

A Third Gender in South Africa:

Does the legal non-recognition of a third gender violate non-binary transgender person's Constitutional rights to dignity and equality?

By

Rachel Sloth-Nielsen

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Supervisor: Pierre de Vos

University of Cape Town

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ABSTRACT

This dissertation will attempt to answer question whether, in terms of the right to dignity in s10 and the prohibition of unfair discrimination in s9 of the South African Constitution, the State must recognise in law a third gender for transgender individuals who do not identify as either male or female. It does so, first, by asking whether the failure by the state to provide for the legal recognition of a third gender violates transgender person's right to dignity. Second, the enquiry proceeds to discuss whether s9(3) of the Constitution (which prohibits unfair discrimination on any ground, including on the listed grounds of sex, gender and sexual orientation) requires the state to recognise a third gender. After discussing the lived experiences of transgender persons in South Africa, the thesis reviews the terminology and concepts relevant to this area of study, in order to lay the foundation for the subsequent examination of relevant case law, the Constitutional Court's approach to dignity, and the analysis of the application of s(9)(3).

I submit that transgender persons fall within the Constitutional Court's definition of a vulnerable group in that they have suffered past patterns of disadvantage, they constitute a minority in South Africa and are subject to stereotyping and bias. Despite the Constitutional Courts erroneous pronouncement that transsexualism falls under the umbrella of sexual orientation, it is argued, rather, that since the expression of their gender identity by gender non-conforming persons shares many of the characteristics of the specified grounds listed in s9(3), unfair discrimination can be found on a ground analogous to those grounds listed in the Constitution. The failure to allow for recognition of a third gender is thus under-inclusive. It cannot be justified under the limitations analysis. Further, if objections were to be raised by the state that recognition is not feasible or affordable and is, hence, justified, I conclude that because there are ways to accommodate individuals who do not identify as binary which are not unduly taxing on the State, this argument would fail.

TRANSGENDER, NON-BINARY, GENDER IDENTITY, EQUALITY, DIGNITY

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CHAPTER 1 - INTRODUCTION

1.1 Introduction

With the rise of social movements globally, increased access to media and information as well as democratic politics based on ideals of equality, there has been increased recognition of minority groups. Traditional norms relating to sexual orientation, family life and expression of identity are being challenged. With the coming out of these previously ignored and invisible (in order to protect themselves) groups, changes have been and continue to need to be made in the legal landscape to make the law accommodating and inclusive of these minority and often vulnerable groups who challenge legal and social norms. One such group is that of transgender individuals. Many transgender individuals are not only defying gender norms by not identifying with the sex or gender they were assigned at birth, but go even further and denounce gender altogether, thus identifying as neither male nor female. The law, however, does not provide for one to be legally recognised as neither female or male. In this thesis, I will therefore look at the implications of not allowing transgender persons who identify as neither male or female (non-binary) to register as a third sex in line with their non-binary gender identity, and whether this non-recognition infringes their rights to dignity and equality as enshrined in the Constitution of the Republic of South Africa, 1996 (the ‘Constitution’).

1.2 Motivation for this study

When the South African Constitution came into force in 1996, it was heralded as a revolutionary document. One of the reasons for this was that it included a justiciable right not to be discriminated against on any ground, including on the basis of sex, gender and sexual orientation. However, recent legal developments in other jurisdictions suggest that this constitutional right has not yet been fully realised in South Africa. One such development has been the legal recognition of a third gender by various states, either directly through legislation, or because of constitutional or other litigation.¹

Until fairly recently, it would have been unthinkable for a state to recognise the right of an individual to have themselves identified on official state documents as anything other than male or female. But this started changing in the second decade of the twenty-first century. In 2014 an Australian Court ruled that an individual was legally permitted to choose ‘X’ or ‘other’ as their gender on a birth certificate should they feel they do not identify with either the

¹ This thesis grapples comprehensively with the distinction between ‘sex’, ‘gender,’ ‘gender identity,’ and related concepts in chapter 2. The word ‘gender’ is used here in order to introduce the topic.

categories ‘male’ or ‘female’.² In 2014, the Supreme Court of India, following judgments made in Nepal, Pakistan and Bangladesh, recognised ‘transgender’ as a third sex, declaring that transgender persons were a minority group in need of protection under the law.³ California now also allows a person to choose to be identified as a third gender on their driver’s license;⁴ the European Union passed a resolution that European Parliaments should ‘consider including a third gender option in identity documents for those who seek it’;⁵ the highest court in Germany ruled, on constitutional grounds, that parents can choose a gender other than male or female on their children’s birth certificate;⁶ and most recently, the Limburg District Court in the Netherlands ruled that a person who does not identify as either male or female can register their sex as ‘sex undetermined’ on the birth register, noting that it was time for a third gender to be recognised, but leaving the enactment into law of a third gender up to the legislature.⁷ Despite these promotion of rights for non-binary individuals, there is still considerable push back from certain institutions, with the Vatican recently issuing ‘guidance questioning modern gender identity’, criticising ‘the modern understanding of gender as being more complex than the binary division of sexes’ and stating, in short, that God made men and women and that there is nothing in between the two.⁸

The developments which have occurred all over the world raise the question whether the prohibition of unfair discrimination in s9 of the South African Constitution similarly requires the recognition of a third gender. In South Africa there is little in the way of legal research into transgender issues,⁹ and even less so on transgender issues from a Constitutional

²² *NSW Registrar of Births, Deaths and Marriage v Norrie* 2014 HCA 11.

³ *National Legal Services Authority v Union of India and others* AIR 2014 SC 1863; *Supreme Court of Nepal in Sunil Babu Pant & Ors. v. Nepal Government*; *The Supreme Court of Pakistan in Dr. Mohammad Aslam Khaki & Anr. v Senior Superintendent of Police (Operation) Rawalpindi*. The *National Legal Services Authority v Union of India and Others* case was cited with approval in the recent judgment of Fortuin J in the case of *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4 (23 September 2019).

⁴ Mary Brown ‘Female, male or non-binary: California legally recognizes a third gender on identification documents’ *USA Today* 19 October 2017, available at <https://www.usatoday.com/story/news/nation-now/2017/10/19/female-male-non-binary-california-legally-recognizes-third-gender-identification-documents/779188001/>, last accessed 17 April 2018.

⁵ Christina Richards *et al* ‘Non-Binary or genderqueer genders’ (2016) 28 *International Review of Psychiatry* 95 at 97.

⁶ BVerfG, Order of the First Senate of 10 October 2017 - 1 BvR 2019/16, available at <http://www.bverfg.de/e/rs20171010_1bvr201916en.html>.

⁷ ECLI:NL:RBLIM:2018.

⁸ Unknown ‘Vatican issues guidance questioning modern gender identity’ *BBC News* 10 June 2019, available at <https://www.bbc.com/news/world-europe-48584892>, last accessed 12 June 2019.

⁹ See for example Ryan Thoreson ‘Beyond Equality: The Post-Apartheid Counternarrative of Trans and Intersex Movements in South Africa’ on the difference between the gay rights movement and the trans and intersex

perspective.¹⁰ To my knowledge, there has yet to be a sustained legal analysis of the question of third gender recognition in the context of the Constitutional rights to equality and dignity, thus this thesis seeks to fill this gap in knowledge. This dissertation will attempt to answer this question. I will do so, first, by asking whether s9(3) of the Constitution (which prohibits unfair discrimination on any ground, including on the grounds of sex, gender and sexual orientation) requires the state to recognise a third gender. Second, I will enquire whether the failure by the state to provide for the legal recognition of a third gender violates transgender person's right to dignity.

1.3 Relevance of the study: Rights infringement as the Lived Realities of Transgender Individuals

This thesis seeks to determine whether the Constitutional rights of equality and dignity are infringed when transgender persons who identify as non-binary are not accorded to option of being recognised as their chosen gender identity of non-binary. However, I found it necessary to take a step back and look firstly at whether transgender persons in general experience equality and dignity violations. As will be explained in greater detail in Chapter 5, if the greater 'class' of transgender are having their right to equality and dignity violated, it may be easier to prove that the subclass of non-binary identifying transgender people are even more marginalised. The relevance of this study to academic discourse is that while great strides have been taken to afford rights to transgender persons in South Africa, there has been to date no study of this 'subclass' of transgender persons (non-binary transgender individuals) in the South African context. specific instance of rights violations will be discussed in order to illustrate practical examples of when transgender individual's rights are infringed. These examples demonstrate that transgender individuals are a marginalised group in South Africa, who are oppressed as a consequence of their gender identity. This has relevance for the argument I put forward in Chapter 5 that gender identity should constitute an analogous ground for purposes of finding that unfair discrimination is taking place by virtue of the fact that the

movements in South Africa and Tamar Klein 'Intersex and Transgender Activism in South Africa' where the activism and struggles by trans and intersex persons are analysed.

¹⁰ Cornelius Visser & Elizabeth Picarra 'Victor, Victoria or V? A Constitutional Perspective on Transsexuality and Transgenderism' ask with regards to the basic values of dignity, equality and freedom as espoused in s1 of the Constitution, whether the law has gone far enough to secure the rights of 'not only transsexuals but also transgender people' so that they are able to have all the 'rights and freedoms enjoyed by all other individuals in South Africa'. While trans rights violation are looked at through a Constitutional lens, the article does not grapple with non-binary trans rights or the Constitutionality of not allowing a third gender option in South Africa.

law does not provide for recognition of a third gender. The sub-sections which follow will primarily look at violations perpetrated by organs of state.¹¹

1.3.1 Apartheid era infringements on dignity

The Constitutional Court has repeatedly taken into account the position of groups under apartheid in Equality jurisprudence when determining whether they form part of a marginalized group. Thus, the historical position of transgender persons under the apartheid regime is worthy of brief discussion. Historically, more gender reassignment surgeries were performed under the Apartheid regime than are performed today.¹² This was because of the binary view the State held about sex.¹³ In particular, in the South African Defence Force (SADF) forced gender reassignment surgery on many of the members of the SADF who experienced gender dysphoria.¹⁴ ‘All conscripts were screened for homosexuality and gender non-conformity. Those found “guilty” were mass-incarcerated in psychiatric wards and subjected to “aversion therapy”; those deemed “incurable” were forced into surgery’.¹⁵ As many as 900 conscripts during the period of forced white male conscription were forced into gender reassignment surgery.¹⁶ This is not only a violation of dignity, but can be seen as akin to torture, similar to that which was undertaken by the Nazis in experimenting on homosexuals during World War II.¹⁷ Their rights, including bodily integrity and dignity, were violated as they were forced into surgery unwillingly and without proper consent.

1.3.2 Toilets

For transgender persons, having to choose between using a male or female toilet, even if they identify as binary, has been recorded as causing severe anxiety due to the threat of violence. The discussion as to whether to create gender neutral bathrooms has exploded world-wide,

¹¹ For violations committed by private individuals see Human Rights Watch report “‘We’ll show you you’re a woman” Violence and discrimination against black lesbians and transgender men in South Africa’ 2011, available at <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and>, last accessed 05 October 2019.

¹² Tamar Klein ‘Who decides whose gender? Medico legal classification of sex and gender and their impact on transgendered South African family rights’ (2012) 14(2) *Ethnoscripts* 12 at 19.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Klein *op cit* 10 at 20.

¹⁷ *Ibid.*

with talks taking place at Utrecht University in the Netherlands,¹⁸ Erasmus University Rotterdam,¹⁹ and even this University (of Cape Town), and them being in the near future at the offices of Google in the United Kingdom.²⁰ Gender neutral bathrooms can either be one, all-inclusive bathroom or a third bathroom, so one has the choice of going to either male, female, or gender neutral facilities. Gender neutral bathrooms have been the basis of big discussions in the United States of America. Several surveys have been conducted to determine how gender non-conforming and non-binary persons fared when forced to use conventional gender binary toilets (male and female toilets). In one survey, it was reported that ‘63 percent of 75 respondents...experienced denial of access and/or harassment at least once while using public restrooms’.²¹ Denial of access to a public bathroom would infringe on a person’s feeling of self-worth and thus their sense of dignity. Similarly, so would harassment. In another survey, 48 out of 117 respondents specifically detailed their bathroom experiences, stating that they had been ‘physically abused, verbally harassed, fired, arrested, and made ill from avoiding restrooms all together’.²²

By not having access to gender neutral bathrooms, their dignity is clearly infringed. This infringement is a result of the abuse they suffer as a result by virtue of their membership of a group. It is their attribute of not conforming to long held understanding of sex and gender which leads to this. This is an important building block for my submission in Chapter 5 that transgenderism and non-binaryism constitute analogous grounds for the purposes of finding a Constitutional infringement.

1.3.3 Academic Institutions

In all academic institutions, transgender and non-binary individuals (both students and teachers/academics) face hardships. School children face some of the biggest challenges related to being transgender or non-binary. In the United Kingdom it was reported that school children

¹⁸Annaliese Waterlander ‘Three UU building to have gender neutral bathrooms’ *Dub* 07 May 2018, available at <https://www.dub.uu.nl/en/news/three-uu-buildings-have-gender-neutral-bathrooms>, last accessed 30 August 2018.

¹⁹ Anonymous ‘First gender neutral toilets at EUC’ *Erasmus University Rotterdam* 17 May 2017, available at <https://www.eur.nl/en/news/first-gender-neutral-toilets-euc>, last accessed 30 August 2018.

²⁰ Hallie Detrick ‘Google’s new London office is going to have gender neutral bathrooms’ *Fortune* 26 March 2018, available at <http://fortune.com/2018/03/26/google-london-office-gender-neutral-bathroom/>, accessed 30 August 2018.

²¹ Jody L Herman ‘Gendered restrooms and minority stress: The public regulation of gender and its impact on transgender people’s lives’ (2013) *Journal of Public Management and Social Policy* 67 at 67.

²² *Ibid.*

were not being called by their chosen name or pronoun, effectively meaning their identities were being invalidated.²³ Furthermore, they were being prevented from wearing the school uniform of the sex/gender that they identify with.²⁴ It is submitted that as their identities are being negated, their dignity is being infringed. These actions will impede on a student's sense of self-worth. Bullying is also rife within the school community, with students being bullied for showing their true identity. This will affect their feelings of value, and thus is an infringement on their dignity. GLSEN, a United States based organization, found that '75% of transgender youth feel unsafe at schools, and those who were able to persevere had significantly lower GPAs [marks], were more likely to miss school out of concern for their safety, and were less likely to plan on continuing their education.'²⁵ It further notes that it is not just students who bully transgender and non-binary students. Similarly to in the United Kingdom above, in the United States 'school officials themselves single out these [transgender] youths by refusing to respect their gender identity and even punishing them for expressing that identity'.²⁶

According to transequality.org:

'59% of trans students have been denied access to restrooms consistent with their gender identity. Rather than focusing on their education, many students struggle for the ability to come to school and be themselves without being punished for wearing clothes or using facilities consistent with who they are. Some are denied opportunities to go on field trips or participate in sports. Together with bullying and victim-blaming, these conflicts can lead to disproportionate discipline, school pushout, and involvement in the juvenile justice system.'²⁷

In one incident of many, it was reported that:

'parents of Marilyn Morrison, an eight-year-old transgender girl, made the decision to pull her out of school after her complaints of constant harassment were met by no response from the school's administration. The child described the school as "a horrible, horrible place" wherein teachers refused to accept her chosen name and where she was denied bathroom rights.'²⁸

Added to this is the suicide statistics of transgender and non-binary youths, as it has been reported that they are 'eight times more likely to attempt suicide than cisgender people,

²³ Hannah Richardson 'Transgender pupils leaving school over rights breaches' *BBC* 20 September 2017, available at <https://www.bbc.com/news/education-41333232>, last accessed 31 August 2018.

