

# THE IMPOSSIBILITY TO BE 'LOST IN TRANSFORMATION'

by JJ Van der Walt\*

## 1 Introduction

This Constitution<sup>1</sup> provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development [of] opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.<sup>2</sup>

This quote is the product of the National Unity and Reconciliation statement provided for in the Interim Constitution. The quote is neither ambiguous nor difficult to comprehend as the first sentence thereof makes it patently clear that the Interim Constitution is a bridge between our past and future. Accordingly, from the adoption of the Interim Constitution South Africa, as a nation, was all too aware from what point this new constitutional democracy took its inception (an inegalitarian society that was the product of Apartheid) and where it is heading (*inter alia*, towards the *achievement* of equality and the establishment of 'a society which affords each human being equal treatment on the basis of equal worth and freedom').<sup>3</sup> I can only wonder in dismay how one can lose oneself in a process that was all too clear from the start.

I must pause my discussion in order to indicate that I purposefully took it upon myself *not* to consult other authors on the specific topic of 'lost in transformation' for the simple reason that I intend to

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1 The reference here is to the Constitution of the Republic of South Africa Act 200 of 1993 (hereafter the 'Interim Constitution').

2 National Unity and Reconciliation statement of the Interim Constitution.

3 *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para 41 (hereafter 'Hugo').

convey to the reader that the law, together with some, albeit limited, recourse to legal philosophy can provide a concise answer to the question whether it is *possible* to be lost in transformation. I am taking a step back and asking whether the question posed is an appropriate one. Accordingly, the purpose of this work is an attempt to argue that South Africa as a society cannot be lost in transformation, but that the process of transformation can be misguided or ineffective is, in my opinion, irrefutable.

Because of our particular history, equality jurisprudence will be used as the subject matter to indicate whether our society can be lost in transformation. In the first instance, I discuss the *conditiones sine quo non* of post-apartheid South African equality jurisprudence in the second part. Thereafter, in the third part, the aspirational *end* – the achievement of equality – serves to identify, through our constitutional values and section 9 of the Constitution,<sup>4</sup> three power relations which require addressing for our society to transform. With reference to Legal feminism, Critical Race Theory and Queer Theory, patriarchy, white supremacy and heteronormativity are identified as power relations that are the, current, object of transformation in our society.

## 2 The *conditiones sine qua non* of South African post-apartheid equality jurisprudence

It is trite within the South African constitutional jurisprudence that the Constitution is inherently transformative and therefore committed to transformation.<sup>5</sup> Furthermore, dignity, as a foundational value, adopts a role of hermeneutic importance, alongside freedom and equality, in determining the content of the rights contained in the Bill of Rights as well as the justifiability of the limitation of these rights.<sup>6</sup> It is therefore important to discuss

4 S1 of The Constitution of the Republic of South Africa, 1996 (hereafter the 'Constitution') provides for the values of 'the achievement of equality', 'non-racism[,] and 'non-sexism' and s9(3) prohibits discrimination on the grounds or, *inter alia*, race, gender and sexual orientation.

5 *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 9 BCLR 891 (CC) par 7 (hereafter '*Bel Porto*'); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC) para 76 (hereafter '*Bato Star*'); *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC) para 25 (hereafter "*Van Heerden*"); *South African Police Service v Solidarity abo Barnard (Police and Prisoners Civil Rights Union as amicus curiae)* 2014 10 BCLR 1195 (CC) para 29 & 78 (hereafter '*Barnard*').

6 O'Regan 'From form to substance: the constitutional jurisprudence of Laurie Ackermann' (2008) *Acta Juridica* 15.

Transformative Constitutionalism and the centrality of dignity<sup>7</sup> as *condictiones sine qua non* of South African post-apartheid equality jurisprudence.

