases in relation to *KOS*

The cited foreign cases raise several issues for consideration. The issue of changing identificatory details on a range of documentation – education diplomas and certificates, passports, birth certificates and marriage certificates – is one theme, but save for the question as to changes to a marriage certificate, the other documentation issues fall outside the scope of this article.[41] Whether changes to a gender on a marriage certificate must be recorded retroactively does have some relevance to the conclusion in *KOS*

[38] C/03/200177 (see n 35 above) 6–7.
[39] Ibid 6.
[40] Ibid 7. The quotation refers to the need for key official documents, such as school and work diplomas to be ascertained in a quick, transparent and accessible manner.
[41] Section 2 of the Alteration Act refers only to changes to the birth register, but presumably that would lay a basis for changes to identification documents, including a passport. However, s 3(2) confirms that changes are from the date of recording of such alteration; therefore, presumably, education certificates already awarded do not qualify for alteration.

that the fact of a marriage (its solemnisation and registration) are historical events only, and that the course of history cannot be changed (retrospectively). Hence, were a South African court to be confronted with an application similar to that in the Netherlands, based on the reasoning in *KOS*, one must conclude that the marriage certificate or register will remain reflective of the gender details as they were at the time of that marriage. This is also the position in the Alteration Act, namely that changes operate prospectively only.

Second, as was decided in Germany, it is now established in *KOS* that the existence of a dual marriage system for heterosexual and for same-sex couples does not entail the need for a divorce if the parties were married under the Marriage Act. Nor does an application under the Alteration Act convert the marriage to a civil union (as under Finnish law). As regards the issue of accessing civil partnership status (which is reserved for same-sex couples in many European countries) when sex reassignment surgery is incomplete (in other words hormone treatment has commenced, but surgery has not taken place), it is clear that the fact that civil unions in South Africa may be concluded by either different or same-sex couples means that the gender status of would-be civil union partners would theoretically be irrelevant. The facts in the second German case would thus (again theoretically) not arise. A change of gender would not in any way affect the existence of a civil union concluded in South Africa.

But the question can still be asked whether South Africa's constitutional and domestic legal regime does not throw up different answers with respect to the existence of a dual marriage regime than would arise in a European context. The decision of the European Court on Human Rights was that where parallel and equal marriage systems exist for different and same-sex couples, a conversion option (that is virtually automatic, save for the consent of the existing partner) is not disproportionate and overly burdensome. There is, thus, neither violation of the right to private and family life nor discrimination.

The Dutch decision may be relevant to the further discussion of the constitutionality of a dual marriage regime. In the Netherlands, the prospective regime preserved for private and family law (in the context of the refusal to order alteration of the original marriage certificate to reflect the altered gender) indicates an intention to keep the two marriage forms for same-sex and different-sex couples separate, at least as regards their historical existence (at the time of conclusion of the marriage, the sex description of the parties was correct). As already discussed, this is the evident position taken in the Alteration Act too. However, the closed nature of the Dutch civil registry and lack of discretion or latitude awarded to civil registry officials (in the context of a civil law system), coupled with the expressed intent of the Legislature to treat private and family law concerns differently to identity documents and other documentation, explains the ultimate finding of the Dutch court. A constitutional reading might yield a different answer to the question as to whether maintaining two marriage regimes in South Africa does not violate the equality clause.[42]

[42] The South African Law Reform Commission notes that marriage is '[h]istorically dominant […] in terms of the 1961 Marriage Act'; see SALRC 'Single marriage statute' (2019) para 1.29 <http://www.justice.gov.za/salrc/ipapers/ip35_prj144_SingleMarriageStatute.pdf>

It seems that the parliamentary decision, made after the Constitutional Court's finding of the underinclusivity of the Marriage Act,[43] to enact a separate statute governing civil unions (rather than read in the words 'spouse' to the marriage formula) has given rise to consequences that may not have been expected.[44] This is due to the 'knock on' effect that is presented by transgender persons wishing to alter their official gender, while remaining in an existing marriage concluded under the Marriage Act. The judgment in *KOS* argues that the two separate pieces of legislation relating to marriage forms do not create separate parallel marriage systems, but only signify that there is a dual solemnisation system.[45] It was not necessary on the facts to decide of this case whether the dual system so created was constitutionally compatible. Although this point has previously been argued,[46] a seeming oddness is created by the two solemnisation systems, where one is purportedly reserved exclusively for heterosexual couples, but such reservation is rendered mythical at a future point, because one party applies for a sex alteration; the result is the perpetuation of a marriage that is not compatible with the constituent requirements of this legal family form in South African law.