²⁴ *Ibid.*

²⁵ Anonymous 'Youth and students' *National Centre for Transgender Equality* date unavailable, available at <https://transequality.org/issues/youth-students>, last accessed 02 September 2018.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Leila Etachfani 'The deadly reality for transgender students facing discrimination in school' *Broadly* 20 November 2016, available at https://broadly.vice.com/en_us/article/59mbp8/the-deadly-reality-for-transgender-students-facing-discrimination-in-school, last accessed 02 September 2018.

and almost 50 percent of transgender youth have considered taking their own lives'.²⁹ Most of those that had committed suicide had 'voiced their experiences of bullying and discrimination at school to those close to them'.³⁰ It is reported that transgender and non-binary youth feel largely 'less safe, less seen, and less supported' than their cisgender classmates.³¹

There has, however, been some progress with regard to transgender youths in the school system in the Western Cape. The Western Cape Education Department has publicly stated that school students should be allowed to wear the uniform in which they feel comfortable and which most resonates with their identity.³² Westerford High School in Newlands has already made provision for transgender students to wear the uniform of the gender they identify with as opposed to the uniform of the gender they were assigned at birth.³³ This is a big step toward recognising individual gender identity. It does still, however, conceptualise gender as binary, with pupils still having to choose between a female or male expression of their gender identity.

Recognising a third gender would help pave the way for a more gender fluid way of thinking. This could help decrease bullying and increase awareness about non-binary and gender non-conforming individuals, leading to greater understanding and acceptance.

1.3.4 Workplace

Many transgender persons are discriminated against in the workplace.³⁴ In May of 2018, it was reported that a transwomen from Gugulethu was forced to leave her job after the company she worked for refused to let her use the female bathrooms at the office, in line with her gender

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Lizell Persens 'Transgender learners should wear the uniform they identify with' *EWN* 08 October 2018, available at <https://ewn.co.za/2018/10/08/wced-transgender-learners-should-wear-uniform-they-identify-with>, last accessed 29 November 2018; Luke Daniel 'Transgender students allowed to choose between uniforms, says Education Department' *The South African* 08 October 2018, available at <https://ewn.co.za/2018/10/08/wced-transgender-learners-should-wear-uniform-they-identify-with>, last accessed 29 November 2018.

³³ Christina Pitt 'Western cape school embrace transgender learners' *News24* 07 October 2018, available at <https://www.news24.com/SouthAfrica/News/western-cape-schools-embrace-transgender-learners-20181007>, last accessed 29 November 2018.

³⁴ Discrimination in the workplace is regulated by the Labour Relations Act 66 of 1995. It prohibits Discrimination on, *inter alia*, sex, gender and sexual orientation. Should an employee be dismissed for being transgender, it would amount to unfair discrimination on the basis of sex and gender, as was found in *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* 2010 31 ILJ 2382 (LC). However, as will be seen in chapter 5, I do not believe that discrimination against transgender persons is discrimination on the ground of sex or gender.

identity.³⁵ She reports that the company she worked at told her that ‘I can be whatever I want outside of work, but here [at work] they consider me male’.³⁶ Tensions at her place of work rose and the environment became so toxic that her desire and ability to work became affected, eventually forcing her to resign.³⁷ She has taken her former employers to the Commission for Conciliation, Mediation and Arbitration (CCMA).³⁸ Individuals who are transgender are not only prevented from using the bathroom of the gender they identify with, but are also often intimidated and even sexually assaulted as a result of their gender identity.³⁹ They can be ‘told to dress, act and present as a different gender from their own in order to keep their job, or [have] had a boss or co-worker share private information about their status without their permission’.⁴⁰

Sharing a person’s status without their permission not only violates their dignity, but also their privacy. In the United States of America, a case has been brought against a car dealership for the severe intimidation and assault a transgender women (Male to Female or MTF)⁴¹ faced while in employment.⁴² Stating that the company was conservative in nature, she was asked to hide her transition, even being told that if she reversed her transition and presented as that of a man again she would have greater opportunities in the company and could then ‘go anywhere she wanted’.⁴³ Moreover, she was sexually harassed by her manager, who ‘would stand behind Candice, stare down her top and ask about her breasts. He would try to force Candice into his private bathroom, encouraging her to change her clothes, would grab her and try to pull her under his desk to give him oral sex’. Her complaints to upper management were ignored.⁴⁴ South Africa is a conservative society, where many are uneducated about

³⁵ Marvin Charles ‘Transgender women takes firm to CCMA’ *IOL* 25 August 2018, available at <https://www.iol.co.za/capeargus/news/transgender-woman-takes-firm-to-ccma-15154804>, last accessed 29 November 2018.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Christianna Silva ‘Almost every transgender experiences harassment or mistreatment on the job, study shows’ *Newsweek* 29 November 2017, available at <https://www.newsweek.com/transgender-employees-experience-harassment-job-726494>, last accessed 03 September 2018; see further with regard to harassment and sexual assault Human Rights Watch Report op cit note 11.

⁴⁰ *Ibid.*

⁴¹ See a full description in Chapter 2.3 below.

⁴² Mike Spradley ‘A case of horrific transgender employment discrimination Orange County California’ *Huffingtonpost* 08 November 2017, available at https://www.huffingtonpost.com/entry/a-case-of-horrific-transgender-employment-discrimination_us_5a02c263e4b0230facb8417b?guccounter=1, last accessed 03 September 2018.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

transgender issues. There are immense power differences between employees and staff and there is thus a very real risk of a similar situation occurring here.⁴⁵ These types of behaviours signal to transgender individuals that they are less deserving of respect and thus their worth is less and their lives less valued. This all will have a negative impact on the dignity of transgender individuals and thus will be a violation of their right to dignity as well as to their right to bodily integrity. As Candice put it, ‘she wanted nothing more than to be treated with dignity and respect’.⁴⁶

1.4.5 Prisons and Youth care centres

Places where people are deprived of their liberty give rise to particular challenges with respect to dignity (and privacy). A multitude of issues arise when discussing transgender persons who are arrested or detained in prisons and youth care centres. The first issue ties up with the issue of searching. It is well established that females must be searched by females and males by males. However, the question arises as to what happens if a transgender identifies as female, who should conduct the search? Although the person concerned may be anatomically male, they self-identify as female. In the Western Cape, the standard operational procedure for the detention of transgender persons stipulates that individuals must be searched by an officer of the same biological sex.⁴⁷ This ultimately means that, due to the inclusion of the word ‘biological’, a transgender person will be searched by an officer of the sex that they were born as, regardless of the gender they identify with now. Thus, an MTF (Male-to-female)⁴⁸ will still be searched by a male officer and an FTM (female-to-male)⁴⁹ will be searched by a female. It is submitted that this is an infringement on their bodily integrity and dignity as they are being treated in a manner corresponding to the gender they do not identify with, and may not even be legally recognised as.

The other issue which arises is where to house the detained transgender person while they are in detention and how to treat them. Not treating them or housing them according to

⁴⁵ In fact, in her thesis on transgender persons in the work place, Sashin Padiyachi identifies four main problems which transgender persons face in the workplace, namely accommodation, access to toilet facilities, sexual harassment and dismissal. See Sashin Padiyachi *Transgender Persons in the Workplace: International Solutions for South Africa* (Unpublished LLM Thesis, University of Pretoria, 2018).

⁴⁶ Mike Spradley op cit 42.

⁴⁷ Standard Operating Procedure: Detention of Transgender Prisoners *SAPS: Western Cape V5*. Note that The Standard Operating Procedure, however, only applies to arrested persons and not those awaiting trial or convicted of a crime.

⁴⁸ See 2.3 below for a more detailed explanation of MTF.

⁴⁹ See 2.3 below for a more detailed explanation of FTM.

their gender identity violates their right to dignity as they are being conveyed the message that their gender identity is less important than that of other people. On the other hand, allowing them to identify with their chosen gender while being kept with those who identify as another gender (for example a female transgender being housed with male inmates) could be dangerous for their safety. In terms of the Standard Operating Procedure for the Detention of Transgender Prisoners, transgender detainees who are in police custody must be held in a separate police cell at the police station or at the facility where they are being held.⁵⁰ This does not apply to awaiting trial or convicted prisoners who are in prison and thus not in police custody.

A case on this very matter has been decided by the Equality Court in South Africa.⁵¹ A transgender woman, Jade September, was placed in the male division of Helderstroom Correctional facility despite identifying as female. Her makeup was forcibly removed by correctional officers and she was precluded from dressing according to her gender identity, namely female. She also contended that she was harassed and placed in solitary confinement in violation of her rights. Solitary confinement occurred after an altercation with Subramoney [the head of Helderstroom Correctional facility] regarding her make up during which he accused her of being disrespectful.⁵² The correctional facility contends she was not placed into solitary confinement but put away for her safety as she was situated in a cell with men who had been convicted of violent crimes, and her insistence on presenting as a female put her at risk.⁵³ The applicant argued that the treatment she received from prison officials caused her ‘to feel extremely demeaned and deprived of my identity’.⁵⁴ *Gender Dynamix*, an organisation which campaigns for transgender rights, was admitted as a friend of the court.⁵⁵ In their legal submissions they noted that, in terms of South Africa’s international law obligations, ‘a

⁵⁰ Standard Operating Procedure: Detention of Transgender Prisoners op cit note 47.

⁵¹ *September v Subramoney and Others* supra note 3.

⁵² *Ibid* para 33.

⁵³ *Ibid*. See also Zodidi Dano ‘Dangerous allowing female transgender inmate in Male Prison’ *IOL* 28 November 2018, available at <https://www.iol.co.za/capeargus/news/dangerous-allowing-female-transgender-inmate-in-male-prison-says-counsel-18289494>, last accessed 29 November 2018, where it is reported that the State’s legal advocate, Karrisha Pillay, has argued in the Equality Court that ‘The applicant’s request for communal access with other male prisoners while expressing herself as female would expose her to sexual violence because male rape is an undeniable reality of incarceration’.

⁵⁴ Christina Pitt ‘Transgender prison inmate fights for right to express female gender identity’ *News24* 27 November 2018, available at <https://www.news24.com/SouthAfrica/News/transgender-prison-inmate-fights-for-right-to-express-female-gender-identity-20181127>, last accessed 29 November 2018.

⁵⁵ Ohene Yaw Ampofo-Anti ‘Transgender rights: prisoners case heads to equality court’ *Timeslive* 24 May 2018, available at <https://www.timeslive.co.za/news/south-africa/2018-05-24-transgender-rights-prisoners-case-heads-to-equality-court/>, last accessed 03 November 2018.

transgender person may not be denied the right to express their gender identity merely because they have been imprisoned'.⁵⁶ They suggested that either we 'allow transgender inmates to express their gender identity regardless of being housed in a male or female prison' or we 'detain transgender inmates based on their self-identified gender, not the gender assigned to them by the state'. The third option they raised was to establish separate detention facilities exclusively for transgender inmates. For example, Kerala prison in India has an exclusive third gender block following an Indian Supreme Court decision recognising a third gender.⁵⁷

The judgment in this case was handed down on Monday 23 September 2019 and affirms my argument that there is a Constitutional lacuna as regard recognition of the rights of transgender persons. A fuller analysis of the judgement and its implications on this thesis is to be found in Chapter 5.

1.3.6 Searches

Searches are an infringement of all persons right to dignity and privacy; however, this infringement is justified by public interest and public safety. In a meeting with a transgender male, I was alerted to the difficulties experienced by transitioning transgender individuals in having to undergo being searched, whether in an airport, on the side of the road or at certain government institutions such as court buildings. While going through the process of transitioning from the gender they were assigned at birth to that of the gender they identify as, many of these searches occur because the individuals will, for instance, still appear male but have had breast augmentation surgery (should they be a male transitioning to a female) or will be bandaged up from a mastectomy (should they be a male transitioning to a female). These searches can occur because of prejudice to the transgender individual by virtue of their gender identity or because of ignorance of the person who is conducting the searches. Not only does being searched violate their bodily integrity and their right to privacy as they will then have to disclose their gender identity and that they are in transition, but arbitrary searches also violate the right to dignity.

1.3.7 Identification to authorities

A mismatch between one's identification documents and one's physical appearance can lead to a violation of one's dignity and equality and for the possibility of discrimination occurring. When a transgender person transitions from the gender they are assigned at birth to the gender

⁵⁶ Ibid.

⁵⁷ Ibid.

they identify as, the inevitable result is that they may have physical attributes of one gender while still substantially looking like the other. Their identification cards will not align with how they appear to others during this period. This is also so due to the Department of Home Affairs reportedly taking up to five years to process sex change applications and issue new identification documents.⁵⁸ This can lead to accusations of identity fraud, as it can be assumed that the transgender individuals, by virtue of the mismatch between their identity documents and their appearance, have stolen another's identity. This also makes them vulnerable to arrest should the accuser believe identity fraud has occurred. This makes every day activities potentially dangerous and has the effect of causing anxiety for transgender individuals. They are constantly in fear of being doubted as to their identity. A very real possibility of being detained thus occurs in daily life. Should a third gender be recognised, there would be no societal ideals as to how this third gender would look. This would allow for fewer accusations of fraud and identity theft, as a mismatch between a picture on identification document and the appearance of a person would not be at issue.

1.3.8 Difficulties accessing basic facilities

Prevention of access to basic facilities such as higher education or the ability to travel, amounts to an infringement of equality and is discrimination. In line with the delay in obtaining identification documents corresponding to their gender identity, transgender individuals going through their transition are often precluded from accessing basic services and facilities. They cannot travel as their passport photographs do not match their physical appearance. Furthermore, they are precluded from opening bank accounts due to a mismatch between their identity cards and their current appearance.⁵⁹ Their university degrees cannot be obtained as the gender marker⁶⁰ on the degree certificate differs from the gender that they identify with and will eventually obtain identification for.⁶¹ This makes life extremely difficult for them, as they cannot perform even the simplest of tasks. They cannot open a bank account.⁶² They cannot

⁵⁸ Busisiwe Deyi et al *Briefing Paper Alteration of Sex Description and Sex Status Act, No 49 of 2003*, available at <https://genderdynamix.org.za/wp-content/uploads/LRC-act49-2015-web.pdf>, last accessed 28 March 2018 at 7.