## 2.1 Transformative constitutionalism

As stated above, recognition of Transformative Constitutionalism is indisputable as the text of the Constitution itself evokes notions of transformation.<sup>8</sup> Furthermore, not only the Constitutional Court<sup>9</sup> recognises the importance of Transformative Constitutionalism, but other courts<sup>10</sup> also follow its lead.<sup>11</sup> The meaning of this concept is, however, not settled or uncontested.<sup>12</sup> Because the meaning of Transformative Constitutionalism is contested, I will provide but *one* conception thereof, which is by no means *novel*, but is the only relevant one for the discussion at hand. Accordingly, I subscribe to Klare's basic understanding of the concept as a basis from which I will extract the 'elements' of Transformative Constitutionalism, which are relevant for the enquiry as to what the content of equality ought

7 The Constitutional Court has placed the value of dignity at the core of our equality jurisprudence, *Harksen v Lane* 1997 11 BCLR 1489 (CC) para 46 & 49 (hereafter '*Harksen*'); *Prinsloo v Van der Linde* 1997 9 BCLR 759 (CC) para 31 - 33 (hereafter '*Prinsloo*'); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 124 (hereafter '*National Coalition*').

8 Preamble of the Constitution read with s1(a) of the Constitution.

9 *Barnard* (n 5 above) para 29 & 78, Moseneke ACJ, writing for the majority, observed that the Constitution has 'a transformative mission and permits government to take remedial measures to redress the lingering and pernicious effects of [A]partheid' and Cameron, Froneman JJ and Majiedt AJ added that '[i]t does this even though this commitment means that individuals may be adversely affected by the process of transformation'; *Bata Star* (n 5 above) para 76, Ngcobo J, as he then was, described transformation as a process and that 'profound difficulties ... will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them'; *Van Heerden* (n 5 above) para 25, Moseneke J, again writing for the majority, affirmed that 'our Constitution heralds ... the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework'; *Bel Porto* (n 5 above) para 7, Chaskalson CJ explained that '[t]he difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with ... the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others'; Langa 'Transformative constitutionalism' (2006) *Stellenbosch Law Review* 351 - where the previous chief justice draws attention to *S v Makwanyane* 1995 6 BCLR 665 (CC) para 262 where it was acknowledged that 'the Constitution expressly aspires to ... provide a transition from ... grossly unacceptable features of the past to a conspicuously contrasting ... future' and *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) para 157 for yet another example where the Constitutional Court accepted that '[the Constitution] is a document that seeks to transform the *status quo ante* into a new order'.

10 *Rates Action Group v City of Cape Town* 2004 12 BCLR (C) para 100; *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W) para 51 - 52.

11 Langa (n 9 above) 351.

12 As above; Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) *South African Journal of Public Law* 155.

to be. For the learned author this concept entails an enduring and long lasting project of 'constitutional enactment, interpretation, and enforcement ... *committed* to transforming a country's political and social institutions and *power* relationships in a[n] ... *egalitarian* direction' [own emphasis].<sup>13</sup>

The Constitution is committed to transformation and the object of transformation is the hierarchical structure of our society and therefore the power relationships prevalent therein. The requirement that transformation must be conducted in an egalitarian direction has two consequences. The first of these consequences is the recognition of a substantive notion of equality<sup>14</sup> and the second, which is not that evident, entails that equality is to be achieved in an egalitarian *fashion*. Equality is to be achieved and aspired to while having regard to human dignity:

[a] transforming Constitution such as ours will only succeed if ... restitutive equality becomes a reality and basic material needs are met, because it borders on the obscene to preach human dignity to the homeless and the starving. This must, however, be achieved in a manner consonant with the human dignity of all.<sup>15</sup>

Transformative Constitutionalism is accordingly the constitutionally recognised basis upon which the enquiry into the content of equality must be founded on and from which it must be expanded. To this end, there are two necessary 'elements' of Transformative Constitutionalism: a commitment to an egalitarian directed process of transformation and the transformation of power relations.

