

# WHAT IS IN A SURNAME? AN ENQUIRY INTO THE UNAUTHORISED NAME CHANGES OF MARRIED WOMEN

<https://doi.org/10.29053/pslr.v16i1.4511>

by Odirile Matladi\*



## Abstract

*In recent years there have been reports of the Department of Home Affairs changing women's surnames to that of their husbands upon the conclusion of a marriage without the married women's consent. This conduct by the Department of Home Affairs officials infringes, as this article will argue, not only on the affected women's right to just administrative action but also on the rights to equality and dignity and, in some instances, freedom of movement and universal suffrage. This article enquires into the possibility of taking the conduct of the Department of Home Affairs, which arguably amounts to administrative action, on judicial review seeking systemic relief. It will look at the sexist and patriarchal social norms relied upon to justify the conduct of the Department of Home Affairs and calls for intervening measures that not only result in broader social recognition but also effectively dismantle the systems and frameworks of inequality that continue to marginalise and subjugate women in the socially constructed gender hierarchy.*

\* ORCID iD: <https://orcid.org/0000-0003-4844-8595> Institutional affiliations: Candidate legal practitioner at Phatshoane Henney Attorneys. I wish to dedicate this labour of love to my darling mother, Germina Neo Sophia Matladi (née Noge), who kept the Earth on its axis for as long as she was on it. My sincerest gratitude goes to Professor Melanie Jean Murcott who supervised the writing of this article in its earlier form as a dissertation in partial fulfilment of the requirements for the LLB degree at the University of Pretoria. Any errors and inaccuracies remain wholly my own.

# 1 Introduction

## 1.1 Factual background

This article explores the sexist and patriarchal origins of conduct of the South African Department of Home Affairs (the Department) in changing the names of married women without their consent. It aims to unpack the impact of such conduct on women and the various rights violations caused. Given that the conduct of the officials amounts to public power, specifically, administrative action reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or reviewable in terms of the constitutional principle of legality, this research explores the possibility of taking the conduct of the Department on judicial review to seek systemic relief. It is argued that a court could grant declaratory and injunctive relief to advance women's rights. It is considered herein whether, although the problem lies primarily in the implementation of the law, legislative intervention such as a provision that allows men to similarly change their surnames upon the conclusion of a marriage could normalise the practice of spouses, rather than only wives, choosing a family name.<sup>1</sup> This legislative intervention could be accompanied by directives and internal training workshops that explain why the practice of choosing a family name is necessary and could create a space for the officials to confront their sexist biases constructively.<sup>2</sup> This would hopefully explain to officials why it is important not to impose their views on those people who seek to exercise their constitutional rights.

By way of a qualitative study of primary and secondary sources of law and relevant literature, the enquiry into the unauthorised changes to married women's surnames revolves around the Department's violation of the women's constitutional right to just administrative action as it impacts their lives in significant ways in the context of a society riddled with sexism, misogyny and patriarchy. Exploring the possibility of taking the conduct of the Department on judicial review for systemic relief, this article asks, firstly, on what bases the Department's conduct can be taken on judicial review and, secondly, what type of relief the courts may grant. This article further explores what social and legal transformation may be necessary to accompany the relief granted.

This first section of the article provides social and legal contexts. The second section discusses the constitutionally entrenched right to

1 M Rosensaft 'The right of men to change their names upon marriage' (2002) 5(1) *Journal of Constitutional Law* at 201.

2 Legal Resources Centre 'Minister responds to unauthorised change of women's surnames after marriage' 24 March 2017 <https://m.polity.org.za/article/lrc-minister-responds-to-unauthorised-change-of-womens-surnames-after-marriage-2017-03-24> (accessed 20 October 2020).

administrative justice and the legislation enacted to give effect to it in an effort to determine the bases on which the Department's conduct can be taken on judicial review to seek systemic relief; and what that relief might look like in a society seeking gender equality. Prominent case law will be used to elaborate on the remedies courts are empowered to grant by section 172 of the Constitution and section 8 of PAJA.

Section 26(1) of the Births and Deaths Registration Act 51 of 1992 (BADRA) provides that a married woman may assume her husband's surname or retain her birth surname or a prior surname which she legally bore.<sup>3</sup> BADRA was amended in 2002 to add the option of a woman joining her surname with that of her husband as a double-barrelled surname.<sup>4</sup> Stated otherwise, a married woman may elect to assume her husband's surname, retain her birth surname or a prior surname which she legally bore, or join her surname with that of her husband as a double-barrelled surname. No application to the Department is necessary to effect this change. However, the Department must be notified in writing to enable it to update the national population register, or not, if a woman chooses to retain her surname. This means that a woman's election to change or retain her surname does not require approval from the Department but occurs by operation of law.

Nevertheless, numerous women have reported that their surnames have been changed by officials of the Department, even after they had expressly informed the Department of their election to retain their birth names when registering their marriages.<sup>5</sup> In addition, many of the affected women have been told by officials of the Department that they require their husband or father's consent to retain their birth surnames.<sup>6</sup> One of the effects of the unauthorised surname changes on the registration of their marriages is that women find that their identity documents contradict their registered details. As such, they are prevented from performing various tasks such as opening an account with a mobile service provider, travelling abroad, or voting in local elections. This action by officials of the Department has thus led to the violation of several fundamental rights, including the right to freedom of movement and the right to universal suffrage<sup>7</sup>. One woman could not be registered on her child's birth certificate,

3 Sec 26 amended by sec 3 of Births and Deaths Registration Amendment Act 67 of 1997.

4 Births and Deaths Registration Amendment Act 1 of 2002.

5 LRC (n 2).

6 S Wild 'Home Affairs requires husbands to give women consent to change their names and it's an affront' 24 July 2019 <https://www.news24.com/news24/columnists/guestcolumn/home-affairs-requires-husbands-to-give-women-consent-to-change-their-names-and-its-and-affront-20190724> (accessed 18 October 2020).