⁵⁹ Ibid.

⁶⁰ See Chapter 2.

⁶¹ Busisiwe Deya op cit note 58.

⁶² Ibid.

get a job as they do not have access to their university degrees.⁶³ They cannot even vote.⁶⁴ This all has an impact on their dignity as they cannot do the things which cisgender⁶⁵ persons can. With a third gender being provided for, it would not matter if there was a mismatch between their appearance in person and their appearance on their identification documents. However, the Department of Home Affairs would need to rectify their delays in issuing identification documents, otherwise the identification documents of transgender non-binary persons will continue not to reflect their true gender identity.

1.3.9 Medical care

‘A transgender women was gang raped and beaten by five men because of her trans* identity. Upon arriving with the assistance of a friend at hospital in order to receive treatment and preventative HIV car, the nurse seeing her refused to assist her after looking at her identity document and “... told me to go home and take off my dress”. Consequently, the victimised transgender woman is HIV positive. This is an example of discrimination and prejudice. Not only was this woman targeted and brutally harmed because of her identity, but she was also refused critical treatment due to the prejudice held by the nurse. This reinforces.... The need to train health care professionals to be sensitive to transgender clients. Furthermore, it is reasonable to suppose that the nurse would have offered treatment to the patient should she have had an identity document that reflected her female gender identity.’⁶⁶

Access to health care is enshrined as a right in the Constitution. Inability to access this basic right not only infringes the right to basic health care, but also the rights to equality and dignity. By denying the woman access to health care, the nurse was effectively telling her that her life was worth less than that of a cisgender woman. This would have negatively impacted on her dignity.

Health care professionals often also do not know how to treat transgender individuals. A transgender women (MTF) could still face many of the health issues which male cisgenderers face. Health care professionals are not trained to deal with this. Similarly, a transgender male (FTM) could face many of the health problems which cisgender females face. It is noted that ‘the discriminatory attitudes of health care providers are a growing concern with some transgenders people opting for private medical services where they can afford it. However, for those to whom public health services are the only way to access basic health services, significant barriers remain. The interaction with health personnel can be a traumatising

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ See Chapter 2.

⁶⁶ Busisiwe Deya op cit note 58 at 24.

experience'.⁶⁷ This has clear implications for access to health services, a fundamental right of itself, but also dignity and equality.

1.4 Research Question

The situations listed in section 1.3 above, indicate the potential for violations of dignity and equality taking place for non-binary transgender individuals in South Africa. Therefore, in this thesis, I raise the following research question, namely, whether there is a constitutional obligation for the law to acknowledge a third gender, imposed by the equality provision, the right to non-discrimination and right to dignity of transgender persons?

1.5 Limitations

My thesis will focus solely on the recognition of a third gender for non-binary transgender persons, that is, for those transgender individuals who do not identify as male or female. It will thus not discuss intersex persons or others who do not identify as either male or female, despite the fact that that recognition of a third gender would also positively affect their situation, as they would be able to legally classify themselves in accordance with this third gender (as opposed to choosing only between male or female).

Moreover, my thesis will only advocate for or against the recognition of a *third* gender in South Africa, despite the fact that there are strong arguments for both sex and gender to be completely done away in official records with due to them being such fluid categories.⁶⁸ The justification for focussing only on the recognition of a third gender is that, despite having a progressive constitution, much of the South African population is still very conservative. I believe that bringing about gradual change through incremental steps will lead to greater acceptance of difference, as opposed to advocating for the complete removal of all gender markers in society, which appears to remain an unreachable goal in the short to medium term. I nevertheless propose that the argument for a third gender could be seen as a form of activism

⁶⁷ Ibid.

⁶⁸ Peter Dunne, however, notes that de-gendering the law is not without its difficulties. 'A project to fully de-gender the law may elicit strong opposition, both from cisgender communities and from transgender individuals themselves. There are many cisgender persons who enjoy their legally affirmed gender, and who would reject attempts to involuntarily forfeit that status. Even cisgender allies who are sympathetic to non-binary recognition may draw a line at requiring all persons to adopt implied gender neutrality. Similarly, as noted, for many trans people, legal gender recognition is the final stage in a lifelong journey towards gendered affirmation. For these individuals, obtaining formal state acknowledgement validates their sense of self and facilitates greater self-actualisation'. See Peter Dunne 'Towards trans and intersex equality' in Jens M. Scherpe *et al* (eds) *The Legal Status of Intersex Persons* (2018) at 239.

towards the eventual goal of eliminating gender markers altogether. It is my opinion that the classification of people based on sex and gender by the state and other institutions should eventually be eradicated, having no purpose in a modern state based on equality and dignity.

This thesis will further not explore the development of the legal status of transgender persons and their attainment of rights.⁶⁹

1.6 Methodology

This is a desk-top research thesis. Although I have met with some transgender persons and non-governmental organisations who specialise in advising transgender and non-binary individuals, no formal interviews were conducted and thus no ethical clearance was required for these informal meetings. for discussions in order to better understand their perspectives. I have also consulted literary sources which deepen my understanding of the issues they confront.⁷⁰ South African as well as international literature will be considered in the subsequent chapters. Furthermore, case law from other jurisdictions where a third gender has been recognised will be discussed and will be consulted.

1.7 Chapter Outline

1.7.1 Introduction and motivation.

Chapter 1 will introduce the topic and provide the motivation for undertaking this research. The relevance of this subject has already been discussed. The rest of this Chapter is dedicated to explaining each Chapter and how the Chapters are linked to one another.

1.7.2 Conceptual clarification

In Chapter 2, the differences between gender, gender identity, sex and sexual orientation, cisgender, transgender, transsexual, trans and the terminology of binary/non binary as well as gender queer and gender fluid are discussed so as to get a better understanding of these terms and the implications for my argument. Only sexual orientation, gender and sex are protected by the Constitution; however, gender identity determines which gender, if any, a person will categorise themselves as, and is thus central to some of the arguments I will put forward. It must be noted that while the concept of sexual orientation will be explained, my thesis will not concern itself with sexual orientation as such. These concepts, particularly sex, gender and

⁶⁹ For further discussion on this topic, see Jens M Scherpe ‘The legal development of the legal status of transsexual and transgender persons’ in Jens M Scherpe *et al* (eds) *The Legal Status of Intersex Persons* (2018).

⁷⁰ Such as Landa Mabenge *Becoming Him: A Trans Memoir of Triumph* (MFBooks 2018).

gender identity, can often be incorrectly viewed as similar concepts, used interchangeably or be interpreted incorrectly. As sex and gender are inextricably linked, the connection between the two must be explored. This Chapter will ensure the correct meaning is given to these words so that no confusion or misinterpretation arises.

1.7.3 Overview of relevant South African law and international policy

In Chapter 3, I will provide an overview of the relevant South African law and International policy which applies to the problem at issue is discussed, including the application of the legislation in question and, where applicable, its shortfalls. The legislation which will be considered is the Alteration of Sex Act 49 of 2003; the Identification Act 68 of 1997; the Births and Deaths Registration Act 51 of 1992; and the Marriage Act 25 of 1960, Recognition of Customary Marriages Act 120 of 1998 and the Civil Union Act 17 of 2006. Additionally, although not binding upon South Africa, the *Yogyakarta Principles*⁷¹ and the subsequent *YP+10*,⁷² which aim to address human rights relating to sexual orientation and gender identity will be addressed. This will aid me in the constitutional analysis which follows.

1.7.4 Dignity

How the dignity of transgender persons will be affected should a third gender be recognised or not will be determined with constitutional arguments as a framework in Chapter 4. The concept of dignity as interpreted by case law and academic writing is considered. It will be noted that it is a founding value of the Constitution and that it is unique in that it is not only a self-standing right but also informs all other rights in the Bill of Rights. The relationship between dignity, sex and gender will be discussed as well as examples of how the dignity of transsexuals and transgender persons is diminished through non-recognition of a third gender. Furthermore, there will be an exploration of the right to dignity's relationship with other rights in the Bill of Rights, most pertinently, equality. This sets a backdrop for the Chapter 5. It will be determined that through unequal treatment, the worth of transsexuals is diminished. Furthermore, by not being able to identify with the gender they associate themselves with, their individuality is

⁷¹ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* March 2007, available at http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf, accessed 10 January 2019.

⁷² International Commission of Jurists (ICJ), *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Compliment the Yogyakarta Principles* November 2017, available at http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf, accessed 10 January 2019.

devalued and their identity is not properly accepted. Drawing from the daily reality of difficulties faced by transgender persons outlined in Chapter 1.3 above, this Chapter will conclude that transsexual's rights to dignity are infringed.

1.7.5 Equality and non-discrimination

Whether non-recognition of a third gender discriminates against transgender persons will be considered in Chapter 5, which will traverse constitutional arguments. The concept of equality in South Africa will be explained, with reference to the Constitutional Court's interpretation of equality in prominent cases. The differences between differentiation, discrimination and unfair discrimination will be described, as well the tests which have been employed by the Constitutional Court to determine when this distinction occurs. It will be noted that discrimination on the grounds of sex, gender and on sexual orientation are automatically unfair in terms of s9, and the implications of this categorisation will be explored. Further, the possibility that the discrimination exists on a non-listed (i.e. analogous) ground is explored. I will consider whether non-recognition of a third gender amounts to unequal treatment and constitutes unfair discrimination, using constitutional theory in order to advance the discussion.

1.7.6 Conclusion

The final Chapter, Chapter 6, will summarise the results of the research and answer the research question as to whether or not the Constitution requires recognition of a third gender. I will conclude that, due to the arguments given and reasons provided in my thesis, transsexuals' Constitutional rights to equality, non-discrimination and dignity are being infringed by the state not recognising a third sex/gender. I will answer the question as to whether the state has a positive obligation to bring about reform of the law in South Africa and recognise a third gender. Recommendations for the way forward will also be provided.

CHAPTER 2 - CONCEPTUAL FRAMEWORK

2.1 Introduction

In Chapter 1, I explained that it is important for one to have a comprehensive understanding of the different terminology and meanings relating to this field of study. The terms which I highlight are ever evolving, with our understanding of what these ‘labels’ mean being drastically different today to what they were ten years ago and even two years ago. These are not layman’s terms and each term refers to a specific category or group identity. However, these terms are often misapplied, with sub groups of identities being ‘lumped’ together incorrectly. This conflation of terms is not only done by uninformed members of the general public, but also by higher organs who are expected to be experts or to have done extensive research on this topic. An example of this is the South African Courts, which will be expanded on in Chapter 5. Some of these concepts are listed in s9(3) of the Constitution and are thus listed grounds upon which discrimination, when it occurs, is presumed to be unfair. This must be distinguished from analogous grounds of discrimination, (grounds not listed in s9(3) but discrimination on the basis of these characteristics have the potential to impact a person's dignity and thus have a similar impact to those listed grounds, for example discrimination on the basis of HIV status) which are not presumed to be unfair. If the failure of the state to provide for the recognition of a third sex does not constitute discrimination on the listed grounds of either sex, sexual orientation, or gender, one would have to construct an argument that the discrimination is based on some or other unlisted ground which – as noted – will have consequences for the onus to prove that the discrimination is unfair (or not). A nuanced understanding of the correct terminology is thus critical to the development of my arguments relating to unfair discrimination in Chapter 5. Hence this chapter lays the foundation for a proper understanding of the arguments to follow.

I will begin by discussing the distinction between sex and gender and gender identity, then the nature of gender reassignment surgery will be explained. These distinctions are important, as how a person classifies themselves contributes to how they identify themselves and thus for part of their construction of their identity. Using the correct terminology when describing a person is thus imperative as it shows respect and an acknowledgement of personal identity. This will be followed by an explanation of sexual orientation and then the meaning of the terms ‘cisgender’, ‘transgender’, ‘transsexual’ and ‘trans’. Lastly, the labels ‘non-binary’, ‘binary’, ‘gender queer’ and ‘gender fluid’ are defined.

The terms which will be defined in the chapter, are important as they are used by the persons to whom this thesis applies. These are terms which they use to define themselves. Lastly, in particular, the term ‘transsexual’ needs clarification as the Constitutional Court has already made a pronouncement on the applicability of the listed prohibited grounds to transsexuals.⁷³ However, I will argue that the Court’s understanding of the term transsexual is different to the current understanding of the word and that their categorisation is thus technically incorrect.⁷⁴

2.2 *The Distinction between Sex and Gender and Gender Identity.*

Sex is traditionally understood as ‘the classification of a person as male or female’.⁷⁵ It is based on specific ‘anatomical and physiological’ differences between men and women, which are seen as relevant for this classification.⁷⁶ In layman’s terms it is the biological distinction between men and women.⁷⁷ This biological distinction is made up of the presence or absence of certain organs, sex characteristics and hormones. Thus, which internal and external organs are present in a person, as well as certain hormonal factors, will determine whether one is classified as male or female. Despite popular belief, sex is not binary. Some persons are born with both male and female genitalia. These persons are called intersex.⁷⁸ It is common for the parents of an intersex child to choose to have the child undergo surgery in order for the child to more closely resemble what is socially considered either male or female.⁷⁹ This practice has been condemned by many intersex persons as well as by the United Nations.⁸⁰

⁷³ See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) which is further discussed below at Chapter 2.6.

⁷⁴ See further Chapter 5

⁷⁵ Anonymous ‘GLAAD media reference guide- transgender’ *Glaad* date unavailable, available at <https://www.glaad.org/reference/transgender> [last accessed 22/08/2018].

⁷⁶ Tim Newman ‘Sex and gender- What’s the difference?’ *Medical New Today* 07 February 2018, available at <https://www.medicalnewstoday.com/articles/232363.php>, last accessed 22 August 2018; See also South African Litigation Centre *Laws and policies affecting transgender persons in Southern Africa* (2016), available at <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Transgender-Rights-Booklet.pdf>, last accessed 05 October 2019.

⁷⁷ Gerda Siann *Sex, Gender and Sexuality: Contemporary Psychological Perspectives* (1994) at 3; Louise K Newman ‘Sex, gender and culture: issues in the definition, assessment and treatment of gender identity disorder’ (2002) 7(3) *Clinical Child Psychology and Psychiatry* 352; Jayde Pryzgoda & Joan C Chrisler ‘Definitions of gender and sex: The subtleties of meaning’ (2000) 43(7/8) *Sex Roles* 553 at 554.

⁷⁸ L Hermer ‘Paradigms revised: intersex children, bioethics & the law’ (2002) 11 *Annals Health L* 195 at 196.