Substantive equality within Transformative Constitutionalism can be read in conformity with the Constitutional Courts' understanding of substantive equality because it has been held that the Constitution provides for not only the right to and the value of equality, but rather the *achievement* of equality, which is both a value and a constitutional right.<sup>16</sup> In *Bato-Star* it was made clear that our Constitution is *committed* to the *transformation* of our society and for Klare Transformative Constitutionalism entails an enduring and long lasting constitutional project of a *committed transformation* of a country in an *egalitarian* direction.

The commitment to an egalitarian process of transformation must be guided by the value of dignity. The reason why the mentioned process need be guided by dignity is because the process of transformation must be carried out within the precepts of our Constitution. Although our Constitution heralds the start of a credible

13 Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150.

14 Langa (n 9 above) 352; Pieterse (n 12 above) 159.

15 Ackermann 'The legal nature of the South African constitutional revolution' (2004) 4 *NZ L Rev* 678 - 679.

16 *Van Heerden* (n 5 above) para 22.

and abiding process of reparation for past exclusion, dispossession, and indignity, such process must be carried out within the discipline of our constitutional framework and the profound difficulties facing our constitutional order must not stand to be underestimated.<sup>17</sup> Thus, it cannot be overemphasised that this process should be carried out in accordance with the Constitution and its Bill of Rights.<sup>18</sup>

Moving towards the ever-prevalent power relations within any society, substantive equality is appropriate because of its context driven approach; in other words a court in determining a question on equality (discrimination) will have regard to the position of the complainant in the society; for example, he or she forms part of a group, which was discriminated upon in the past.<sup>19</sup> It is also important to note that regard must be had to the *nature of the power*<sup>20</sup> in terms of which the discrimination was effected.<sup>21</sup> It is also trite that constitutional interpretation comprises of a purposive approach where the text is interpreted with due regard to context and generosity.<sup>22</sup>

The position as provided up to this point is admirable, but insufficient. With utmost respect, our positive law regarding equality requires something more. Although our Constitution is aspirational in its approach to equality, or its achievement rather, any 'rational' human being must accept the impossibility of the achievement of equality. Therefore, the following passage in *Hugo*, with respect, stands to be criticised:

... [a]lthough a society which affords each human being equal treatment on the basis of equal worth and freedom *is our goal*, we cannot *achieve* that goal by insisting upon identical treatment in all circumstances before that goal *is achieved*.<sup>23</sup> [own emphasis]

It is argued that a society that affords equal treatment on the basis of equal worth and freedom is but an aspirational end to long for, but never to realise; one we all seek, but stands never to be found; an end to strive for, but never to be achieved. By accepting the hermeneutic role of dignity, I will advocate and support an *ethical* understanding

17 *Van Heerden* (n 5 above) para 25; *Bel Porto* (n 5 above) para 7.

18 *Bel Porto* (n 5 above) para 7.

19 *Harksen* (n 7 above) 49.

20 Although the Court did write in the context of presidential pardon, I argue that this passage can appropriately be applied to, for example, the use of public power (position of authority) to discriminate, under the guise of 'affirmative action' against a white male – this will be evident where a public official clearly acts *mala fide* based on racial considerations, i.e. acting in a racist manner. Furthermore, in the private sphere where a male dominates the female within the normalized understanding of the so-called 'nuclear family' where the role of the male is one of domination over the female; i.e. this power is patriarchy.

21 *Hugo* (n 3 above) para 43.

22 Currie & De Waal *The Bill of Rights Handbook* (2014) 135; *Viking Pony Africa Pumps (Pty) Ltd t/a Tricon Africa v Hydro-Tech Systems (Pty) Ltd* 2011 1 SA 327 (CC) para 32.

23 *Hugo* (n 3 above) para 41.

of the Constitution. Thus, and to draw from Cornell, the Constitution is as much law as it is an ethical summons directed at South African citizens to admit, subscribe to and live in accordance with the aspirational ideals as enumerated in section 1 of the Constitution.<sup>24</sup> Accordingly, the Constitution is not the 'final' Constitution,<sup>25</sup> but rather a legal instrument providing us with aspirational ends and the means with which we can and should transform our society through the continuum of freedom, equality and dignity. Transformation, in my opinion, is encapsulated in an aspirational 'spirit of transformation' as opposed to a social fact, being static in nature.