7 Secs 19(3)(a) & 21 of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution').

and her parental rights and responsibilities were affected<sup>8</sup>. Some women have suffered monetary loss because they have had to take leave from work to rectify this action; some have been asked to pay a fee for this rectification, while others have been unable to claim from the Unemployment Insurance Fund or take maternity leave from their employers.

Consequently, the state has failed in its duty to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>9</sup> Furthermore, the Department's discriminatory requirement to correct the population register of male consent,<sup>10</sup> for which there is no justifiable legal basis, effectively reduces the legal capacity of competent adult women to that of children and people who are mentally disabled. This amounts to unfair discrimination based on sex, gender and marital status, which are listed in section 9(3) of the Constitution,<sup>11</sup> and it constitutes an infringement of these women's right to dignity.<sup>12</sup> The test for discrimination was developed in *Harksen v Lane NO*.<sup>13</sup> In this case, the Constitutional Court held that differentiation between people or categories of people might amount to discrimination if it amounts to discrimination on a specified ground or if the ground of discrimination is based on attributes and characteristics which could potentially impair the fundamental human dignity of persons or adversely affect them in a comparably serious manner. Such discrimination is presumed unfair if it is on one of the grounds specified in section 9(3) of the Constitution.<sup>14</sup> If it is on an unspecified ground, then the complainant must establish unfairness based on the impact of the discrimination on the complainant or others in a similar situation.<sup>15</sup> If discrimination is found to be unfair, then it must be determined whether it is justified under the general limitation clause found in section 36 of the Constitution, which provides that the limitation of any right in the Bill of Rights may only be done by a law of general application that is 'reasonable and justifiable in an open and democratic society based on dignity, freedom and equality'.

With assistance from the Legal Resources Centre (the LRC), some of the affected women have been able to take the Department to task and have their unauthorised name changes reversed.<sup>16</sup> The LRC met with the Deputy Director-General of the Department (the DDG) on behalf of the women who indicated that they would like to be

8 Sec 19 of the Children's Act 38 of 2005.

9 Sec 7(2) of the Constitution.

10 As above.

11 Sec 9(3) of the Constitution.

12 Sec 10 of the Constitution.

13 *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 54; R Krüger 'Equality and unfair discrimination: refining the *Harksen* test' (2011) 128(3) *South African Law Journal* 480 at 481.

14 As above.

15 As above.

16 Wild (n 6).

represented by the LRC in taking steps towards addressing the unauthorised change of their surnames following the conclusion of their respective marriages.<sup>17</sup> The DDG confirmed that the surnames of those women who were represented by the LRC, which were erroneously changed, have been amended to reflect the correct choice and that the Minister of Home Affairs has undertaken an internal review of the systems that led to the unauthorised name changes.<sup>18</sup> The DDG further stated that internal training would be undertaken to eliminate staff biases and prejudice.<sup>19</sup> He also stated that changes would be made to the data-capturing programme, which should address human error, and that directives were issued to staff in October 2016 to ensure compliance.<sup>20</sup>

The Department has rectified the errors and correctly captured the affected women's names in line with their preferred surnames as stated on the marriage register and the population register.<sup>21</sup> The Department has undertaken internal training to eliminate staff biases and prejudice in the capturing of information in the national population register.<sup>22</sup> Additionally, the Department set out to implement a new system which sought to eliminate the unauthorised change of surnames, and directives have been issued to staff to ensure compliance with and adherence thereto.<sup>23</sup> The internal steps taken by the Department thus far have been effective insofar as they have corrected unauthorised name changes so that the population register reflects the correct names of the women. However, they have not proven effective in preventing a reoccurrence of the issue or addressing the systemic causes thereof. As of 2019, women were still reporting surname changes without their consent.<sup>24</sup>

## 1.2 Historical context

Patriarchy refers to the organisation of social life and institutional structures so that men are vested with authority, power and control over women and children in most, if not all, aspects of life.<sup>25</sup> Patriarchy ensures men's supremacy and women's subjugation.<sup>26</sup> The origins of patriarchy were traced to Egyptian and Greek cultures

17 LRC (n 2).

18 As above.

19 As above.

20 As above.

21 LRC (n 2).

22 As above.

23 As above.

24 R Grobler 'Women lash out at home affairs after surname changes' 25 July 2019 <https://www.news24/southafrica/news/p3-we-want-our-surnames-back-women-lash-out-at-home-affairs-20190725> (accessed 20 October 2020).

25 A Roberts 'South Africa: a patchwork quilt of patriarchy' (2010) 3 *Skills at Work: Theory and Practice Journal* 59 at 63.

26 Roberts (n 25) 65.

millennia ago when enslaved people and women were not afforded any status in society other than that ascribed to them by me<sup>27</sup>n. Slavery, colonialism and apartheid proliferated and perpetuated patriarchal oppression and repression.<sup>28</sup> Colonialism and neo-colonialism changed African women's status in a society profoundly.<sup>29</sup> During the colonial era, the colonisers' agenda of recreating societies in their image resulted in the imposition of the patriarchal system on African societies and the erosion of African women's status.<sup>30</sup> Despite the critical role played by women in the struggle for liberation from racial injustice in many African countries, issues pertinent to the subjugation of women were overlooked in favour of national liberation objectives once the countries gained independence.<sup>31</sup> Post-independence African states thus emerged patriarchal by nature, even with constitutions based on human rights.<sup>32</sup> This patriarchal nature perpetuates the subservient gender role ascribed to African women.<sup>33</sup>

Keeping with the trend, the necessities of a nationalist agenda subordinated women's struggles to the anti-apartheid struggle in South Africa.<sup>34</sup> Post-1994, the residue of the patriarchal nature and mode of operation of apartheid has resulted in ambiguous gender positionings – women are simultaneously 'empowered and victimised, seen and unseen, included and excluded in different ways'.<sup>35</sup> Patriarchy remains pervasive in South African society.<sup>36</sup> It has been described as 'the one constant profoundly non-racial institution across all communities'.<sup>37</sup>

The vast experiences, interests and demands of the many different categories of South African women fell by the wayside as racial equality was prioritised in the pursuit of national liberation from white domination.<sup>38</sup> In the 1950s, the Federation of South

27 Roberts (n 25) 63.

28 As above.

29 As above.

30 As above.

31 Roberts (n 25) 63; S Hassim 'Gender, social location and feminist politics in South Africa' (1991) 15 *Transformation* at 65.