⁷⁹ See Rachel Sloth- Nielsen ‘Gender normalisation and the best interest of the child’ (2018) 29(1) *Stell L Rev* 48.

⁸⁰ See the UN Human Rights Council, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (5 March 2015) UN Doc No A/HRC/28/68; F Pansieria Keynote address by Flavia Pansieri, United Nations Deputy Commissioner for Human Right, at the panel ‘Human Rights for all:

Unlike sex - which as I have explained above - is widely believed to refer to the biological differences between men and women, gender is a social construct.⁸¹ It refers to how society thinks men and women should act (as defined by their real or perceived biological differences) or how they ought to behave so that their behaviour accords with their sex. According to the World Health Organization it is the ‘socially constructed characteristics of men and women - such a norms, roles, and relationships of and between men and women’.⁸² It is the ‘manner in which culture defines and constrains the differences between men and women’.⁸³ In other words, ‘gender typically refers only to the behavioural, social and psychological characteristics of men and women’.⁸⁴ Thus, the gender which you are expected to identify with is more often than not informed by your sex. The roles men and women are expected to play differs from society to society.⁸⁵ It is the expected ‘social and cultural role of each sex within a given society’.⁸⁶ Unlike sex, gender is not about chromosomes and bodily features, with ‘people often develop[ing] their gender roles in response to their environment, including family interactions, the media, peers, and education’.⁸⁷ As society changes, gender roles change.⁸⁸

Men are increasingly taking on roles which traditionally were seen as being those ascribed to women, and women are progressively taking on those roles traditionally designated for men.⁸⁹ Thus, ‘gender roles and gender stereotypes are highly fluid and can change

protection and promotion of the human right of LGBTI individuals- from local communities to global organisations’ (20 November 2015) United Nations Human Right Office of the High Commissioner, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16798&LangID=E>, last accessed 03 January 2019.

⁸¹ Louise K Newman op cit note 77. See also South African Litigation Centre *Laws and policies affecting transgender persons in Southern Africa* op cit note 76; Stacy-Leigh Manoek *et al Training manual: a guide for south african police service (SAPS) officers to the rights of sex workers and the LGBTI community* Women’s Legal Centre 2014.

⁸² Anonymous ‘Gender equity and human rights’ *World Health Organization* date unavailable, <http://www.who.int/gender-equity-rights/understanding/gender-definition/en/>, last accessed 24/08/2018.

⁸³ Gerda Siann *Sex, Gender* (1994) op cit note 77

⁸⁴ Jayde Pruzgoda & Joan C Chrisler op cit note 77.

⁸⁵ Gerda Siann *Sex, Gender* (1994) op cit note 77.

⁸⁶ Tim Newman op cit note 76. Jayde Pruzgoda & Joan C Chrisler op cit note 77 note that ‘to people who study it, gender indicates something about socialised behavioural patterns’. See also Rhoda Kessler Unger ‘Towards a redefinition of sex and gender’ (1979) 43(11) *American Psychologist* 1085 at 1085 where, in the article, she introduces the term gender ‘for those characteristics and traits socio-culturally considered appropriate to males and females’.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

substantially over time'.⁹⁰ However, in many societies, gender remains a powerful disciplining tool that is used to police behaviours and to maintain a male dominant, patriarchal system. Males are still seen as the breadwinners, with women's roles being confined to child rearing and keeping house. This leaves them at an economic disadvantage, dependent on males for money to live and thus subject to their control. Females are also denied education or given an education subpar to that of men in order to ensure they cannot find adequate work and be self-sufficient. Of course, women are expected to behave in a feminine manner and men in a masculine or 'butch' manner. From all of the above it is clear that much still needs to be done in the reversal of ideas about gender roles and norms to ensure gender equality.

The distinction between the concepts of sex and gender was 'first developed in the 1950s by psychiatrists working with intersex and trans patients in order to distinguish between a person's sex and gender identity, and was then taken up by feminists'.⁹¹ The perception and understanding of sex started changing in the 1960s, with sex being regarded as being 'defined by biology/medicine' and gender being understood to be a cultural or social construct.⁹²

'From this perspective, sex came to be regarded as an objective scientific fact and thus fixed. In contrast, gender was considered fluid and a variable category; the cultural or social interpretation of sex made visible, e.g. in the roles, behaviours, and attributes that a particular society assigns to discriminate between the sexes'.⁹³

Feminist thinkers pointed out the importance of this distinction, namely that 'the gender expectations are cultural products'.⁹⁴ This insight by feminist thinkers has 'challenged the view that unequal social positions between men and women are somehow directly representative of, or "caused by", their biology'.⁹⁵ The distinction between sex and gender at this time allowed for feminist thinkers to contradict 'biological determinism' and to 'criticise gender inequality on the basis that biology is not destiny'.⁹⁶ Gender is therefore widely regarded now as a social construct.

Queer and post-structuralist theorists began questioning the seemingly clear distinction between sex and gender (one as a biological given and one as a social construct) in the 1980's.

⁹⁰ Ibid.

⁹¹ Tamar Klein op cit note 12 at 13. See also Robert J. Stoller *Sex and Gender: on the Development of Masculinity and Femininity* (1968).

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Tamar Klein op cit note 12.

⁹⁵ Ibid.

⁹⁶ Ibid; see also Gayle Rubin 'The traffic in women: Notes on the "political economy" of sex' in Rayna R. Reiter (ed.) *Toward an Anthropology of Women*. (1975); Rhoda Kessler Unger op cit note 86.

Like gender, sex has now started to be understood as ‘a historical and social phenomenon, and as such a fluid, variable and constructed category’.⁹⁷ This is in contrast to the traditional understanding of sex as determined by biology as discussed above. In fact, this would mean that sex and gender are similar, if not nearly the same. As far back as 1979, Rhode noted that ‘physiologically, there is some suggestion that the dichotomy between maleness and femaleness may not be as distinct as was once believed’.⁹⁸ In fact, in a subsequent article, Rhode notes that ‘there is considerable evidence... that sex is not dichotomous nor necessarily internally consistent in most species’.⁹⁹ Hence it can be deduced that sex is not a particularly accurate way of distinguishing the two categories of male and female. While biological factors can be a useful way to differentiate between persons, I believe that many other factors need to be taken into account and thus the clear divide between ‘male’ and ‘female’ is outdated. It fails to take into account biological variances in individuals. For example, it is ineffective when it comes to categorizing those who are born intersex.

If it is to be agreed that sex, like gender, is also not biologically determined, and thus not inherently a given in each individual, it would follow that the classification of people into male and female upon birth is not correct. It would thus follow that amendments would have to be made to the categorisation of people into two different sexes or genders. One option would thus be to do away with sex and gender classification altogether. Another option, the option I advocate for in this thesis, is to include a category for those who do not fall within the traditional gender and sex categories of male and female.

Although similar, gender identity and gender are not the same. While gender refers to socially constructed ideas about how men and women should behave, the activities they should perform, what they should like (e.g. colours) and their general disposition, gender identity is not *per se* a social construct, but rather how an individual perceives their own gender (as opposed to how society thinks they should act). It is commonly understood as the ‘sense of knowing to which sex one belongs, that is, the awareness that “I am a male” or “I am a female”’.¹⁰⁰ It is the ‘core sense of the self as male, female or somewhere on the spectrum

⁹⁷ Ibid.

⁹⁸ Rhoda Kessler Unger op cit note 86 at 1086.

⁹⁹ Rhoda Kessler Unger ‘Commentary: sex and gender: the troubled relationship between terms and concepts’ (1993) 4(2) *Psychological Science* 122 at 124.

¹⁰⁰ Robert J Stoller ‘A contribution to the study of gender identity’ (1964) 45 *The International Journal of Psychoanalysis* 220.

outside the binary'.¹⁰¹ Despite this common understanding, there are differing views on whether gender identity is still actually a social construct or not. For instance, in terms of essentialist views on gender identity, one's gender identity is 'natural', i.e. 'it is natural for those born male to act masculine... while those born female are supposed to act feminine'.¹⁰² In terms of a constructionist view, gender identity is a social construct in that it 'is the result of repeated performance of one's expected gender role that creates the illusion of an internal identity that underlies the expression of these behaviours'.¹⁰³ I, however, ascribe to the essentialist view of gender identity, believing it is innate, while gender is the social construct. Despite these conflicting views, it remains that there is a difference between gender and gender identity. The distinction between the two becomes important in the discussion on dignity in Chapter 4 and that on unfair discrimination in Chapter 5.

2.3 Nature of Gender Reassignment Surgery

Gender reassignment surgery, or gender affirming surgery, is generally understood as the final step in the process in aligning a person's sex characteristics and their gender identity with one another.¹⁰⁴ However, the decision to transgender is a purely personal choice and is not a precondition for being transgender. Many transgender persons decide not to undergo gender reassignment surgery due to the risks involved and the possibility of irreversible mutilation to one's genitals should the surgery not be performed properly. Many further do not have the financial resources needed for the surgery, as gender reassignment surgery is viewed as cosmetic and thus not covered by medical aid. In South Africa, gender reassignment surgery is not a prerequisite for legally changing one's sex description, as will be discussed in greater detail in Chapter 3, with reference to the Alteration of Sex Act.

The steps which would precede surgical intervention include presenting as the gender one identifies with (dressing as that gender in public, adopting mannerisms popularly thought to be those specific to that gender) and undergoing hormone therapy. Oestrogen will be given to those who are transitioning from male to female in order to feminise the body by, for

¹⁰¹ Vicki Pasterski 'Gender identity and intersex conditions' in Jens Scherpe *et al* (eds) *The Legal Status of Intersex Persons* (2018) at 65.

¹⁰² Julie L Nagoshi, Stephan/ie Brzuzy & Heather K Terrell 'Deconstructing the complex perceptions of gender roles, gender identity and sexual orientation among transgender individuals' (2012) 22(4) *Feminism and Psychology* at 407.

¹⁰³ *Ibid.*

¹⁰⁴ See also South African Litigation Centre *Laws and policies affecting transgender persons in Southern Africa* op cit note 76.

instance, decreasing hair growth, increasing the size of the breasts and redistributing the fat in the body, leading to a womanlier body taking shape.¹⁰⁵ For females who are transitioning into males, testosterone will be administered. This will lead to an increase in facial hair, a lowering of the voice and increased sex drive.¹⁰⁶

Complete sex reassignment surgery is generally more successful with male to female (commonly referred to as MTF) transitions. The individual will generally undergo a vaginoplasty, which involves removing the testes and making use of the scrotal tissue to create labia. The penis is inverted in order to create a vagina.¹⁰⁷ For a female to transition to male (male to female transition is commonly known as FTM) the process, specifically with regard to reconstructing the genitalia, is more difficult. The individual can choose to either have the clitoris freed in order to make it longer (metaoidioplasty) or to undergo the more complicated phalloplasty.¹⁰⁸ A phalloplasty involves removing tissue from an area of the body (most commonly the forearm) in order to construct a penis. The success rate of the procedure varies. Thus while some will opt for both top surgery (removal of breasts or construction of breasts) and bottom surgery (vaginoplasty or phalloplasty), many transgender persons, particularly Female to Male transgender persons, will decide to just undergo top surgery.

2.4 Sexual Orientation

It is necessary to define sexual orientation, distinguishing it from the concepts of gender identity and transgender due to the fact that many people wrongly conflate sexual orientation with gender identity or transgenderism. Sexual orientation is descriptive of a person's 'enduring physical, romantic and/or emotional attraction to another person'.¹⁰⁹ There are different types of sexual orientations. Being heterosexual is having an emotional and sexual attraction to people of the opposite sex. A homosexual is emotionally and sexually attracted to persons of the same sex. A bisexual is a person who has an attraction to both people of the same sex and of the opposite sex. People who identify as asexual have 'little or no sexual

¹⁰⁵ Alexander John Goodrum *Gender identity 101 a transgender primer* (1998), available at <http://www.sagatucson.org/downloads/GI101.pdf> [last accessed 05/10/2019].

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ <https://www.glaad.org/reference/transgender> op cit note 75.

attraction to others and/or lack interest in sexual behaviour/relationships’.¹¹⁰ Those who are pansexuals are people who experience ‘sexual, romantic, physical and/or spiritual attraction for members of all gender identities/ expressions’.¹¹¹ Skiliosexual describes persons who are ‘primarily sexually, romantically and/or emotionally attracted to some genderqueer, transgender, transsexual and/or non-binary people’.¹¹²

The Constitutional Court has identified the homosexual community as a vulnerable group in society, who have historically been discriminated against and victimised. The rights of homosexuals have been highly litigated.¹¹³ This jurisprudence can be used in relation to the Constitutional position of transgender persons due to their similar position in society, which will be expanded on in Chapter 5 below.¹¹⁴

2.5 Cisgender

Cisgender is the proper term for a person whose gender identity ‘is on the same side as their birth-assigned sex’.¹¹⁵ Simply, their gender identity ‘matches’ the sex which they were assigned at birth. For instance, I was assigned the female gender when I was born and female is reflected on my birth certificate. I thus identify as a cisgender female. Cisgender is the opposite of the term transgender:

‘*Cisgender* emerged from trans* activist discourses in the 1990s that criticized many commonplace ways of describing sex and gender. The terms *man* and *woman*, left unmarked, tend to normalize cisness – reinforcing the unstated “naturalness” of being cisgender.’¹¹⁶

The terms cisgender was therefore developed by transgender individuals in opposition to the entrenched idea that individuals whose gender identity aligns with their birth assigned sex are ‘normal’ and those whose gender identity does not align to their birth assigned sex are not normal.

¹¹⁰Sam Killermann ‘Comprehensive list of LGBTQ vocabulary definitions’ *Its Pronounced Metrosexual* 07 January 2013, available at <http://itspronouncedmetrosexual.com/2013/01/a-comprehensive-list-of-lgbtq-term-definitions/> [last accessed 25/08/2018].

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ See *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC); *Satchwell v President of Republic of South Africa* 2002 (6) SA 1 (CC); *J v Director of Home Affairs* 2003 (5) SA 621 (CC); *Gory v Kolver* 2007 (4) SA 97 ; *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA); *Laubscher N.O v Duplan* 2017 (2) SA 264 (CC).

¹¹⁴ See the discussion on *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73 in 5.6.

¹¹⁵ B Aultman ‘Cisgender’ (2014) 1(1-2) *Transgender Studies Quarterly* at 61.

¹¹⁶ Ibid.