## 2.2 Human dignity

In the previous sub-section, I expressly stated that Transformative Constitutionalism requires an egalitarian directed process of transformation and it is my submission that such process is to be found in the value of and the right to human dignity.

As already indicated, both the Constitution<sup>26</sup> and Transformative Constitutionalism provide for substantive conceptions of equality, but the question is equality of what? Discussions on equality usually entail the notion of treating or dealing with those who find themselves in the same legal position or situation the same, alike, or similarly.<sup>27</sup> The latter can be associated with an Aristotelian understanding of equality, which entails that 'equals ought to be treated equally and "unequals" treated unequally in proportion to their inequality'.<sup>28</sup> This conception of equality is too narrow and simplistic and therefore stands to be rejected, because it fails to answer the question: equal in respect of what? Accordingly, and to answer the posed question: human beings are equal in respect of their innate, common and inalienable human worth (or human dignity).<sup>29</sup>

The reduction of equality to an essentialist understanding of treating 'like' 'alike' cannot be justified in a post-apartheid

24 Cornell 'Bridging the span towards justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence' (2008) *Acta Juridica* 18.

25 As above.

26 *Barnard* (n 5 above) para 28; *Van Heerden* (n 5 above) par 25; *Brink v Kitshoff* 1996 6 BCLR 752 (CC) para 42 (hereafter '*Brink*'); *Bata Star* (n 5 above) para 74.

27 Hahlo & Kahn *The South African legal system and its background* (1968) 34 - 45; Currie & De Waal (n 22 above) 210.

28 Ackermann 'Equality and non-discrimination: some analytical thoughts' (2006) 22 *South African Journal on Human Rights* 597 600.

29 Ackermann (n 28 above) 610 - 612; *Hugo* (n 3 above) para 41 & 47; *Prinsloo* (n 7 above) para 31 - 33.

constitutional democracy and equality as 'sameness in treatment' is contrary to the values of equality<sup>30</sup> and dignity. The nub of my argument is that substantive equality requires treatment of human beings as being of *equal human worth* (or dignity) as opposed to requiring mere equality in treatment.

To bring this discussion back to whether being lost in transformation is possible the reader is referred to the two *conditiones*. The Constitution is transformative, requiring transformation along *egalitarian* lines. The latter introduces human dignity as the lodestar<sup>31</sup> of achieving equality, in other words the *manner* in which we aspire to transform from a grossly unequal society to one which affords each human being equal treatment on the basis of equal worth and freedom.<sup>32</sup>

### 3 The achievement of substantive equality

It has been argued that Transformative Constitutionalism and human dignity are *conditiones sine qua non* for post-apartheid South African equality jurisprudence. Accordingly, for South Africa to achieve equality transformation is constitutionally mandated and this process must be conducted in such a manner as to have regard to the human dignity every person involved therein. For my argument to succeed I must authoritatively answer the questions of *what* needs to be transformed, *from* where or what point must the process of transformation commence and *into what* or *where to* is transformation required or mandated? It is to these questions to which I now turn.

Albertyn & Goldblatt, writing in the early years of our constitutional democracy, stated that our new society is one based on substantive equality and the transformation from one side of the bridge to the other (or rather in accordance with my understanding of transformation - the journey on the bridge of transformation) will:

require a complete *reconstruction* of the state and society, including a redistribution of *power* and *resources* along *egalitarian* lines. The challenge of achieving equality within this transformation project involves the *eradication* of *systemic* forms of *domination* and *material disadvantage* based on *race, gender, class* and other *grounds of inequality*, [for example sexual orientation]. It also entails the

30 *Van Heerden* (n 5 above) para 25, Moseneke J, as he then was, affirming that the Constitution has a 'conception of equality that goes beyond mere formal equality and the mere non-discrimination which requires identical treatment, whatever the starting point or impact'; *Bata Star* (n 5 above) para 74, Ngcobo J, as he then was, observed that '[i]n this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in doing so entrench existing inequalities'; Currie & De Waal (n 22 above) 213 - 215.