In essence, the ruling in this case (correct though it was) fundamentally alters the very scheme that the legislator sought to bring about, namely to 'insulate' heterosexual marriages from infiltration by same-sex couples. This means that where a sex change application is granted for partners in a subsisting marriage, without them having to get divorced, the *de facto* outward situation will resemble all intents a same-sex civil union but will remain a marriage. This, of course, is also the position taken by the German Constitutional Court.

It is discernible that in the first German case, in *Hämäläinen* as well as in *KOS*, there are indications that the institution of marriage is regarded by some as the 'superior' institution, which may, at least in part, explain the parties' reluctance to divorce (or

[43] *Lesbian and Gay Equality Project* (n 11 above).

[44] However, the existence of separate and parallel marriage regimes is not unique to South Africa, as the case law discussed shows. See further I Curry-Sumner 'A patchwork of partnerships' in KB Woelki & A Fuchs (eds*) Legal Recognition of Same Sex Relationships in Europe: National, Cross-border and European Perspectives* 2 ed (2012) 80. Ian Curry-Sumner distinguishes three models of legal recognition of same-sex partnerships, which he terms pluralistic, dualistic and monastic models. In these terms, South Africa's system would be characterised as pluralistic, insofar as same-sex and heterosexual couples are offered the chance to register a civil partnership, while leaving pre-existing marriage legislation intact (Curry-Sumner terms this the first phase of a pluralistic system). The second phase would be opening civil marriage to same-sex couples too. Curry-Sumner does concede that in the first phase of pluralism, 'the discrimination faced by same sex couples in not being able to marry is simply replaced by a new form of discrimination; although different-sex couples are faced with a choice of relationship forms, same-sex couples are not' (Curry-Sumner 2012, 87). Interestingly, though, he concludes his analysis by applauding the South African approach because couples are provided with one legal institution but two different nomenclatures (that is, they can call their union a marriage or civil union).

[45] And distinguishing the Civil Union Act is the controversial provision in art 6 of the Civil Union Act that a marriage officer ex officio may notify the Minister that they object on grounds of conscience, religion and belief to solemnising a civil union between two persons of the same sex, whereupon they will not be obliged to solemnise such a civil union. As at 30 April 2018, there were 1,131 marriage officers in South Africa, of whom 421 had been granted exemption from officiating in same-sex civil unions (Legalbrief 30 April 2018). Abolition of the exemption was the subject of a private member's bill in parliament (Bill 11 of 2018) that sought to remove s 6. It was argued that civil marriage officers are employees of the state and should not be allowed to opt out of performing civil unions on the basis of their conscience. This could be seen as an endorsement by the state of unfair discrimination, because a civil marriage officer must solemnise all (heterosexual) marriages placed before him or her and is not allowed to refuse to solemnise a marriage on the grounds of conscience, religion or belief. The Bill was passed in October 2018. <https://www.politicsweb.co.za/opinion/civil-union-amendment-bill-2018-parliamentary-subm>.

[46] See for instance, P de Vos & J Barnard 'Same sex marriage, civil unions and domestic partnerships: Critical reflections on an ongoing saga' (2007) 124 *South African Law Journal* 794, 822.

convert to a civil union).[47] Does this perception – even if commonly held – have any bearing on the constitutionality of having two regimes? Any assertion of unconstitutionality might be more difficult to justify if the differentiation between the two regimes does not result in inferior legal consequences but exists only in the mind of public opinion (even if in the opinion of those ultimately affected).

It was necessary to make the civil union regime available to same-sex and different-sex partners as an inevitable corollary of the *Fourie* judgment, which warned against a scheme for same-sex partners only, and which would then reinforce existing marginalisation and exclusion of same-sex people.[48] Separate but equal would not do: this would serve 'as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation'.[49] This was also reflect of the distasteful past under apartheid, during which mixed racial marriages were proscribed.