2.6 Transgender, Transsexual and Trans

‘Transgender’ refers to someone whose gender identity differs from the sex assigned to them at birth.¹¹⁷ It is an umbrella term encompassing persons who have not undergone sex reassignment surgery,¹¹⁸ those who have, and those who have only undergone hormonal therapy.¹¹⁹ Transsexual is not an umbrella term.¹²⁰ It generally is used to describe a person who has undergone hormone therapy or sex reassignment surgery, although not always.¹²¹ Trans, on the other hand, is also an umbrella term, encompassing both transsexual and transgender persons. It is also used ‘sometimes to be inclusive of a wide variety of identities under the transgender umbrella’.¹²²

It was in the 1970’s that the term transgenderism (and by implication transgender) was coined.¹²³ Formerly, only the term transsexualism (transsexual) was used, with it having the narrow understanding that undergoing sex reassignment surgery was a requirement for one’s identifying gender to be legally recognised.¹²⁴ Transgenderism thereafter became to be understood as ‘an umbrella term for transvestites,¹²⁵ transsexuals and a new category, transgenderists, who moved between the sexes and genders and did not necessarily insist on specific medical treatment’.¹²⁶

¹¹⁷ <https://www.glaad.org/reference/transgender> op cit note 75 .See also Stacy-Leigh Manoek *et al* op cit note 81. The opposite of a transgender person is a cisgender person. A cisgender person’s gender identity will conform to the sex they were assigned at birth.

¹¹⁸ See 2.3 above. See further Peter Wroblewski, Jonas Gustafsson & Gennaro Selvaggio ‘Sex reassignment surgery for transsexuals’ (2013) 20(6) *Current Opinion in Endocrinology, Diabetes and Obesity* 570; Gennaro Selvaggio & James Bellringer ‘Gender reassignment surgery: an overview’ (2011) 8 *Nature Reviews Urology* 272.

¹¹⁹ See Universal Periodic Review *Sexual Orientation, Gender Identity and Expression, and Sex Characteristic at the Universal Periodic Review*, available at <http://arc-international.net/wp-content/uploads/2016/11/SOGI-report-October-2016-1.pdf>, last accessed 05 October 2019.

¹²⁰ <https://www.glaad.org/reference/transgender> op cit note 58.

¹²¹ *Ibid.* See also Stacy-Leigh Manoek *et al* op cit note 81.

¹²² *Ibid.*

¹²³ Friedmann Pfafflin ‘Transgenderism and transsexuality: medical and psychological viewpoints’ in Jens M Scherpe (ed) *The Legal Status of Transsexual and Transgendered Persons* (2015) at 19.

¹²⁴ *Ibid.*

¹²⁵ That transvestites fall into the transgender group is debatable, as transgenderism has to do with one’s gender identity being at odds with the gender assigned at birth and not to do with outward expression through apparel. In addition, no other definition of transgender which I have encountered includes transvestite within its compass. I do however submit that, in light of the definitions I have come across of trans, transvestite may fall under this wider categorisation.

¹²⁶ *Ibid.*

Although formerly thought to be (and was classified as) a mental illness, in the recently released International Disease Classification-11,¹²⁷ transgenderism, or gender incongruence or dysphoria,¹²⁸ was deliberately taken out of the category of mental health disorders, instead being classified as a sexual health condition. This has been seen as a positive step toward reducing the stigma surrounding transgenderism.¹²⁹

In the book *The Legal Status of Transsexual and Transgendered Persons*, Friedmann Pfafflin notes that British Richard Etkins and Dave King distinguished ‘between four types of transgenderism’:¹³⁰

‘The first one being the traditional transsexual who exclusively wants to be transformed from male to female or vice versa in terms of role behaviour, bodily outfit and legal recognition. The second type oscillates between variably long phases of living a male or female social life. A third type fundamentally negates the gender dichotomy and wants to belong to neither category, neither male nor female, but to an alternative third sex and gender. Finally, there is a fourth type, wanting to escape sex and gender categories. Richard Etkins and Dave King define their attitude as *transcending*, which may be best defined as an attempt to overcome the gender question altogether. These persons do not want to be called male or female, transsexual or transgender, but only *trans* or *per*, derived from the word person.’¹³¹

In this dissertation, I mainly focus on this third and fourth category of transgender persons, ie those who want to negate ‘the gender dichotomy’ and who identify as neither male nor female, and those who ‘attempt to overcome the gender question altogether’.¹³² This is because, for those who negate the gender dichotomy, a third gender option would allow them to identify legally as something other than male or female, and for those who want to overcome gender, a third gender is a step towards the elimination of legal gender categorisations. My focus on these two groups does not, however, negate the importance of the other two categories, as their rights may be enhanced by the recognition of a third category outside of male and female because it would clearly then identify transsexuals (in whatever form they present themselves) as being worthy of heightened constitutional protection.

Sexual orientation and transsexualism are often confused and used interchangeably and/or incorrectly. While sexual orientation has to do with one’s sexual preferences (who a

¹²⁷ World Health Organization *International classification of diseases for mortality and morbidity statistics* (ICD-11) 11th Revision, available at <https://icd.who.int/browse11/l-m/en>, last accessed 15 October 2019.

¹²⁸ Gender Dysphoria is defined as the ‘distress or discomfort that may occur when a person’s biological sex and gender identity do not align’. See Sean R Atkinson & Darren Russel ‘Gender dysphoria’ (2015) 44(11) *Australian Family Physician* 792 792.

¹²⁹ Caroline Simon ‘Being transgender no longer classified as being a mental illness. Here’s why’. *USA Today* 20 June 2018, available at <https://www.usatoday.com/story/news/2018/06/20/transgender-not-mental-illness-world-health-organization/717758002/>, last accessed 08 January 2019.

¹³⁰ Pfafflin op cit note 123 referring to Richard Etkins & Dave King *The Transgender Phenomenon* (2006).

¹³¹ Ibid.

¹³² Ibid at 19-20.

person is sexually attracted to), transsexualism has to do with a person's gender identity (the gender which they identify with). Gender identity is not determined by sexual orientation or vice versa. A transgender person can be gay, straight, bi-sexual or embrace any other sexuality. It is a misconception that if a person is transgender, they are automatically homosexual. For example, a man who, before reassignment surgery, was attracted to other men would be regarded as having been homosexual. However, after transitioning to female (MTF) and continuing to be attracted to males, she could be considered to be heterosexual. Transsexualism, as stated before, denotes an individual who has undergone sex reassignment surgery. It is not about sexuality or sexual orientation,

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court makes the error of categorising transsexualism as a sub-category of sexual orientation.¹³³ In the majority judgement, Ackermann J states that:

‘The concept of ‘sexual orientation’ as used in s9(3) of the Constitution must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies equally to the orientation of persons who are bi-sexual, or transsexual and it also applies to orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex.’¹³⁴

As the previous discussion has shown, transsexualism has nothing to do with sexual orientation but with having a gender identity which does not equate to the sex one is born with, and then undergoing sex reassignment surgery in order to align one's sex and gender identity. The Constitutional Court here seems to be under the misconception that transsexualism is a sexual orientation. This does not adhere to current definition of the term. However, as will be seen in Chapter 5, the Constitutional Courts erroneous interpretation of the term could, in fact, lead to the conclusion that transsexuals are indeed protected under the equality clause. The implication of this, in turn, is that discrimination on the grounds of transsexualism would fall under the prohibited (listed) grounds for discrimination.¹³⁵

2.7 Non-binary, binary, gender queer and gender fluid

Traditional notions of gender track traditional notions of sex, and dictate that there are only two genders, namely male and female. The term ‘binary’ is used to describe individuals who identify exclusively as female or male and do not fall on a spectrum between the two. This is how the term will be used in my thesis. Non-binary, or gender queer, denotes persons who do not exclusively identify as male or female. They ‘may identify as both male and female at one

¹³³ *National Coalition of Gay and Lesbian Equality v Minister of Justice* supra note 73.

¹³⁴ Ibid para 21.

¹³⁵ This argument is developed further in Chapter 5.

time, as different genders at different times, as no gender at all, or dispute the very idea of only two genders'.¹³⁶ The term is thus used to refer to 'those people whose gender identities fall outside the dominant societal gender binary'.¹³⁷ It is these non-binary identifying individuals who are the subject of this thesis. While there are transgender individuals who do identify as exclusively male or female (and who are thus binary), there is an increasing number of trans persons who do not identify as male or female but rather have a non-binary gender identity.¹³⁸ Dutch Courts recently acknowledged the rights of these non-binary individuals, ruling that a non-binary individual (who was born intersex) could be registered as 'het geslacht is niet kunnen worden vastgesteld' which translates to 'the gender cannot be determined'.¹³⁹ There are further persons who 'move between genders in a fluid way'. These people may be termed as gender fluid. They are technically 'non-binary' as they do not identify as either male or female. They may on some days feel more masculine and, on other days, feel more feminine. It is those who identify as non-binary whom this thesis focuses on. As they do not identify as either male or female, should the law compel them to register as male or female or should the law provide a third option which is more in line with their gender identity? It is this question which the thesis will seek to answer.

2.8 Conclusion

This chapter has attempted to clarify the different meaning of the terms which will be used in this thesis. Having an understanding of these terms becomes important in the determination of whether discrimination has occurred, and on what ground, as will be discussed in Chapter 5.

The following Chapter will outline the South Africa legislative framework applicable to the issue of recognition of a third gender. The Alteration of Sex Act will be discussed as the primary legislation which allows for persons to legally alter their sex. The Identification Act is relevant in as much as it requires one to have a gender marker on all identification documents.¹⁴⁰ It further deals with the compilation and maintenance of the population register, as well as what is to be included on the population register. The Births and Deaths Registration Act states that upon birth, a child's gender must be registered, and legislation relating to

¹³⁶ Christina Richards *et al* op cit note 5 at 95.

¹³⁷ Rob Clucas & Stephen Whittle 'Part 1: societies' in Christina Richards (ed) *Genderqueer and Non-binary Genders* (2017) at 74.

¹³⁸ *Ibid*.

¹³⁹ ECLI:NL:RBLIM:2018:4931 *supra* note 7.

¹⁴⁰ A gender marker refers to the 'M' (referring to male) or 'F' (referring to female) describing your gender on all identification documents including one's drivers license, passport and identification document.

marriage determines which gender may marry which gender. All the legislation referred to adheres to a binary definition (and thus understanding) of gender only.

CHAPTER 3 – OVERVIEW OF RELEVANT SOUTH AFRICAN LAW AND INTERNATIONAL POLICY

3.1 Introduction

According to Deyi, ‘South African law is predicated on a hierarchal and essentialist conception of gender and the concomitant result is the erasure of transgender persons and a denial of access to basic human rights’.¹⁴¹ This remark is made despite the fact that there is dedicated legislation which specifically deals with transgender persons, namely the Alteration of Sex Act 49 of 2003. Nevertheless, as will be explained, whilst accommodating the change of gender marker of transgender persons, subject to certain requirements being met, the Act only provides for registration of male or female and thus excludes registration of a non-binary gender marker. Similarly, legislation that prescribes that upon birth a person must be registered as either male or female, that states which sexes may conclude marriages with one another, as well as other related pieces of legislation which make reference to the terms ‘he’/‘his’/‘him’ and ‘her’/‘hers’/‘she’ are not inclusive of non-binary transgender persons.

Because my thesis is about the constitutionality or non-constitutionality of not recognising a third gender, the mentioned legislation will be discussed because it would be directly affected by the recognition of a third gender. After reviewing this legislation, I will analyse the *Yogyakarta Principles* and the subsequent *YP+10*, which are regarded as non-binding international law. During this discussion, I will motivate the relevance of these principles for South African Jurisprudence

3.2 The history and process of adoption of the Alteration of Sex Act

Prior to the Alteration of Sex Act coming into force, the Births, Marriage and Deaths Registration Act 81 of 1963 regulated the legal alteration of one’s sex. Section 7(b) stipulated that a person could alter the sex on their birth certificate; however, it was only applicable to post-operative transgender individuals and intersex persons.¹⁴² Thus, transgender persons who had not undergone surgery to alter their sex characteristics, such as those who had only had hormone therapy, were precluded from legally altering their sex. The Act of 1963 was repealed by Births and Deaths Registration Act 51 of 1992 (which will be discussed in more detail below). The Births and Deaths Registration Act 51 of 1992 did not contain a provision similar

¹⁴¹Busisiwe Deyi ‘First Class Constitution, Second Class Citizen: Exploring the adoption of the Third-Gender Category in South Africa’ in Sylvie Namwase & Adrian Jjuuko (eds) *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (2017) at 130.

¹⁴² Busiswe Deyi op cit note 58 at 12.

to that found in section 7(b) of the earlier Act, thus after its adoption one could not legally apply in South Africa to have one's sex altered on identification documents.¹⁴³

The decision to not include a provision allowing for the alteration of one's sex on identification documents and the population register is thought to be based on the 1976 case of *W v W*.¹⁴⁴ In that case, Nestadt J held that he could not grant a decree of divorce to the parties as there was no valid marriage to dissolve, due to him deciding that both parties to the marriage were male. The plaintiff was a male transgender (MTF) who had undergone sex reassignment surgery to become a female prior to the conclusion of the marriage. Nestadt J found that the surgery did not make the plaintiff a female but rather gave her certain characteristics of a female. In short, it was found that a person could not medically change their sex. Thus, in terms of this decision, sex reassignment surgery did not alter one's sex and transgender persons would always be categorised according to their birth sex. This decision followed the English decision of *Corbett v Corbett*.¹⁴⁵

In 2003, largely in response to increasing litigation against the Department of Home Affairs, the Alteration of Sex Description and Sex Status Bill was set to be presented to Parliament. Written and oral submissions were received and the concerns raised by the interested parties were considered. The Bill was amended to address the concerns and in November 2003, the Department of Home Affairs Portfolio Committee unanimously passed the Bill.¹⁴⁶

3.3 *The Alteration of Sex Description and Sex Status Act 49 of 2003*

The Alteration of Sex Act that was enacted in 2003 'seeks to legally enable transgender and intersex people to amend their identification documentation from the gender recorded at their birth to reflect their true gender identity'.¹⁴⁷ The requirements for the amendment of one's sex in terms of all legal documentation is set out in the Alteration of Sex Act. These are essentially threefold: the birth certificate of the applicant, a report prepared by medical practitioners who treated the applicants or carried out gender reassignment surgery, and a report from another

¹⁴³ Ibid; Human Rights Commission *Submission Alteration of Sex Description and Sex Status Bill [37-2003]*, available at:

<https://www.sahrc.org.za/home/21/files/10%20SAHRC%20Submission%20on%20Alteration%20of%20Sex%20Description%20and%20Sex%20Status%20Bill%20%28Parl.%29Sept%202003.pdf>, last accessed 07 January 2019. One could change the sex on identification documents only in the case of a mistake.

¹⁴⁴ *W v W* 1976 (2) SA 308.

¹⁴⁵ *Corbett v Corbett* [1971] 2 All ER 33.

¹⁴⁶ Busisiwe Deyi op cit note 58.

¹⁴⁷ Busisiwe Deyi op cit note 58.

medical practitioner who has medically examined the applicant to establish his or her sexual characteristics. The Alteration of Sex Act is not a model of clarity but provides as follows:

‘(1) Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.’