31 Ackermann 'Human dignity: lodestar for equality in South Africa' (2012) 74.

32 *Hugo* (n 3 above) para 41.

*development of opportunities* which allow people to realise their full human potential within positive social relationships.<sup>33</sup> [own emphasis]

The Constitutional Court has on multiple occasions given guidance on the questions posed in the first paragraph of the third part of this discussion. In *Barnard*, Moseneke ACJ, writing for the majority, observed that the Constitution has ‘a transformative mission and permits government to take remedial measures to redress the lingering and pernicious effects of [A]partheid’ and Cameron, Froneman JJ and Majiedt AJ added that ‘[i]t does this even though this commitment means that individuals may be adversely affected by the process of transformation’.<sup>34</sup> It was also acknowledged by the Constitutional Court in *Makwanyane* that ‘the Constitution expressly aspires to ... provide a transition from ... grossly unacceptable features of the past to a conspicuously contrasting ... future’<sup>35</sup> and in *Du Plessis* the Constitutional Court accepted that ‘[the Constitution] is a document that seeks to transform the *status quo ante* into a new order’.<sup>36</sup> As a transformative document, our Constitution enjoins us to re-imagine the power relations within our society, because it requires, from us as citizens, to take active steps to achieve substantive equality,<sup>37</sup> in order to assist those who are *still* victim of past discrimination by developing and enhancing their economic and social well-being so as to enable them to *fully* exercise their inherent capacity as full citizens of the Republic.

O’Regan has, rather convincingly, conveyed that the Constitution affirms the moral human agency of every human being.<sup>38</sup> O’Regan considers this moral human agency as being normative in nature in the sense that this agency is indicative of the capacity of every human being to exercise a morally responsible choice.<sup>39</sup> Furthermore, the society must enhance this capacity and the Constitution imposes a *positive* duty on the State to develop the conditions in which the moral agency of every human being is to prosper.<sup>40</sup>

One of the consequences of past discrimination is material disadvantage and the latter solidifies some South Africans as ‘still-victim’ of past discrimination and in consequence constrain their ability to act as moral agents and fully exercise their inherent capacity as full citizens. This disadvantage is structural in nature and found in the power relations *still* prevalent in our society. I

33 Albertyn & Goldblatt ‘Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality’ (1998) 14 *South African Journal on Human Rights* 248 249.

34 *Barnard* (n 5 above) para 29 & 78.

35 *Makwanyane* (n 9 above) para 262.

36 *Du Plessis* (n 9 above) para 157.

37 *Barnard* (n 5 above) para 29.

38 O’Regan ‘The three Rs of the Constitution: responsibility, respect and rights’ (2004) *Acta Juridica* 92.

39 O’Regan (n 38 above) 88 & 92.

40 As above.



accordingly allude the reader to some of these power relations which must be identified and eradicated in our process of transformation.

### 3.1 Legal feminism: Patriarchy and male supremacy

Feminists agree to the inclusion of patriarchy within Legal Feminism in general, but seeks recourse to the concept and accords importance thereto differently.<sup>41</sup> Patriarchy is a concept that denotes the systems and structures in society that sustain male power<sup>42</sup>. Accordingly, because of the systemic nature of patriarchy the privilege of being male exists independently from the intention and actions of a male.<sup>43</sup>

For transformation to succeed the systemic nature of patriarchy must be eradicated by transforming (not merely changing or reforming) the social structure of our society. In other words, the normality of men dominating women must be exposed and discarded. A contemporary example to convey the point: the accepted normality of the conception of reality as conveyed by sport. The role of women is that of a 'sporting wife'. Another example is that of the role portrayed by politics: 'the wife of the politician'.