32 Roberts (n 25) 64.

33 As above.

34 R Frenkel 'Feminism and contemporary culture in South Africa' (2008) 67 *Africa Studies* at 1.

35 Frenkel (n 34) 2.

36 Frenkel (n 34) 2; C Albertyn 'Law, gender and inequality in South Africa' (2011) 39:02 *Oxford Development Studies* 136 at 156; C Albertyn 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' (2018) 34(3) *South African Journal on Human Rights* at 444; Roberts (n 25) 63.

37 Frenkel (n 34) 1.

38 C Albertyn 'Women and the transition to democracy in South Africa' (1994) *Acta Juridica* at 39; see also C de la Rey 'South African feminism, race and racism' (1997) 13(32) *Agenda* at 7 for a critical discussion on the axes of difference in the lived experiences of South African women.

African Women (FSAW) wrote the Women's Charter, which demanded formal legal equality with men regarding marriage, property and inheritance. The more substantive demands were not part of the claim for legal equality but 'demand[ed] social services and amenities to protect and sustain women's role as mothers'.<sup>39</sup> In this sense, the separation of legal equality from social and economic equality impedes the transformation of women's position in society.<sup>40</sup> The subordination of gender struggles to the national liberation struggle resulted from the deeply rooted patriarchal attitudes and values structured by the material inequality between men and women.<sup>41</sup> This subordination was echoed in the Freedom Charter, which even excluded the call for social amenities.<sup>42</sup>

Decades later, in the 1990s, the Women's National Coalition was launched with the two-fold aim of engaging in a political campaign that would mobilise and educate women at a grassroots level and influence the national political constitution-writing process.<sup>43</sup> This feminist project sought to advance substantive equality in the Constitution and the law.<sup>44</sup> Women's organisations sought to institutionalise the equality commitments made by the post-1994 government in the formal norms, procedures and institutions of the new democracy to reduce the dependency on political will.<sup>45</sup> The institutionalisation of gender issues had the theoretical effect of requiring the state to consider gender issues in its internal operation and policy formulation.<sup>46</sup> The two forms of state-led transformation collectively termed 'institutional gender responsiveness' that emerged were racial and gender representation in state institutions and reducing social and economic inequalities through public policies.<sup>47</sup> The former required a focus on gender equity within civil service.

In contrast, the latter required an examination of the impact of policies and service delivery on gender relations and the extent to which women are included among the 'publics' served by government agencies.<sup>48</sup> It later became evident that the civil service was resistant to change and had retained the structure and culture of the hierarchical, militaristic organisation of apartheid. Despite the support for gender equity at the highest levels of government, lower-level department officials were resistant and openly hostile to

39 Albertyn (n 48) 44.

40 As above.

41 Albertyn (n 48) 45.

42 As above.

43 Albertyn (n 48) 51.

44 Albertyn (n 48) 52.

45 S Hassim 'The gender pact and democratic consolidation: institutionalising gender equality in the South African state' (2003) 29 *Feminist Studies* at 508.

46 Hassim (n 45) 509.

47 Hassim (n 45) 510.

48 As above.

attempts to mainstream gender.<sup>49</sup> No resources were allocated to gender training programmes for civil servants, resulting in policy implementers and service agencies reverting to conventional and familiar ideological and technical frameworks and tools.<sup>50</sup>

Matrimonial law has evolved so that the legal rules that gave men marital power and placed them in positions as the heads of household and guardians of their children have been abolished.<sup>51</sup> However, social norms and habits that remain assure that wives defer to their husbands the power to make decisions about the family.<sup>52</sup> This patriarchal culture dictates the practice of women adopting their husbands' names.<sup>53</sup> It has been argued that 'patriarchy operates in both the "public" and the "private" sphere of life'.<sup>54</sup> In the public sphere, it manifests as the deprivation of women's rights, which leaves them dependent on men to represent their interests. In contrast, relations in the private sphere often dictate the capacity of women to participate in the public world.<sup>55</sup> The trend of women electing to keep their birth surnames appears to attempt to sever such dependence.

Bonthuys argues that the differential treatment that allows women to exercise the choices to legally retain or change their surnames after marriage appears to favour women but facilitates and reinforces the existing patriarchal social practices.<sup>56</sup> The gender-specific rule reinforces the inequalities in women's and men's abilities to choose to retain their names after marriage, which allows women to assume their husbands' surnames without hindrance.<sup>57</sup> Such a legal rule disguises its practical effect of facilitating and reinforcing expectations that women should assume their husbands' surnames.<sup>58</sup> The differentiation based on gender serves no legitimate government purpose,<sup>59</sup> and it may be hard-pressed to pass constitutional muster.<sup>59</sup>

Although gender equality is constitutionally entrenched, it remains as much an afterthought as it was during the process of drafting the Constitution.<sup>60</sup> Women's initial claims for equality with

49 Hassim (n 45) 511.

50 Hassim (n 45) 513.

51 E Bonthuys 'Equal choices for women and other disadvantaged groups' (2001) 21 *Acta Juridica* at 45.

52 As above.

53 As above.

54 H Barnett *Introduction to feminist jurisprudence* (1998) at 64.

55 Barnett (n 54) 65.

56 E Bonthuys 'Deny thy father and refuse thy name: Namibian equality jurisprudence and married women's surnames' (2000) 117 *South African Law Journal* at 466.