This subsection provides us with the substantive application of the alteration of sex. It applies to intersex persons as well as those who alter their sex characteristics to align with the gender they identify as. Although the Alteration of Sex Act does not use the word ‘transgender’, transgender is imported by implication, as it is difficult to conceive a person altering their sex characteristics for any other reason than having their external appearance correlate to the gender they identify as. It thus allows transgender individuals to apply for legal recognition of their altered gender identity.

Subsection 2 sets out the procedural requirements for an application under the Act, and provides that:

‘(2) An application contemplated in subsection (1) must—

- (a) be accompanied by the birth certificate of the applicant;
- (b) in the case of a person whose sexual characteristics have been altered by surgical or medical treatment resulting in gender reassignment, be accompanied by reports stating the nature and results of any procedures carried out and any treatment applied prepared by the medical practitioners who carried out the procedures and applied the treatment or by a medical practitioner with experience in the carrying out of such procedures and the application of such treatment;
- (c) in every case in which sexual characteristics have been altered resulting in gender reassignment, be accompanied by a report, prepared by a medical practitioner other than the one contemplated in paragraph (b) who has medically examined the applicant in order to establish his or her sexual characteristics; and
- (d) in the case of a person who is intersexed, be accompanied by—
 - (i) a report prepared by a medical practitioner corroborating that the applicant is intersexed; and
 - (ii) a report prepared by a qualified psychologist or social worker corroborating that the applicant is living and has lived stably and satisfactorily, for an unbroken period of at least two years, in the gender role corresponding to the sex description under which he or she seeks to be registered.¹⁴⁸

The effect of a successful application is that one’s gender markers will be changed on all identification documents, in the population register, and one will receive a new identification number reflecting the new gender.

However, the manner in which the Alteration of Sex Act has been implemented has led to inequality of treatment and discrimination between transgender individuals. Firstly, there is inequality in how long an application for alteration of one’s sex can take, with it being reported that some applications can take up to five years.¹⁴⁹ Moreover, many applications are rejected

¹⁴⁸ S2.

¹⁴⁹ Busisiwe Deyi op cit note 58 at 20.

on the basis that the applicant had undergone medical treatment (for instance, hormone therapy) but not surgery.¹⁵⁰ This is an incorrect interpretation of the Alteration of Sex Act by the relevant officials.¹⁵¹ The Department of Home Affairs thus ‘denies those citizens who have not undergone gender-conformation surgeries involving sterilisation the right to amendment of their identity documentation, and in many cases unduly delays the application of those who have undergone surgery’.¹⁵²

The Alteration of Sex Act was drafted in a manner which excludes certain groups of transgender individuals. This is due to the fact that non-binary individuals are not catered for by the Alteration of Sex Act. As previously stated, a non-binary person is someone who does not identify with the traditional binary notions of gender i.e. male and female. They can fall anywhere on a spectrum between male and female. The Alteration of Sex Act makes provision for a change from male to female or from female to male but does not allow for one to register one’s gender/sex as anything but the traditional binary male or female. The Alteration of Sex Act thus ‘presupposes that gender is not ambiguous and that there is a definitive sex-binary’.¹⁵³ Should I find that non-recognition of a third gender is indeed unconstitutional, the Alteration of Sex Act will need amending as it will in consequence be underinclusive

3.4 The Identification Act 68 of 1997.

The purpose of the Identification Act is ‘to provide for the compilation and maintenance of a population register in respect of the population of the Republic; for the issue of identity cards and certain certificates to persons whose particulars are included in the population register; and for matter connect herewith’.¹⁵⁴ However, the Identification Act too makes reference to ‘he’ and ‘she’ and not the gender-neutral terms ‘they’ or ‘them’. This has the effect of maintaining an essentialist understanding of gender, in which gender is perceived to be ‘a biological and a natural manifestation of a person’s birth-sex’.¹⁵⁵ This is problematic as the possession of an identity document presupposes citizenship.

With citizenship comes rights which the state is under a duty to protect and promote. These rights can be seen to be comprised of three elements, namely: civil rights which include

¹⁵⁰ Ibid.

¹⁵¹ S2(1)(b) states that either or surgical treatment medical treatment is sufficient for alteration of one’s sex.

¹⁵² Thamar Klein op cit note 12 at 24.

¹⁵³ Ibid at 21.

¹⁵⁴ Identification Act 68 of 1997.

¹⁵⁵ Busisiwe Deyi op cit note 141 at 130.

‘individual centred rights’ such as the right to freedom of expression, freedom to contract and the rights to justice and liberty; political rights, including the right to vote, right to participate and right to be part of political parties; and social rights which encompass socio-economic rights.¹⁵⁶ All these elements are necessary for substantive citizenship and must be ‘viewed as mutually supportive’.¹⁵⁷ It is submitted that by not recognising a third gender, government is failing to promote political rights and the social rights of those who do not fit into the gender binary, due to identity documents being gender-binary.

3.5 The Births and Deaths Registration Act 51 of 1992

As stated, when the Births and Deaths Registration Act came into force, no provision was made for the alteration of one’s sex either prior to or post sex reassignment surgery. This meant that transgender persons could not align their gender identity with their legal sex. The Alteration of Sex Act changed this position, amending the Births and Deaths Registration Act to allow for those who qualified under the Alteration of Sex Act to apply to have their sex changed on the birth register.

The Births and Deaths Registration Act is predominantly gender neutral, referring to a ‘child’ in relation to births, and a ‘person’ in relation to Deaths. Mention is only made of gender in chapter IV which sets out general provisions and uses the male pronouns ‘he’ and ‘himself’.¹⁵⁸ It is doubtful that these provisions apply exclusively to males, and it can thus be assumed that any reference to one gender is equally applicable to the other.

Considering that little reference is made to gender and, when it is, the Act can be assumed to apply to the other, it could arguably equally be made to be applicable to any other gender(s) which became recognised by law.

In same vain as the Alteration of Sex Act and the Identification Act, should I conclude that only providing for unconstitutional gender markers is unconstitutional, the Birth and Deaths Registration Act will need to be amended.¹⁵⁹

¹⁵⁶ Ibid at 131.

¹⁵⁷ Ibid.

¹⁵⁸ ‘Women’ is used only in the provisions relating to the assumption of another name upon marriage, divorce or a woman becoming widowed.

¹⁵⁹ It is not only the birth certificate of the non-binary individuals which would be affected should the Birth’s and Deaths Registration Act be amended to provide registration of a non-binary gender marker. As the recent English case *R (on the application of TT) v The Registrar General For England and Wales* [2019] EWHC 2384 (Fam) has shown, it would also implicate the birth registration certificate of a child born of a non-binary or transgender individual. The applicant in this case was a FTM, who had successfully altered their legal gender in terms of the English equivalent to the South African Alteration of Sex Act. However, having not had a hysterectomy, the applicant subsequently underwent IVF resulting in him conceiving and giving birth to a child.

3.6 The Marriage Act 25 of 1961; The Recognition of Customary Marriages Act 120 1998; The Civil Union Act 17 of 2006

The Marriage Act, the Recognition of Customary Marriages Act and the Civil Union Act all regulate the legal recognition of the marital relationship between two individuals. The Marriage Act provides for marriage, whether civil or religious, between persons of the opposite sex (a man and a woman). The Recognition of Customary Marriages Act provides for marriages concluded in terms of customary law to be registered as well as their regulation and their formal requirements. The Civil Union Act provides for civil marriages and civil partnerships between two individuals, regardless of their sex.

Neither the Alteration of Sex Act nor any of the three marriage acts outlined above contain provisions which regulate what should happen should one spouse to either a marriage in terms of the Marriage Act or the Customary Marriages Act alter their sex in terms of the Alteration of Sex Act. The alteration of one spouse's sex would result in them being the same sex as the other spouse, which is seemingly not permitted in terms of the legislation they are married under. In fact, it has been reported that the Department of Home Affairs has refused to alter the sex of transgender individuals who are married under the Marriage Act or have altered their sex, but have deleted records of their marriage on the population register at the same time, effectively divorcing the couple.

In *KOS v Minister of Home Affairs*,¹⁶⁰ the conduct of the Department of Home Affairs in the alteration of the sex of individuals who were married under the Marriage Act came under spotlight. In short, the Department of Home Affairs contended that it could not alter the sex of two individuals who had transitioned in terms of the Alteration of Sex Act because they were married in terms of the Marriage Act. Furthermore, in the case of a third individual, while they did approve his application for his sex to be altered from male to female, the Department of Home Affairs removed details of the marriage to the applicant's wife from the population register, in essence imposing 'a kind of administrative divorce'.¹⁶¹ The court ordered the Department of Home Affairs to approve the application for the alteration of sex for the two

The applicant was however prohibited from being registered as father or in the alternative parent on the child's birth certificate. Thus, he was the child's mother despite legally being male. His application to be registered as the child's father was unsuccessful. A comprehensive discussion of the Courts reasoning is beyond the scope of this thesis.

¹⁶⁰ *KOS v Minister of Home Affairs* 2017 (6) SA 588. See further *GPCM v Minister of Home Affairs* (unreported) Case No: 38909/2017 Judgment of 16 May 2019 for a similar set of facts.

¹⁶¹ Julia Sloth-Nielsen 'KOS v Department of Home Affairs and its relevance to the law of marriage in South Africa' (2019) *SAJHR* [online] available online: <https://doi.org/10.1080/02587203.2019.1662732>, last accessed 06 October 2019.

individuals whose applications had been denied and, for the third individual, reinstate the details of the applicant's marriage in the population register. Binns Ward AJ held that there is nothing in the Marriage Act which prohibits one of the parties to a marriage from changing their sex. Furthermore, there is nothing in the Alteration of Sex Act which requires an individual who is married in terms of the Marriage Act to get divorced in order for their application to be successful. There was further no scope for the conversion of the marriages into civil unions as there are only parallel systems of solemnisation and registration established by the Marriage Act and the Civil Union Act, not parallel systems of marriage.

While this case means that those who are married under the Marriage Act and who apply for an alteration of their sex cannot be rejected on the basis of their existing marriage, it has not amended any of the marriage Acts. These Acts, thus, still make reference to specific genders in their requirements for who is eligible to marry under their respective provisions.

The South African Law Reform Commission has issued a law reform issue paper relating to whether South Africa should enact a single marriage statute.¹⁶² Should a uniform marriage statute be enacted in the future, it could be drafted in such a manner that it would be gender neutral. Should I be successful in proving that non-recognition of a third gender is unconstitutional, this would need to be taken into account in the drafting of such a statute.

3.7 *The Yogyakarta Principles*

After discussing the contents of the *Yogyakarta Principles*. I will give a brief explanation as to their relevance for this thesis.

The *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* were adopted following four days of meetings and discussions held in Yogyakarta, Indonesia, between 29 experts from 25 countries.¹⁶³ The aim of the principles was to 'develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to State's human rights obligations.'¹⁶⁴ There are 29 principles, and under each principle the actions which States must take in order to ensure that rights embodied in the principles are not violated are outlined. For this thesis, the

¹⁶² South African Law Reform Commission Issue Paper 35 (Project 144) *Single Marriage Statute* (2019).

¹⁶³ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* [online] March 2007, available at: http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf, last accessed 10 January 2019.

¹⁶⁴ *Ibid* at 7.

most important principles contained in the *Yogyakarta Principles* are Principle 1 (The Right to Universal Enjoyment of Human Rights); Principle 2 (The Right to Equality and Non-Discrimination); and Principle 3 (The Right to Recognition before the Law).

Principle 1 states that ‘all human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of human rights’.¹⁶⁵ It implores States to:

- ‘A. Embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of human rights;
- B. Amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of human rights;
- C. Undertake programs of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;
- D. Integrate within State policy and decision-making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.’¹⁶⁶

Principle 2 states that:

‘Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination. Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.’¹⁶⁷

States must, *inter alia*

- ‘C. Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;
- D. Take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;
- E. In all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;
- F. Take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.’¹⁶⁸

The most important declaration made in Principle 3 is that ‘[e]ach person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most

¹⁶⁵ Ibid at 10.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid at 11.

basic aspects of self-determination, dignity and freedom'.¹⁶⁹ In addition, States must ensure that all persons are able to reflect their 'self-defined gender identity' on all identification documents and that there are measures in place to ensure that individual's gender identities are respected.¹⁷⁰

In 2017, the *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*,¹⁷¹ also known as *YP+10*, was adopted. It sets out 9 additional principles as well as placing additional obligations on States with regard to some of the principles found in the original *Yogyakarta Principles*. The most important additional principle in *YP+10* is the right to legal recognition. The right to legal recognition is found in principle 31. It states that:

'Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.'¹⁷²

Most notably, it requires States to 'make available a multiplicity of gender markers' where 'gender is required to be registered'. It is also noteworthy that there should be 'no eligibility criteria' for an individual to change their 'name, legal sex or gender'. The Alteration of Sex Act is thus in conflict with the *YP+10*, as it limits the specific categories of persons who are eligible to change their sex.¹⁷³ They can only re-register as male or female. Plus, they must provide evidence of medical or surgical intervention to alter their sex. The further obligation placed on States to ensure equality and non-discrimination is also relevant.

The *Yogyakarta Principles* were signed on behalf of the Republic of South Africa by Justice Edwin Cameron, then Justice of the Supreme Court of Appeal. This provides some evidence of their applicability as being relevant to South African law. In addition, since (ret) Judge Cameron was one of the drafters, it is likely that the Constitutional Court would be aware of these principles, were a matter concerning the topic of this thesis come before it.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid at 12.

¹⁷¹ International Commission of Jurists (ICJ), *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* [online] November 2017, available at: http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf, last accessed 10 January 2019.

¹⁷² Ibid at 9.

¹⁷³ See 3.3 for the categories of people who are able to change their sex under the Alteration of Sex Act.

However, the *Yogyakarta Principles* and the *YP+10* are also relevant by virtue of section 39(1) of the Constitution. Section 39 is also known as the interpretation clause, and states that ‘when interpreting the Bill of Rights, a court, tribunal or forum... must consider international law’.¹⁷⁴ In *S v Makwanyane*, the court noted that section 39(1) encompasses the use of both binding and non-binding international law.¹⁷⁵ The Constitutional Court has since then on many occasions had regard to non-binding international law other than treaties which South Africa has ratified.¹⁷⁶ My submission that the *Yogyakarta Principles* and *Y+10* is of significant relevance to this topic was confirmed in the recent Equality Court judgement of *September v Subramoney*.¹⁷⁷ In her judgement, Fortuin J cited the *Yogyakarta Principles* and the *YP+10* with approval, thus validating my submissions.¹⁷⁸

I conclude that although the *Yogyakarta Principles* are only a set of principles and are thus not binding, they must, and likely will be, used by the Courts as a tool for interpreting the constitutional rights in the Bill of Rights.¹⁷⁹

3.8 Conclusion

The binary notions of gender permeate the law in South Africa as the above discussion has shown. Persons are forced to legally register as either male or female. The recognition of a third gender would have immense implications for, in particular, the Identification Act and legislation regulating marriages. With marriage in terms of the Marriage Act and the Recognition of Customary Marriages Act being between a man and a woman only, should a third gender be recognised, non-binary persons wishing to marry in terms of either Act would be excluded from their application. However, due to the decision in *KOS* that solemnisation of a marriage is a historical fact, persons already married in terms of the Acts who choose to alter their gender remain so married. Any proposed uniform marriage statute would need to grapple with the possibility of a non-binary gender marker or at least deal with the anomaly thrown up

¹⁷⁴ Section 39(1)(b).