To my knowledge there have not been made any mention of a 'sporting man', as in the same context of a 'sporting woman', nor of 'the husband of the politician'. The message that I am attempting to convey is that the structure of the society is of such a nature as to normalise the role of the female as supporting the male in order for the latter to achieve his own success as if the success of the female is dependent upon that of the male. The female is not known for that which she *is* but rather for *being* the *wife* of the male in her role of supporting the latter. In following upon an ethical conception of the Constitution, the author will develop content from the thought of Ethical Feminism. Neither the right to equality nor the value of equality should therefore be defined nor understood as it *is* but rather as it *ought* to be – the emphasis being on the aspirational commitment of *achieving* substantive equality.

In following Ethical Feminism there is no quest for the transfer of power by appropriating that which 'belonged' to the man. Conversely, Ethical Feminism involves *redefinition* of 'fundamental concepts' and I associate this redefinition of concepts with the re-imagining of power relations<sup>44</sup> because the redefining concepts (for

41 Bonthuys *et al* *Gender, law and justice* (2007) 19.

42 As above.

43 As above.

44 De Vos 'The past is unpredictable: race, redress and remembrance in the South African Constitution' (2012) *South African Law Journal* 80; This re-imagining of power relations exactly that which Moseneke, DCJ conveyed in *Barnard* (n 5 above) para 29.

example equality) will lead to the re-imagination of power relations, which re-imagined relations can question and reject the normality of the structural organisation of society and thereby produce *social* transformation. There is a call for redefining concepts as well as defining equality with emphasis upon the aspirational ends, but the question that needs to be answered is from whose perspective? I argue for and advocate a so-called 'feminist standpoint theory', in other words: to put women in the centre of legal thought, to direct that thought from the standpoint of a woman<sup>45</sup> and to recognise that sameness/difference between man and woman is an issue of power (male supremacy), and that one can distance oneself from pre-determined (male) norms.

In conclusion, by adopting the post-modernist tool known as deconstruction and applying an Ethical Feminist approach by expressing how something *ought* to be, not how it *is*, transformation, in this context (patriarchy and male supremacy), might just be possible.<sup>46</sup> One can accordingly and authoritatively argue that we are *not* lost in transformation.

### 3.2 Critical race theory: White superiority

De Vos alludes to the complexities of 'questioning the positions and discourses of privilege and dominance that stem from an ideology of "white" superiority and hegemony'.<sup>47</sup> White superiority is indicative of the power relationship between races, that being the white minority standing in a dominant relation to the black majority in South Africa. This power is expressed in economical, educational and accordingly developmental terms. The latter exposition is not merely fancy and popular terms strung together, but signifies a developed understanding of white superiority and the extent thereof. Disadvantage is not only the product of a person's material conditions, but also 'a person's social status associated with his or her race'.<sup>48</sup> A person's social status is determined by his or her race and the latter is indicative of his or her economical position, level of education and thus his or her development as a citizen. The centrality of race and its determinative role is the outcome of the perpetuated consequences of past discrimination still prevalent today.

One of the core principles of Critical Race Theory is 'intersectionality', which emphasises the interconnection between, *inter alia*, race, gender, sex and sexual orientation.<sup>49</sup> I will draw from this concept in order for my notion of substantive equality to be

45 Bonthuys & Albertyn (n 41 above) 47.

46 Bonthuys & Albertyn (n 41 above) 46.

47 De Vos (n 44 above) 80.

48 As above.

49 Harris *Race and equality law* (2013) xxi.

contextual and therefore in reasoning one must move from the specific to the general and not from the general, which is abstract and usually from the point of view of the dominant class or position, to the specific. Thus, if one places race, where appropriate, in the centre of a specific equality conundrum and accept that *not only race* will play a determinative role in identifying disadvantage, transformation and its direction is anything but vague.