57 Bonthuys (n 56) 467.

58 Bonthuys (n 56) 469.

59 Bonthuys (n 56) 473.

60 Albertyn (n 38) 43-46.



men were demands for formal legal equality ‘in relation to property, marriage and children, and for the removal of all laws and customs that deny women equal rights’.<sup>61</sup> The substantive demands were not part of the legal equality claim but social and economic equality.<sup>62</sup> Very few women were among the delegates at the first round of constitutional negotiations,<sup>63</sup> and the parties that would eventually contest to govern the country had little to no regard for women’s rights in their policy considerations.<sup>64</sup>

The legacy of gender oppression and suppression persists but manifests in different forms. The conventionally gendered ideas of society are sustained by legal and social boundaries that are normative and doctrinal, despite the broad reach of constitutional equality.<sup>65</sup> Gender equality jurisprudence has broadened the net of inclusion without dislodging the underlying social framework of our gendered society.<sup>66</sup> The government must fulfil its constitutional mandate of addressing socio-economic inequalities as part of a progressive realisation of human rights in ways that erode inequalities of race and gender.<sup>67</sup>

## 2 Administrative justice as a constitutional right

Judicial review can be employed to ensure that administrative conduct is exercised within the legislative mandate conferred on officials and to give effect to the constitutional right to administrative action that is lawful, fair and reasonable.<sup>68</sup> During any judicial review of the Department’s conduct, the court would assess such conduct against administrative law standards.<sup>69</sup> Although the exhaustion of all internal remedies is a prerequisite for judicial review,<sup>70</sup> the duty to exhaust internal remedies may be bypassed if there are exceptional circumstances and it is in the interests of justice.<sup>71</sup> This article argues that review proceedings are in the interests of justice and that internal remedies may be bypassed given the systemic nature of sexism evident in the Department’s conduct.

61 Albertyn (n 38) 44.

62 As above.

63 Albertyn (n 38) 54.

64 Albertyn (n 38) 46.

65 C Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23(2) *South African Journal on Human Rights* at 254.

66 Albertyn (n 65) 254.

67 S Hassim ‘The gender pact and democratic consolidation: institutionalising gender equality in the South African state’ (2003) 29 *Feminist Studies* at 505-506.

68 Secs 33 & 34 of the Constitution; G Quinot ‘Regulating administrative action’ in G Quinot (ed) *Administrative justice in South Africa: An introduction* (2015) at 107.

69 Quinot (n 68) 109.

70 Sec 7(2) of PAJA.

71 Sec 7(2)(c) of PAJA; Quinot (n 68) 115.

This section explores whether the conduct of changing married women's surnames by the Department amounts to public power that might be administrative action and how the rights violations caused thereby can be vindicated by taking the conduct on judicial review.

## 2.1 What is administrative action?

The Department's conduct constitutes an exercise of public power. Although largely elusive, public powers tend to be associated with conduct and activities that are governmental, i.e., activities 'for which the public, in the shape of the state, have assumed responsibility' or 'linked to the functions and powers of government'.<sup>72</sup>

The rule of law imposes an obligation on the state to exercise its power by the law.<sup>73</sup> This means that public power must comply with the rule of law. Compliance of public power with the rule of law is measured against a continuum of constitutional accountability.<sup>74</sup> Beginning at one end of the continuum, first, are foundational or general legal norms that create the context for applying the more explicit and indirect constitutional norms.<sup>75</sup> The constitutional principle of legality, inherent in the rule of law, lies at this end of the continuum.<sup>76</sup> Second, are those norms found in the Bill of Rights, such as those included in the right to just administrative action in section 33 of the Constitution.<sup>77</sup> Third, are indirect constitutional norms of accountability, such as PAJA, which give effect to the content of the constitutional right to just administrative action and provide guidelines for judicial review of administrative action.<sup>78</sup> At the opposite end of the spectrum are specific empowering provisions in other statutes or subordinate legislation 'that set out standards of accountability demanded of a functionary in a particular situation, and that [are] appropriate to that specific exercise of power'.<sup>79</sup>

The right to just administrative action is constitutionally entrenched.<sup>80</sup> Section 33(1) of the Constitution states that administrative action must be lawful, reasonable, and procedurally fair. In section 33(2) of the Constitution, a person whose rights have been negatively affected by administrative action is entitled to

72 C Hoexter *Administrative law in South Africa* (2018) at 3-4.

73 M Murcott & W van der Westhuizen 'The ebb and flow of the application of the principle of subsidiarity – critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *Constitutional Court Review* at 50.

74 Murcott & Van der Westhuizen (n 73) 43.

75 As above.

76 Murcott & Van der Westhuizen (n 73) 44.

77 As above.

78 As above.

79 As above.

80 Sec 33 of the Constitution.

written reasons. Section 33 of the Constitution is given effect to by PAJA.<sup>81</sup> Administrative law, through section 33 of the Constitution and PAJA, regulates ‘incidences of public power or the exercise of public functions’ that involve the day-to-day administrative functioning of the state.<sup>82</sup> The three arms of government and ‘all organs of state’ are bound by section 8(1) of the Constitution to give effect to the Bill of Rights, including the right to administrative justice in section 33.<sup>83</sup> Organs of state making up the executive arm of government are primarily responsible for the administrative functioning of the state. Section 239 of the Constitution defines ‘organs of state’ to include departments of state or administration in the national, provincial, and local spheres of government. The primary source of administrative law, PAJA, enacted to give effect to the rights in section 33 of the Constitution, applies only to exercises of public power that fall within its definition of ‘administrative action’.<sup>84</sup> The Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others* discussed the several definitional elements which constitute administrative action.<sup>85</sup> The conduct must be a decision involving the exercise of a discretion or choice, of an administrative nature, by whoever performed, of a public nature, typically involving the implementation of the law, that adversely affects rights and has a direct, external legal effect and which does not fall within any of the exclusions listed in section 1 of PAJA.<sup>86</sup> Corder summarises the listed exclusions thus:

[T]he “executive” and “legislative” functions of government at national, provincial and local levels, the actions of judges, magistrates and traditional leaders when dispensing justice, “a decision to institute or continue a prosecution”, a decision of the Judicial Service Commission in any part of the appointment process of judges, and two other relatively minor but specific acts of administration.<sup>87</sup>

The requirement of a ‘decision’ appears to exclude mechanical acts from the ambit of administrative action.<sup>88</sup> It is, therefore, possible for formal action not to amount to an administrative decision or action.<sup>89</sup> Actions that occur by operation of law without the

81 Sec 33(3) of the Constitution.

82 P Maree ‘Administrative authorities in legal context’ in G Quinot (ed) *Administrative justice in South Africa: An introduction* (2016) at 59.

83 Hoexter (n 72) 125.

84 Sec 1 of PAJA.

85 *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC).

86 G Quinot & P Maree ‘Administrative action’ in Quinot (n 68) 78.

87 H Corder ‘The development of administrative law in South Africa’ in Quinot (n 82) 20.

88 Hoexter (n 72) 193; *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga* 2003 (1) SA 373 (SCA) paras 20 & 28.

89 As above.

exercising of discretion by a decision-maker also do not amount to administrative action.<sup>90</sup>

Upon the conclusion of a marriage, a woman must notify the Department in writing whether she chooses to retain or change her surname but does not need to apply for approval before any change may be effected. When done correctly, the surname change occurs by operation of law rather than by virtue of a decision, and the Department official who updates the marriage register acts mechanically without exercising any discretion. The Department's conduct of changing the names of married women without their consent shows flagrant disregard for the women's instructions and is reminiscent of the recorded resistance and hostility of lower-level department officials towards gender mainstreaming, as illustrated earlier in this article in the discussion of the historical context.<sup>91</sup>

The conduct by the officials of the Department of changing the married women's names contrary to their election arguably amounts to a decision of an administrative and public nature that has adversely affected the married women whose surnames were changed without their consent by limiting the exercise of their abovementioned rights which, in some instances, had the direct, external legal effect of limiting the women's legal capacity. This conduct does not fall under any of the listed exclusions. Even if the conduct of changing the women's names without their consent does not amount to administrative action but is merely a mechanical, clerical act, it could still be reviewed under the principle of legality, which generally provides for the review of exercises of public power.<sup>92</sup>

## 2.2 When can administrative action be taken on judicial review?

The courts have been tasked with regulating and overseeing all public power, including administrative action.<sup>93</sup> Judicial review is concerned with how a decision was taken rather than the correctness of the decision.<sup>94</sup> The courts ask not whether the decision was the best or most correct but whether the decision was taken in a manner that complies with the law.<sup>95</sup> This means that the courts must ensure that state officials remain within the limits of their authority and comply with the processes prescribed by law when exercising the discretion granted to them.<sup>96</sup>

90 Hoexter (n 72) 202; *Phenithi v Minister of Education* 2008 (1) SA 420 (SCA) para 10.

91 Hassim (n 67) 511.

92 Hoexter (n 72) 121.

93 G Quinot 'Regulating administrative action' in Quinot (n 82) 106.

94 Quinot (n 93) 107.

95 As above.

96 Corder (n 87) 13.

The cause of action for judicial review of administrative action arises from section 6 of PAJA.<sup>97</sup> The grounds of review set out in section 6(2) of PAJA are intended to advance the section 33(1) requirements of administrative justice: lawfulness, reasonableness and procedural fairness.<sup>98</sup> Lawfulness requires that an administrator act within the limits of the powers conferred upon them by law.<sup>99</sup> There must be a valid authorisation in an empowering provision,<sup>100</sup> and the administrator must not be mistaken in either law or fact pertaining to their authorisation.<sup>101</sup> Reasonableness entails examining whether a decision was rationally justified, proportional, or just in the outcome.<sup>102</sup> Procedural fairness requires that an administrator act reasonably in their decision-making towards those affected by informing them of those decisions, allowing them to participate in the decisions, and treating each case on its own merits by taking all decisions impartially.<sup>103</sup> Legality overlaps with section 33 (of the Constitution) requirements as it requires that public power be exercised lawfully and rationally.<sup>104</sup> This means that an authority exercising public power must act within the powers lawfully conferred on it, and the decisions it makes must be rationally related to the purpose for which the power was given.<sup>105</sup> Legality has been expanded to include, under minimal circumstances, procedural fairness as a requirement of rationality.<sup>106</sup> It is proposed, with judicial support, that legality requires giving reasons.<sup>107</sup>

Section 7(2) of PAJA establishes the duty to exhaust internal remedies provided by any other legislation before pursuing judicial review<sup>108</sup>. Only in exceptional circumstances and in the interests of justice may a court exempt a person from the obligation to exhaust internal remedies in section 7(2)(c) of PAJA. The duty to exhaust internal remedies has been supported by the Constitutional Court in *Koyabe v Minister of Home Affairs*,<sup>109</sup> where the court held that 'what constitutes exceptional circumstances will depend on the facts of the case and nature of the administrative action'.<sup>110</sup> However, legality does not have a similar duty to exhaust internal remedies.