¹⁷⁵ *S v Makwanyane* 1995 (3) SA 391 (CC).

¹⁷⁶ L du Plessis ‘Interpretation’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2ed (2013) ch 32. See too *Glenister v President of the Republic of South Africa & Others* (Helen Suzman Foundation as *Amicus Curiae*) 2011 (3) SA 347 (CC), in which the Court uses an expansive interpretation of international law. This approach is critiqued in Juha Touvinen ‘What to Do with International Law? Three Flaws in *Glenister*’ (2015) *Constitutional Court Review* 435.

¹⁷⁷ *Supra* note 3.

¹⁷⁸ *Ibid* para 95-100.

¹⁷⁹ It should be noted that the *Yogyakarta Principles* were used by the Dutch Courts in aiding them to come to the decision that a non-binary individual may have their gender recognised as ‘the gender cannot be determined’ in case *Rb. Limburg* 28 May 2018, ECLI:NL:RBLIM:2018:4931 *supra* note 7.

when a person transitions to another gender during the course of a subsisting marriage. This chapter also reviewed the *Yogyakarta Principles* and *YP+10* which are relevant in as much as they advocate for the recognition of a third gender by stating that all persons must be allowed to identify with their chosen gender identity.

With the current legislative framework having been discussed, it is now necessary for me to turn to the crux of my thesis, namely whether the non-recognition of a third gender violates the constitutional rights to dignity and equality. The right to dignity will be discussed first in Chapter 4, followed by the right to equality in Chapter 5.

CHAPTER 4 - DIGNITY

4.1 Introduction

The right to dignity is not only one of the foundational values of the Constitution,¹⁸⁰ but the right to have your dignity respected and protected is also enshrined as a self-standing right in section 10. Despite its fundamental importance, the exact meaning of human dignity has remained imprecise, with the Constitutional Court ‘not [having] ventured a comprehensive definition of human dignity’.¹⁸¹ However, several attempts to define the concept of human dignity have been made. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* Ackermann J noted that ‘the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of society’.¹⁸² In *Le Roux v Dey* dignity (in terms of the common law) was described as a ‘person’s feeling of self-worth’.¹⁸³ In *S v Makwanyane* O’Regan J (concurring) defined dignity as ‘an acknowledgement of the intrinsic worth of human beings’ elucidating that ‘human beings are entitled to be treated as worthy of respect and concern’.¹⁸⁴ It was further noted in *Khumalo v Holomisa* that human dignity ‘values both the personal sense of self-worth as well as the public estimation of the worth or value of an individual’.¹⁸⁵ It is sometimes referred to as a recognition right in that it recognises the full humanity of the individual. It is one of, if not the, most important rights in the Bill of Rights.¹⁸⁶

Although the central argument put forward in my thesis is that non-recognition of a third gender violates the equality clause, as is discussed in detail in the Chapter which follows, it has been held that when other rights in the Bill of Rights are breached, it is often the case that the value of dignity is similarly offended.¹⁸⁷ For instance, when the right to bodily integrity, to not to be subjected to slavery, or the right to freedom are infringed, the value of dignity can also be adversely infringed. action taken in terms of a rights violation will need to be done in

¹⁸⁰ S1(a) of the Constitution.

¹⁸¹ Iain Currie & Johan De Waal ‘Dignity’ in Iain Currie and Johan De Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) at 251.

¹⁸² *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73 para 28.

¹⁸³ *Le Roux v Dey* 2011 (3) SA 274 (CC) para 138.

¹⁸⁴ *S v Makwanyane* supra note 175 para 328.

¹⁸⁵ *Khumalo v Holomisa* 2002 (5) SA 401 para 27.

¹⁸⁶ *S v Makwanyane* supra note 175 para 144. The court stated that the right to dignity and the right to life were the most important of all human rights.

¹⁸⁷ *Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 239 para 35.

terms of the primary right, e.g. the right to bodily integrity, as opposed to the value of dignity being invoked. It is the primary right upon which a court should focus.¹⁸⁸ However, where the right to dignity plays an important role in rights infringement litigation and adjudication, is that where there is no specific right which is infringed, the right to dignity may be invoked. In these cases, the right to dignity will be the primary right as opposed to dignity being a supplementary value to other primary rights.¹⁸⁹ This affords protection to persons whose rights have been infringed when there is no other Constitutional provision which is relevant and affords protection to said person. Hence, should my primary argument not succeed, it would be pertinent to rely on dignity jurisprudence to advance my case.

In the body of this Chapter, I will discuss the right to dignity as found in s10 of the Constitution, the relationship between the right to dignity and the right to equality and the relationship between dignity and one's identity. I will relate the above to my central contention that non-recognition of a third gender is a violation of Constitutional rights.

4.2 Scope of application of the right to dignity

The right to dignity can be found in s10 of the Constitution. S10 states that 'everyone has inherent dignity and the right to have their dignity respected and protected'. How the right to dignity has been formulated in s10 is 'unique'.¹⁹⁰ According to Ackermann:

'Viewed in the context of s1(a) of the Constitution- which proclaims 'human dignity' as one of the values on which the South African state is founded- s10 makes it clear that human dignity, besides being a value and a right, is also a categorical imperative. The phrase '[e]veryone *has* inherent dignity'... is a constitutional proclamation about the essence of the natural person respected and protected by the Constitution. It is a supra-constitutional declaration... of what this person already *is*, what she *has*, before the invocation of any right under the Constitution.'¹⁹¹

Furthermore, by declaring that 'everyone *has* inherent dignity', that dignity is not a right which is 'acquired by the human being from the Constitution; [but] it is already *inherent* in every human being' is emphasised.¹⁹² This first part of the right to dignity is 'enacted as an imperative' and thus cannot be limited or be subject to a proportionality analysis in terms of the limitation clause (section 36 of the Constitution which is invoked when there is a conflict

¹⁸⁸ Ibid. The court said: 'Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality...'

¹⁸⁹ Ibid. In the case, the Court found that as there was no specific Constitutional provision which protected family life, the primary right which was to be relied upon was the right to dignity.

¹⁹⁰ Laurie Ackermann *Human Dignity: A Lodestar for Equality in South Africa* (2012) at 95.

¹⁹¹ Ibid.

¹⁹² Ibid.

of rights) ‘as only rights can be limited’.¹⁹³ ‘However much the *right to dignity* may suffer infringement in an imperfect world, the inherent dignity that everyone *has* cannot be destroyed’.¹⁹⁴

Section 10 cannot be read in isolation, but must be read together with s7(2) and s8(1) of the Constitution.¹⁹⁵ S7(2) of the Constitution stipulates that ‘the state must respect, protect, promote and fulfil the rights in the Bill of Rights’ while s8(1) states that ‘the Bill of Rights applies to all law and binds that legislature, the executive, the judiciary and all organs of state’.

4.3 Dignity and Equality

Due to the fact that the constitutionality of not recognising a third gender will be analysed in terms of both dignity and equality. In addition to being a self-standing right which can be directly relied on, dignity is also a value which underlies other rights in the Bill of Rights. In particular, there is a close relationship between dignity and equality.¹⁹⁶ The Constitutional Court has on numerous occasions ‘emphasised the centrality of the concept of dignity and self-worth to the idea of equality’.¹⁹⁷ Equality and dignity must be seen as ‘complementary’ as opposed to ‘competitive’.¹⁹⁸ Inequality will occur not when there is merely difference of treatment between two or more groups, but when differentiation takes place which ‘perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth associated with membership of the group’.¹⁹⁹ Thus, ‘the test for unfair discrimination is based on the question whether inherent dignity has been infringed upon as a result of any applied discriminatory measures’.²⁰⁰ This connection between equality and dignity was most recently reiterated in the case of *Moosa v Minister of Justice and Correctional Services*²⁰¹ where the Constitutional Court noted that a ‘dignity challenge... usually and self-evidently underlies any equality

¹⁹³ AC Steinmann ‘The core meaning of human dignity’ (2016) 19 *PER/PELJ* at 13, available at <https://journals.assaf.org.za/index.php/per/article/view/1244>, last accessed 13 October 2019.

¹⁹⁴ Laurie Ackermann op cit note 190 at 95.

¹⁹⁵ Ibid.

¹⁹⁶ Arthur Chaskalson ‘Human dignity as a foundational value of our Constitutional order’ (2000) 16(2) *SAJHR* 193 at 202.

¹⁹⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73 at 120.

¹⁹⁸ Ibid at 125.

¹⁹⁹ Ibid.

²⁰⁰ AC Steinmann *The Legal Significance of Human Dignity* (2016) LLD Thesis, North West University at 393-4.

²⁰¹ *Moosa and Others v Minister of Justice and Correctional Services* [2018] ZACC 19.

complaint”²⁰². The court went on to elaborate on this statement by quoting *Volks N.O v Robinson*,²⁰³ in which case the Constitutional Court had pronounced that:

‘Dignity is an underlying consideration in the determination of unfairness. Thus in the *Harksen* case, this Court held that ‘[t]he prohibition of unfair discrimination in the [equality clause of the] Constitution provides bulwark against invasions which impair human dignity or which affect people adversely in a comparable manner’.²⁰⁴

One must however distinguish a violation of dignity under s9 of the Constitution (right to equality) and a violation of dignity under s10 of the Constitution (right to dignity).²⁰⁵ As explained by Sachs J:

‘The former [violation of dignity under the equality clause] is based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads and is proved by the indignity. The violation of dignity under s10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a road block. It could also be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than inequality relating to closely held group characteristics producing indignity.’²⁰⁶

Insofar as there is jurisprudence relating to the application of the *right* to dignity and not the *value* of dignity, one can have regard to *S v Williams*²⁰⁷, *S v Makhwanyane*²⁰⁸, *Dawood and Another v Minister of Home Affairs*²⁰⁹ and *Booyesen v Minister of Home Affairs*.²¹⁰ The *right* to dignity also seems to be implicated, as indicated in the judgement of Fortuin J in *September v Subramoney*:²¹¹

‘The right to dignity implies protection from conditions or treatment which offends a person's sense of worth in society. Dignity entails recognising everyone's incalculable worth. It generates an entitlement to be treated with respect and concern. These ideas are at the centre of the rights culture which we as a country are aiming at. If the state undermines a person's self-worth through condemnation of conduct that forms part of a person's experience of being human, the state violates that person's right to dignity.’²¹²

²⁰² Ibid para 13.

²⁰³ *Volks N.O. v Robinson* 2005 (5) BCLR 446 (CC).

²⁰⁴ Ibid para 78; *Moosa v Minister of Justice and Correctional Services* supra note 201 para 13.

²⁰⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73 para 124.

²⁰⁶ Ibid.

²⁰⁷ *S v Williams* 1995 (3) SA 632 (CC).

²⁰⁸ *S v Makhwanyane* supra note 175.

²⁰⁹ *Dawood and Another v Minister of Home Affairs* supra note 187.

²¹⁰ *Booyesen v Minister of Home Affairs* 2001 (4) SA 485 (CC). See in general Currie & De Waal *op cit* note 181 at 253.

²¹¹ *September v Subramoney* supra note 3.

²¹² *September v Subramoney* supra note 3 para 117.

In her concluding remarks, Fortuin J finds that the circumstances of Jade's imprisonment were 'contrary to her right to dignity' in violation of s10 ...of the Constitution.²¹³

4.4 Dignity, identity and the self

That self-identification and self-fulfilment are important elements of dignity has been recognised by the Constitutional Court. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Ackermann J notes that the common law offence of sodomy is a 'severe limitation' of homosexual men's right to dignity with this infringement affecting their 'ability to achieve self-identification and self-fulfilment'.²¹⁴ In *Dawood and Another v Minister of Home Affairs*,²¹⁵ O'Regan J held that any legislation which 'impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance... would clearly constitute an infringement on the right to dignity'²¹⁶ It is submitted that it is not only legislation, but rather anything that prevents a person from achieving personal fulfilment in an important aspect of their life, would violate their dignity.

Gender identification plays an important role in self-identification. Sex and gender are integral to how a person identifies themselves and will thus necessarily influence their identity. Sex and gender furthermore influence how the outside world perceives said person which can in turn effect an individual's self-esteem. It is thus important that one's gender and sex be acknowledged and respected. That a third sex/gender is not recognised will certainly affect those who do not identify as either male or female in their formation of identity, self-fulfilment and sense of worth. As their sex/gender is not acknowledged in the same way as that of binary persons, their gender identity is rendered less than that of male and female identifying persons and thus they are treated as not having the same inherent worth as others. This will have a negative impact on their self-worth. By not recognising a third sex/gender, non-binary persons are being forced to categorise themselves as that which they are not. As they cannot fully express their sex/gender but are instead made to 'fit in', an important aspect of who they are is being concealed, erased or denied.

²¹³ Ibid para 158.

²¹⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73 para 36.

²¹⁵ *Dawood and Another v Minister of Home Affairs* supra note 187. The case concerned the circumstances under which a foreign spouse of a South African citizen is temporarily allowed to reside in South Africa while they await the outcome of their application for a permanent permit ('immigration permit') which would allow them to reside permanently in South Africa.

²¹⁶ Ibid para 37.

‘Worth’ is an inherent element in dignity as seen in Constitutional Court jurisprudence. It is something that cannot be taken away. Should people be treated in a way that fails to recognise this inherent worth, their dignity may be infringed. As dignity in terms of the Constitution is made up of both a person’s worth as well as their reputation,²¹⁷ a person’s dignity (and whether or not it has been infringed) is not only contingent on how others view their worth but also on how they perceive their own worth. The value of a person is also considered an integral element of dignity. Factors which influence and form part of a person’s worth will thus necessarily influence dignity. This includes whether or not they have a job, the work they do should they have a job, their family life, their social life as well as many other factors.