But does the 'separate but equal' provision for civil unions and different-sex marriages render the scheme unconstitutional? The fact remains that different-sex couples have a choice of marriage regime, while same-sex couples do not. Since there is differentiation based on one of the listed grounds in s 9 of the Constitution,[50] the burden of justifying the infringement shifts to the party raising it, and it will be necessary to examine the impact of the differential treatment, especially on the dignity of the complainant group. This will be assessed in light of the history of marginalisation and oppression of the affected group, including whether the differentiation signals that that group is somehow worthy of less concern and respect than others in society, in order to determine whether the discrimination is unfair.

It is arguable that due to the past discrimination against same-sex couples, their exclusion from marriage under the Marriage Act – unless they undergo an alteration of gender – might render the overall scheme constitutionally suspect.[51] This could be reinforced by the fact that different-sex couples have a choice of legal regimes, and by the finding in *KOS* that an alteration of sex of one party to a marriage does not result in any change to the marriage status of that couple.

[47] De Vos & Barnard (ibid 821) argue: 'One is tempted to ask why the Marriage Act has been retained in circumstances where the Constitutional Court held explicitly that it is the Marriage Act and the common law definition of marriage that is unconstitutional. Invariably, the signal that is sent out to society is that somehow heterosexual couples remain "special" or "superior" in that they have the choice (and in fact the need) to separate or exclude themselves from "tainted" and "inferior" homosexual couples'. There may, of course, be other reasons for not wishing to divorce and convert the union to another form, for example that the parties see no need to do so and are content with their existing position. See SALRC (n 42 above). In para 1.28 in this document, the SALRC refers to the hierarchical system of marriage and family laws, with historical privilege being accorded certain European derived forms of marriage.

[48] De Vos & Barnard (ibid) 805.

[49] SALRC 'Report on domestic partnerships' (March 2006) 292, 296 & 305 <http://www.justice.gov.za/salrc/reports/r_prj118_2006march.pdf>. See also *Fourie* (n 11 above) 580 E–F.

[50] Differentiation on the basis of sexual orientation.

[51] Henriet de Ru (2010) submits that the 'Civil Union Act is a "separate and unequal" act which confers a second-class marital status upon same-sex couples and further produces new forms of oppression and repudiation. This is clearly in conflict with the guiding principles of the Constitutional Court that the legislature should not provide a remedy that in its context and application would produce new forms of marginalisation. In instances where individuals were already subjected to past unfair discrimination and never provided with equal concern and respect because of personal characteristics, for example, homosexual orientation, any additional differential treatment imposed by legislation increases their unfair social characterisation and accordingly has a more severe impact on them, since they are already vulnerable'; H de Ru 'The Civil Union Act 17 of 2006: A transformative Act of a substandard product of a failed conciliation between social, legal and political issues' (2010) 73 *Journal of Contemporary Roman Dutch Law* 553, 566.

However, it must be borne in mind that Binns Ward AJ concluded that the two legislative enactments do not create parallel marriage systems (but merely different routes to solemnisation).[52] This finding may have a bearing on the question (were it to arise) as to the constitutionality of the separate marriage regimes, since it is, in essence, a finding that there are only different solemnisation paths established by the Marriage Act and the Civil Union Act.[53] The *KOS* decision could, therefore, potentially obstruct any constitutional challenge to the underinclusivity of the Marriage Act to same-sex couples.

However, this may in time become moot, as the recent SALRC issue paper outlining the possibility of a unified, harmonised or single marriage statute would appear to indicate.[54] This statute would potentially cover all marriage forms, including religious and customary marriages, civil unions and marriages currently solemnised under the Marriage Act. However, a long path must still be walked before that becomes a reality.

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Notes on contributor

Julia Sloth-Nielsen, Professor, Department of Public Law and Jurisprudence, University of the Western Cape, Bellville, South Africa and Professor of Children's Rights in the Developing World, University of Leiden, Leiden, Netherlands

[52] This is a rather technical and potentially artificial understanding of the effects of a marriage and of a civil union respectively. In common parlance, we do not understand people to be 'solemnised' but 'married', with the variable and invariable consequences that flow from that.

[53] However, the court's approach does accord with the attitude taken in the foreign jurisdictions discussed earlier, notably that sex alteration operates prospectively.

[54] See n 42 above.