97 Quinot (n 93) 111; *Bato Star fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 113 (CC) para 25.

98 Quinot (n 93) 112.

99 Secs 6(2)(a)(i) & 6(2)(f)(i) of PAJA; Hoexter (n 72) 256.

100 G Quinot 'Lawfulness' in Quinot (n 82) 121.

101 Quinot (n 100) 139.

102 Secs 6(2)(f) and 6(2)(h) of PAJA; Hoexter (n 75) 340-346; M Kidd 'Reasonableness' in Quinot (n 82) 175-185.

103 Hoexter (n 72) 367; M Murcott 'Procedural fairness' in Quinot (n 82) 148.

104 Hoexter (n 72) 122.

105 Hoexter (n 72) 123.

106 As above.

107 Hoexter (n 72) 124.

108 Hoexter (n 72) 539.

109 *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC) paras 36-38.

110 Hoexter (n 72) 542.

Any delay or failure to exhaust internal remedies could give rise to procedural barriers to taking the conduct of the Department on judicial review in terms of PAJA. However, these barriers can be overcome given the exceptional and systemic nature of the problem, as demonstrated in *KOS v Minister of Home Affairs*.<sup>111</sup> The court in *KOS* dealt with the refusal of officials of the Department to change some of the applicants' names and sex descriptions as provided for under the Alteration of Sex Description and Sex Status Act (Alteration Act),<sup>112</sup> despite there being no legal prohibition to do so. The six applicants in *KOS* were three married couples whose marriages were solemnised in the Marriage Act.<sup>113</sup> The first, third and fifth applicants (the transgender spouses) were assigned male at birth.<sup>114</sup> After marrying cisgender female spouses, the transgender spouses underwent medical and/or surgical treatment to alter their sexual characteristics from male to female.<sup>115</sup>

The Alteration Act provides that upon application to the Director-General of the Department, a person's sex description may be altered on the birth register, and the concerned person will be provided with an altered birth certificate.<sup>116</sup> The alteration of a person's sex description applies from the date of recording such alteration.<sup>117</sup> The legal consequences of altering a person's sex description are wholly prospective from the recording date. This means that there is no retrospective effect on any of the person's rights and obligations which have accrued to or have been acquired by the affected person before the alteration.<sup>118</sup> The contractual legal character of marriage brings about mutual rights and obligations between spouses. These mutual rights and obligations are unaffected by the recordal of a postnuptial sex alteration in respect of either or both spouses.<sup>119</sup> The alteration of the record of a person's gender or sex description on the birth register, once the application in terms of the Alteration Act has been granted, results in the alteration of the person's sex descriptor on the population register by the Department.<sup>120</sup> The population register also includes particulars of a person's marriage.<sup>121</sup>

111 *KOS v Minister of Home Affairs* 2017 (6) SA 588 WCC (*KOS* case); for purposes of this discussion, *KOS* is instructive not for its impact on considerations of gender-inclusivity under the matrimonial law in South Africa but rather for its illustration of an instance in which failure to exhaust internal remedies may be condoned by the court.

112 49 of 2003; *KOS* (n 111) para 2.

113 *KOS* (n 111) para 2.

114 As above.

115 As above.

116 Sec 3(1) of the Alteration Act read with section 27A of BADRA; *KOS* (n 113) para 3.

117 Sec 3(2) of the Alteration Act.

118 Sec 3(3) of the Alteration Act.

119 *KOS* (n 111) para 4.

120 *KOS* (n 111) para 5.

121 *KOS* (n 111) para 6.

The Department maintained ‘that the applications by the transgender spouses under the Alteration Act cannot be granted while their marriages remain registered as having been solemnised in terms of the Marriage Act’<sup>122</sup> instead of the Civil Union Act, as is required for same-sex marriages.<sup>123</sup> Apart from death, divorce is the only manner in which marriage can be dissolved.<sup>124</sup> The Department required that applicants whose marriages were solemnised in terms of the Marriage Act first obtain a divorce before the sex description alteration would be granted.<sup>125</sup> The spouses would only be able to obtain a divorce if it could be proved that there had been an irretrievable breakdown of the marriage relationship or if one of the spouses was suffering from mental illness or continuous unconsciousness.<sup>126</sup> According to the court, even if the Department had a justifiable reason for its requirement, the applicants would not have a legal basis to obtain a divorce.

For two applicants (KOS and GNC), the Department failed to decide on the application for the transgender spouse’s sex alteration. For one other applicant (WJV), the Department granted the alteration of sex description but deleted the particulars of WJV’s marriage from the population register without being asked to do so.<sup>127</sup> The Department even went as far as changing WJV’s spouse’s surname to her birth surname. The court found it appropriate to exempt the applicants from having to exhaust the internal remedies due to the ‘important issues that bear materially on the lives of a section of South African society and matters of public administration’ raised in the application.<sup>128</sup> The conduct by officials of the Department was based on their understanding of the current parallel system for the solemnisation of marriages.<sup>129</sup> Civil marriages may be solemnised in terms of either the Marriage Act or the Civil Union Act, which came into being after the Marriage Act and standard law definitions of marriage were declared unconstitutional because they discriminated against gay and lesbian couples by precluding them from marrying.<sup>130</sup> The misunderstanding of the legislation by the Department is based on a common misconception of transgender identity, which tends to conflate sex, gender and sexuality.<sup>131</sup> In other words, the Department conflated the spouses’ sex, gender and sexuality when it struggled to reconcile the spouses’ marriage relationships with the legislation in terms of which the marriage contracts were concluded. The court also

122 KOS (n 111) para 13.

123 Civil Union Act 17 of 2006.

124 KOS (n 111) para 12.

125 KOS (n 111) para 27(c).

126 Sec 5 of the Divorce Act 70 of 1979.

127 KOS (n 111) para 15.

128 KOS (n 111) para 87.

129 KOS (n 111) para 17.

130 KOS (n 111) para 17; 17 of 2006.

131 KOS (n 111) para 20.

chalked up the misinterpretation of the legislation to the widespread opposition to the amendment of the Marriage Act to permit the formalisation of same-sex marriage and the discrimination suffered by gay and lesbian people due to heteronormative ideas of marriage.<sup>132</sup> The court held that how the transgender spouses were dealt with by the Department was inconsistent with the Constitution and unlawful because it infringed on their rights to administrative justice and the cisgender spouses' rights to equality and human dignity and was inconsistent with the state's obligation to respect, protect, promote and fulfil the rights in the Bill of Rights, as set out in section 7(2) of the Constitution.<sup>133</sup>