### 3.3 Queer theory: Heteronormativity

Heteronormativity is the situation that persists in a society where heterosexuality is the accepted legal, as well as moral 'norm' – thus the term heteronormativity. Heteronormativity is ostensibly not only a legal concept, but also one that 'permeates our cultural understanding of sexuality'<sup>50</sup> and is grounded upon the understanding that homosexual and heterosexual categories of desire are socially constructed<sup>51</sup> through power relations within a society in a manner that privileges heterosexual desires and oppresses (marginalise) homosexual desire.<sup>52</sup> The crux of the oppression that persists within a heteronormative state is that homosexual individuals cannot claim full citizenship.<sup>53</sup> Protection is awarded to them only to the extent that they 'conform to the hierarchal assumptions of the heteronormative state'.<sup>54</sup>

I identify heteronormativity as a strand of Queer Theory that can aptly indicate yet another power relation in society, but more importantly it is my opinion that the marginalisation and oppression of homosexual individuals is subject to an even more sophisticated normalising power than the oppression and marginalisation of women or people based on their race. If one identifies heteronormativity as a power relation present in our society, therefore an object of transformation, as well as understands and appreciates the consequences of heteronormativity the direction of transformation is yet again anything but ambiguous.

## 4 Conclusion

When the object of transformation is known as well as *into what* such object need be transformed, one can only but wonder how 'being lost

50 De Vos 'From Heteronormativity to full sexual citizenship?: equality and sexual freedom in Laurie Ackermann's constitutional jurisprudence' (2008) *Acta Juridica* 256.

51 De Vos (n 50 above) 257: 'In a heteronormative world citizens ... are discursively constructed as heterosexual'.

52 De Vos (n 50 above) 56.

53 De Vos (n 50 above) 257.

54 As above.

in transformation' is even a possibility. Both the Interim Constitution and the Constitution makes it patently clear that transformation is constitutionally mandated as well as a constitutional objective. Both these documents as well as the Constitutional Court provide for guidance concerning the object of transformation<sup>55</sup> as well as *into what*<sup>56</sup> such object needs to be transformed. I therefore argue that being 'lost in transformation' is not possible in a post-apartheid South Africa because we are all too aware of our past and we have envisioned a very specific society.<sup>57</sup> What remains for us as South Africans is not to ponder about *where* we are in this process but to work towards achieving the constitutional ideal that is the achievement of substantive equality. In my opinion the words of Ngcobo, J (as he then was) summarises the issue at hand rather appropriately:

[t]he *achievement of equality* is one of the fundamental goals ... in the Constitution. Our constitutional order is *committed to the transformation of our society* from a grossly unequal society to one "in which there is *equality between men and women and people of all races*". In this fundamental way, our Constitution *differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities*. Our Constitution *recognises* that decades of *systematic* racial discrimination entrenched by the [A]partheid legal order cannot be eliminated without *positive action* being taken to achieve that result. *We are required to do more than that*. The effects of discrimination may continue indefinitely unless there is a *commitment* to end it.<sup>58</sup> [own emphasis]

Three power relations prevalent in our society are identified as objects of transformation and it must be patently clear that the achievement of equality is the *end* we sought to achieve. The content of equality and the manner in which transformation is to be conducted is also sufficiently clear for the impossibility of the state of 'lost in transformation' to be constituted as a reality. My message is accordingly clear, rather than pondering about our position in the process of transformation we can *do more* as there is no excuse in law nor fact that South Africa is 'lost in transformation. One need not have recourse to the *impossible* to discover a banal and conceptually unacceptable excuse.

55 *Barnard* (n 5 above) para 29, where the re-imagination of power relations were identified by the Constitutional Court.

56 *Makwanyane* (n 9 above) para 262; *Barnard* (n 5 above) para 29 & 78; *Du Plessis* (n 9 above) para 157.

57 Preamble and s1 of the Constitution.

58 *Bato Star* (n 5 above) para 74.