In a similar vein, exemption from having to exhaust any applicable internal remedies, such as appealing the conduct internally within the Department, could be granted should women challenge the Department's refusal to correct their surnames on the population register due to the material impacts of rights violations and continued discrimination on the lives of married women whose surnames are changed without their consent as a matter of public administration. Much like the misinterpretation of the Alteration Act due to a conflation of sex, gender and sexuality in *KOS*, officials of the Department appear to have once again exceeded the bounds of their authority based on their bounded views of gender relations.

The conduct by the officials of the Department, even if it is found to be mechanical and not amount to administrative action, constitutes an exercise of public power which can be reviewed based on lawfulness – the officials were not authorised to act against the women's instructions and were not authorised to reject the surname that women elect upon the conclusion of a marriage. Section 26(1) of BADRA does not grant the official the authority to deny a woman's retention of her birth surname.

At common law, review proceedings may be refused if the applicant takes too long to bring the application, i.e., if the application is not brought within a reasonable time.<sup>134</sup> The reasonableness of the delay is determined by the circumstances.<sup>135</sup> Furthermore, the court must consider the condonation of the delay.<sup>136</sup> Similarly, section 7(1) of PAJA also stipulates a delay rule. Unlike in common law, under PAJA, review proceedings must be instituted without delay and within 180 days of the exhaustion of internal remedies.<sup>137</sup> A delay may still be unreasonable even if the

132 As above.

133 *KOS* (n 111) para 90.

134 Hoexter (n 72) 532.

135 As above.

136 As above.

137 Hoexter (n 72) 534.



proceedings are brought within the 180-day limit.<sup>138</sup> When there are no internal remedies, the 180-day period starts when the applicant is informed of the administrative action or becomes aware of the action and the reasons for it, or where the applicant might have reasonably been expected to have become aware of the reasons.<sup>139</sup> If the review of the unconsented name changes by the Department is brought based on legality, then the reasonableness of the delay, if any, may be decided by the court. If the review is brought under PAJA, then the 180-day limit will likely start when the outcome of the internal appeal of the decision is communicated.

### 2.3 What could be the appropriate relief?

In general, section 38 of the Constitution grants anyone listed in the section standing to approach a court for appropriate relief when a right in the Bill of Rights is infringed or threatened. The listed persons are anyone acting in their interest, on behalf of another person who cannot act in their name; as a member or in the interest of a group or class of persons; in the public interest; and an association acting in its members' interest.<sup>140</sup> Section 172 provides for the litigation and judicial review of constitutional matters. In *Fose v Minister of Safety and Security*,<sup>141</sup> it was emphasised that appropriate relief must amount to an effective remedy. The Constitutional Court has explained that appropriate relief for the breach of the right to just administrative action usually takes the form of public law remedies, i.e., remedies that balance and protect a broader range of affected interests, including public interest.<sup>142</sup> The remedy must not only be fair to the affected person but also effectively vindicate the right violated by the administrative conduct.<sup>143</sup> The repeated occurrence of unauthorised surname changes, despite the Department's efforts at rectification and prevention, warrants a remedy that will protect the rights of those women who have come forward and those who have not.

The remedies that the court may grant in proceedings for judicial review of administrative action are set out in section 8 of PAJA. Additionally, this section provides that the court may 'grant any just and equitable order'.<sup>144</sup> This article argues that injunctive relief and a declaratory order would be the most equitable relief, similarly to

138 As above.

139 As above.

140 Sec 38(a)-(e) of the Constitution.

141 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

142 *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 22 (*Steenkamp* case); J Bleazard & S Budlender 'Remedies in judicial review proceedings' in Quinot (n 82) 239.

143 *Steenkamp* (n 144) para 29.

144 Sec 8 of PAJA.

the court's decision in *KOS*.<sup>145</sup> Section 172 of the Constitution provides that when deciding a constitutional matter, a court must declare that any law or conduct inconsistent with the Constitution is invalid to its inconsistency and may make any order that is just and equitable.<sup>146</sup> The court could declare, in terms of section 172(1)(a) of the Constitution, that how the Department dealt with the registration of the married women's names in the population register, as conduct inconsistent with the Constitution, is unlawful in that it infringed on the women's right to administrative justice; infringed on their right to human dignity; and was inconsistent with the state's obligation in terms of section 7(2) of the Constitution to respect, promote, protect and fulfil the rights in the Bill of Rights. The court could further prohibit the Department from refusing to register women's surnames as per the women's instructions,<sup>147</sup> forcing the Department to perform its statutory duty of registering the women's details as instructed and to correct the register.<sup>148</sup> An order of structural relief where the court not only orders the Department to train its officials to perform their statutory duty without bias but also orders the Department to produce a report detailing the steps it has taken and plans on taking to ensure compliance would also be appropriate as a means of ensuring transparency and accountability.<sup>149</sup> The structural relief sought would be aimed at reducing and ultimately eliminating lower-level department officials' resistance and hostility towards gender mainstreaming efforts.

## 2.4 What are the considerations of substantive equality?

The Department has previously stated that internal training would take place to ensure that the officials' biases are eliminated in capturing information on the population register.<sup>150</sup> It can be inferred from the reporting of new cases of unauthorised name changes by married women since the Department's statement that the internal training that has taken place did not address the biases that are informed by the patriarchal society that we live in.

Section 26(1)(a) of BADRA explicitly provides that *women* may elect to change their surname at marriage by simply informing the Department. This gendered legislative provision leaves formal equality out of the question in hopes of achieving substantive gender equality. Suffice it to say that the legislative provision allowing women to change their surname at marriage with relative ease is based on the assumption that they will choose to take their husband's

145 *KOS* (n 111) para 90.

146 Sec 172(1)(a)-(b).

147 Hoexter (n 72) 560.

148 Hoexter (n 72) 561.

149 As above.

150 LRC (n 2).

surname. In other words, this legislative provision practically facilitates and reinforces the stereotypical expectations that women should assume their husbands' names and effectively sacrifice their identities.<sup>151</sup> Such expectations are based on the marital unity doctrine, i.e., the historical idea that upon marriage, a husband and a wife become one legal person who is represented by the husband in his capacity as the head of the household.<sup>152</sup>

Albertyn argues that substantive equality can address diverse forms of inequality arising from various social and economic causes.<sup>153</sup> She further argues that meaningful social and economic change can be achieved by and through the courts, as illustrated by the legal form of substantive equality adopted by the Constitutional Court, which emphasises context, impact, difference and values.<sup>154</sup> Inequality is rooted in political, social and economic circumstances.<sup>155</sup> It is often complex and systemic and entrenched in social values and behaviours, as well as the institutions of society, the economic system and power relations.<sup>156</sup>

An analysis of *Van Heerden v Minister of Finance* suggests that the courts will largely defer to government measures to avoid encroaching upon executive functions.<sup>157</sup> How far the courts may nudge the government in more transformative, redistributive directions is yet to be determined.<sup>158</sup> What is required is an intervention which results not only in inclusion but also transformation.<sup>159</sup> This is necessary because inclusion 'broadens the umbrella of social recognition but does not address the structural conditions that create and perpetuate systemic inequalities'.<sup>160</sup> Such a process has been described as 'affirmative' change since its remedies seek to correct inequitable outcomes without disturbing the underlying circumstances causing them.<sup>161</sup> A transformative approach which seeks to address inequalities at the root and shift the power relations that maintain the status quo is more desirable.<sup>162</sup> Albertyn puts it succinctly thus:

[A] transformative approach would locate an understanding of women's disadvantage within these systemic inequalities, then seek to dismantle them through new normative interpretations of equality and through remedies that affirm [a] more egalitarian and flexible set of gender

151 Bonthuys (n 56) 469.

152 As above.

153 Albertyn (n 65) 253.

154 Albertyn (n 65) 254.

155 As above.

156 As above.

157 2004 (6) SA 121 (CC).

158 C Albertyn & G Goldblatt 'Equality' in S Woolman et al (eds) *Constitutional Law of South Africa* (2007) at 40.

159 Albertyn (n 65) 256.

160 As above.

161 N Fraser *Justice Interruptus* (1997) at 23.

162 Albertyn (n 65) 256.

roles, and thus dislodge the underlying norms and structures that create and reinforce a rigid and hierarchical status quo.<sup>163</sup>

Appropriate relief seeks to balance the vindication of the infringed rights of an affected person with the protection of the broader range of interests, including public interest. For purposes of this article, it would be appropriate for the court to advance substantive gender equality imperatives to ensure effective and lasting relief through a finding of unlawfulness and the granting of structural relief in a challenge of the Department's conduct.

### 3 Conclusion

Over the decades, women have been active participants in the human rights and equality discourse in South Africa. It is evident that women have long been marginalised, or at times even wholly excluded, from this discourse. This has resulted in the neglect of women's rights and the often-ineffective intervention. The historical marginalisation and total exclusion of women that has gone unaddressed for decades have led to intervention that is often ineffective today, mainly because such intervention fails to dismantle the systems and frameworks that continue to marginalise women.

The unauthorised changes of married women's surnames upon marriage registration amount to an infringement of their right to administrative justice, which can be taken on judicial review to seek systemic relief. The court could grant declaratory and injunctive relief. In doing so, it would be appropriate for the court to keep the constitutional imperative of substantive equality in mind, even though it would not be interacting with the substance of the matter. The historical context of subordinating matters of gender equality and the separation of legal equality from social equality should be borne in mind.

Although the issue of unauthorised name changes of married women primarily arises due to the poor implementation of the law, a legislative intervention by way of a provision that allows men to similarly change their surnames upon the conclusion of a marriage could go a long way in normalising the practice of spouses, rather than wives, choosing a family name. This practice could be reasonably expected to impact the law's implementation positively. It could contribute to eradicating the social structures that create the bias that informs the conduct of the officials when they do not correctly reflect the married women's choices of retaining their birth surnames in the population register.

163 As above.

For this reason, it is worth considering an extension of section 26(1) to husbands, or simply spouses, as this will serve a social purpose, i.e., the selection of a family name. For example, in the United States of America, specifically in the State of New York, there is a legislative provision which states that '[o]ne or both parties to a marriage may elect to change the surname by which he or she wishes to be known after the solemnisation of the marriage'.<sup>164</sup> Progressive legislation necessitates a change in the social context that will facilitate, not hinder, its implementation. Gender neutral, or gender-inclusive, language in the drafting of legislation is supported by the view expressed in *Fourie and Another v Minister of Home Affairs*, where the court stated that 'it is no longer necessary to be able to even distinguish between the "husband" and the "wife" when applying the rules of our matrimonial law'.<sup>165</sup>

<sup>164</sup> Rosensaft (n 1) 201; N.Y. DOM. REL. LAW 15 (West 1999).

<sup>165</sup> *Fourie and Another v Minister of Home Affairs & Others* 2005 (3) SA 429 (SCA); A Boshoff 'Woman as the subject of (family) law' in R Hunter & S Cowan (eds) *Choice and consent: Feminist engagements with law and subjectivity* (2007) at 42.