How someone identifies themselves (as well as how the outside world identifies him) and their level of fulfilment will influence their sense of worth. As self-identification and self-fulfilment influence a person’s sense of worth and therefore their dignity, they can be included in the concept of dignity. ‘[T]he free development of the personality’ has also been determined to be part of dignity.²¹⁸ When one is hampered in the formation of their identity or has to conceal one’s true identity, it has a harmful impact on one’s self-esteem,²¹⁹ self-identification and self-fulfilment.²²⁰

Since it has the effect of impairing their self-esteem, self-fulfilment, self-identification and self-worth, it can be concluded that non-recognition of a third gender impairs trans non-binary individual’s dignity. Partially in support of my argument, one can turn to the German Constitutional Court’s recent judgement on whether or not to recognize a third gender.²²¹

The case at issue concerned whether, by only allowing for a negative gender entry (no gender entry being made) for intersex variant individuals who do not identify as male or female, and not a positive entry beyond male and female, the rights of intersex variant person (including the complainant) were infringed. The complainant contended that non-recognition had ‘a significant impact on identity development’ which ‘breached their right to free development of personality’.²²²

²¹⁷ *Le Roux v Dey* supra note 183 para 138.

²¹⁸ Laurie Ackermann op cit note 190 at 106.

²¹⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73 para 23.

²²⁰ *Ibid* para 36.

²²¹ 1 BvR 2019/16 supra note 6.

²²² Peter Dunne & Jule Mulder ‘Beyond the binary: towards a third sex category in Germany?’ (2017) 19(3) *German Law Journal* 627 at 629-30.

The German Constitution (Grundgesetz/ GG/ Basic Law)²²³ contains, in section 2(1), the right to personal development.²²⁴ This right is intended, *inter alia*, ‘to guarantee the basic conditions enabling individuals to develop and protect their identity in a self-determined way’.²²⁵ The German right to personality thus contains similar elements to the right to dignity as formulated by the Constitutional Court.²²⁶ Furthermore, the German right to dignity, which mirrors the South African right to dignity²²⁷ is seen as complimenting other rights such as the right to personality.²²⁸ Dignity must therefore be seen as underlying the German right to personality, as it is seen as underlying the rights in our Bill of Rights. Thus, although South African law does not contain a self-standing right to personal development, it is submitted that in light of the South African jurisprudence above and the similarities between the concept of dignity in German and South African law, a violation of the right to personal development in German law would be adjudicated on the basis of dignity in South Africa (especially considering that there is an argument that the right to dignity should be used when no other self-standing right can be identified in a rights violation case).

In the German Case, the German Constitutional Court noted that the ‘general right to personality’ is comprised of the right to personal development together with the right to human dignity (‘Art. 2(1) in conjunction with Art. 1(1) GG’).²²⁹ This general right to personality (the right to be recognised fully for who you are or who you wish to be) is supposed to ensure that one is presented with the ‘basic conditions’ which will enable one to ‘develop and protect their individuality in a self-determined way’.²³⁰ While the general right does not protect against

²²³ The German Constitution (Grundgesetz/ GG/ Basic Law) translation is available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>. For a detailed discussion of this case and its implications for South Africa see Henk Botha ‘Beyond sexual binaries? The German Federal Constitutional Court and the rights of intersex people’ (2018) 21 *PER/PERJ*.

²²⁴ Article 2(1) of the GG states that: ‘Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law’.

²²⁵ 1 BvR 2019/16 supra note 6 para 38.

²²⁶ See the discussion of *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73 and *Dawood and Another v Minister of Home Affairs* supra note 187.

²²⁷ In *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) para 62 Fn 55, the Constitutional Court made reference to the German understanding of dignity. Further similarities between German Constitutional Law and South African Constitutional Law include the fact that both the German Basic Law and the South African Constitution are transformative in nature, taking into account the inequalities of the past (in South Africa, the system of Apartheid and in Germany, the Nazi regime) and trying to redress these inequalities. See too Evadne Grant ‘Dignity and equality’ (2007) 7(2) *Human Rights Law Review* 299 at 310.

²²⁸ 1 BvR 2019/16 supra note 6 para 38.

²²⁹ *Ibid*.

²³⁰ *Ibid*.

everything which could hinder the ‘self-determined development of one’s personality’ (there are too many factors and conditions which influence the development of one’s personality), it does offer protection in those instances where the ‘self-determined development and protection of personality is specifically threatened’.²³¹ The Court concluded that, being an integral element of personality, gender identity is protected under the general personality right-

‘[T]he assignment of gender is of paramount importance for individual identity; it typically occupies a key position in both a person’s self-image and in the way this person is perceived by others. Gender identity plays an important role in everyday life: In part, gender determines entitlements and obligations provided by for law; furthermore, it often forms the basis for the identification of a person, and gender identity is also significant in everyday life irrespective of legal provisions. To a large extent it determines, for instance, how persons are addressed or what is expected of a person in terms of appearance, upbringing or behaviour.’²³²

By not allowing the respondent to register themselves according to the gender they identify with, both the respondents ‘general right of personality in its manifestation as protection of gender identity’ was violated, and their ability to develop and be protected in their gender identity was threatened.²³³ The general right to personality was found to be violated as the respondent was not allowed a gender entry which would correspond with their gender identity (only a male, female or negative entry (no entry being made or gender being left ‘blank’) being allowed).²³⁴

This incorrect entry would lead to the respondent’s identity being impaired. The German Constitutional Court thus ordered that the legislature ‘must enact provisions which are compatible with the Constitution by 31 December 2018’.²³⁵

While the complainant in this was intersex variant, the judgement should not be interpreted narrowly as only applying to intersex variant individuals. In its reasoning, the German Constitutional Court ‘broadly interpret[s] non-binary status: observing how individuals can exist outside both biological and gender dichotomies’.²³⁶ It can thus be argued that ‘to the extent that the opinion of the court is grounded in a wide, multi-faceted understanding of non-binary experiences, surely the German government must accommodate

²³¹ Ibid.

²³² Ibid para 39.

²³³ Ibid para 41.

²³⁴ ‘The “missing data” option does not alter the exclusively binary pattern of gender identity; it gives the impression that legal recognition of another gender identity is ruled out and that the gender entry has simply not been clarified yet, that a solution has not been found yet or even that it has been forgotten. This does not amount to recognition of the complainant in their perceived gender. From the complainant’s view, the entry remains inaccurate, because just deleting a binary gender entry creates the impression of not having a gender.’ Ibid para 43.

²³⁵ Ibid.

²³⁶ Peter Dunne & Jule Mulder op cit note 222 at 641.

non-male and non-female experiences of gender, even in the absence of a-typical sex characteristics'.²³⁷ A narrow interpretation would result in the discriminatory treatment the Court is trying eradicate in this very judgement, as non-binary persons who are intersex variant 'will be formally acknowledged in their preferred legal sex' while persons with typical sexed bodies who identify as non-binary will not.²³⁸

In its legislative response,²³⁹ Parliament took a narrow interpretation of the judgement, whilst keeping male, female and blank options, the category miscellaneous was added *only* for intersex persons who identify as non-binary, who also have to produce medical certification to this effect. This is not a development, but rather an extension of existing German law, previously the sex of an intersex infant could be marked 'indeterminate' but only for a limited time, after which a 'choice' had to be made as to whether the child was female or male.

There can be no doubt that the German legislature's interpretation of the judgement was incorrect in its limitation of the scope the amendments to intersex persons only. This means that transgender persons who identify as non-binary as ultimately still forced to register as either male or female. This could, in future, be brought again to the German Constitutional Court as discriminatory.

4.5 Conclusion

Dignity can be invoked as a self-standing right or it can be used as a guiding value when other rights, in particular the right to equality, are infringed. Despite its imprecise and sometimes varied definition, it is generally understood to allude to the inherent worth of human beings, including how they worthy they perceive themselves.

Self-identification, self-fulfilment and the free development of personality have all been highlighted by the Constitutional Court as factors which have the potential to influence a person's self-worth and thus, in turn, affect their dignity. Preventing an individual from being categorised as the gender they identify with will necessarily influence their self-identification. Further, they are being inadvertently told that their gender identity is less important and less

²³⁷ Ibid at 641-42.

²³⁸ Ibid.

²³⁹ Mary Oppenheim 'Germany introduces new gender for people who identify as intersex' *Independent* 01 January 2019, available at <https://www.independent.co.uk/news/world/europe/germany-intersex-third-gender-identity-passport-lgbt-rights-a8706696.html>, last accessed 30 May 2019; Unknown 'Germany adopts intersex identity into law' *NNC News* 01 January 2019, available at <https://www.bbc.com/news/world-europe-46727611>, last accessed 05 May 2019.

valid to persons able to legally be recognised as male or female. They are further hampered in the free development of their personality. This, too, infringes on their dignity.

The non-recognition of a third gender means that non-binary transgender individuals are forced to legally be deemed to be a gender that they do not identify with. This has harmful implications for their self-fulfilment, self-identification and the free development of their personality. Their sense of worth is diminished as their gender identity is seen as inferior to that of binary persons. Even if it was decided that negative entries were to be allowed, this would not cure the defect, as it would lead to non-binary persons as being perceived as not having a gender. It would also further entrench the idea that gender is binary. The German Constitutional case has been hailed as an important precedent for South Africa,²⁴⁰ and was regarded by intersex and transgender activists as the leading case in this field. However, the legislative response has not lived up to the expected promise.

This Chapter has focused on the infringement of dignity as a Constitutional *value* and as a self-standing, justiciable *right*. I have argued that by not allowing non-binary transgender persons to be recognised as a gender beyond that of male or female, their dignity is effectively infringed. In the next Chapter, I engage the right to equality and the potential unconstitutionality of the position in which such persons find themselves in South Africa.

²⁴⁰See Henk Botha op cit note 223.

CHAPTER 5 - EQUALITY

5.1 Introduction

In this chapter, I will argue that the failure of South African law to provide for the recognition of a third gender constitutes unfair discrimination in breach of s9 of the Constitution. I argued in the previous chapter that non-recognition of a third gender infringes unconstitutionally on the right to dignity. However, that is not the end of the enquiry. The right to equality is also implicated. The right to equality has been used as a powerful right to redress the harm caused by misrecognition or non-recognition in the law. The Constitutional Court has confirmed that ‘a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights’.²⁴¹ In cases such as these, it would ‘be as artificial in law as it would be in life to treat the categories as alternative rather than interactive’.²⁴² Furthermore, ‘a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights’. This means that finding that there has been an infringement of one constitutional right amplifies and strengthens the conclusion that a different right has been infringed. They bolster each other, amplifying the infringement in question. This is the case here. It is thus necessary to explore the extent of the rights violations under the equality clause.

I will analyse the concept of equality by outlining how it has been interpreted and understood by the Constitutional Court. I will also consider whether the difference between differentiation, discrimination and unfair discrimination can be established. I will explore whether an infringement could be found on the listed grounds of sex, gender or sexual orientation as well as whether this amounts to unfair discrimination. I will further argue that an analogous ground of discrimination exists.²⁴³ Should there be found to be unfair discrimination on either a listed or an analogous ground, I will explore whether this infringement can be justified in terms of the s36 limitation analysis.

5.2 The concept of equality

Similar to dignity, equality is enshrined in the Constitution as both a right and value. As a founding value, it permeates the entire Constitution. The importance of the right to equality stems from South Africa’s past. Before the advent of the new Constitutional dispensation,

²⁴¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73 para 114.

²⁴² *Ibid.*

²⁴³ See 5.6.2 for analogous ground.

South Africa was mired with inequality as a result of the apartheid regime.²⁴⁴ In response to South Africa's history of inequality, 'the Constitution is an emphatic renunciation of our past in which inequality was systematically entrenched'.²⁴⁵ Furthermore, it is due to the inequalities of the past that equality, and those rights related to it, such as dignity, are seen to 'occupy a key position in the Bill of Rights and have rightly been described as "revolutionary"'.²⁴⁶ That the right to equality is viewed as so vital in our constitutional dispensation means that it should be viewed as a powerful tool to address harm suffered and inequality experienced.

In *Minister of Finance v Van Heerden*,²⁴⁷ the Constitutional Court held that:

'The achievement of equality goes to the bedrock of our constitutional architecture. The constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all must be tested for constitutional consonance.'²⁴⁸

The right to equality is guaranteed in s9 of the Constitution.²⁴⁹ In *President of the Republic of South Africa v Hugo*,²⁵⁰ the Constitutional Court explained the purpose of s9, with specific emphasis on non-discrimination. It noted that:

'[T]he prohibition on unfair discrimination in the Interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. At the heart of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular group. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is the goal of the Constitution and should not be forgotten or overlooked.'²⁵¹

²⁴⁴ Anne Smith 'Equality Constitutional adjudication in South Africa' (2014) 14 *AHRLJ* 609 at 609-10.

²⁴⁵ *Brink v Kitschoff NO* 1996 (4) SA 197 para 33. Although this case was decided under the Interim Constitution, due to the similarities between s8 in the Interim Constitution and s9 in the final Constitution, jurisprudence on s8 is still relevant.

²⁴⁶ Anne Smith op cit note 244 at 610.

²⁴⁷ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

²⁴⁸ Ibid para 22.

²⁴⁹ S9 states that (1) Everyone is equal before the law and has the right to equal protection and benefit of the law;

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken;

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination;

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair;

²⁵⁰ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1.

²⁵¹ Ibid para 117.

The Constitutional Court has further propositioned some key elements of the right to equality. Equality as included in the Constitution's preamble aims to 'restore and protect the equal worth of everyone... [and] establish a socially just society'.²⁵² 'Restore', in this context, means to single out previously disadvantaged and 'invisible' groups, which makes this dimension of equality especially relevant for my thesis. As was demonstrated in Chapter 2, the only choice one has when registering one's sex is either male or female. Individuals who do not identify as male or female are thus overlooked, and their identity is rendered invisible in the eyes of the law. This already leads one to the preliminary conclusion that recognition of their gender identity would restore their equality rights and position as equal members of society. It has been stated that 'the Constitution commits our society to "improve the quality of life of all citizens and free the potential of each person"'.²⁵³

There are generally two types of harms which are associated with s9, namely social inequalities, also known as misrecognition, and economic inequalities, which are also known as redistribution. Catherine Albertyn describes social inequalities as inequalities which 'result in patterns of inclusion and exclusion in which the identity, norms and behaviours of a particular group are stigmatised and/or marginalised, while another group is affirmed or privileged'.²⁵⁴ She further notes that with regard to women who have been historically been in a disadvantaged position, 'the hierarchies of gender recognition result in women being relegated to a lesser status, and denied legal and practical access to rights, resources, benefits and opportunities. They also result in increased vulnerability to physical and psychological violence and to political marginalisation'.²⁵⁵ Economic inequality has to do with financial inequality and inequality in the ability to make money and benefit from economic activity.²⁵⁶ These material inequalities continue to be influenced by the legacy of apartheid.²⁵⁷ It is the harm caused by social inequality which is relevant to this thesis, as it will be determined whether non-recognition of a third gender has resulted in the exclusion of the 'identity, norms and behaviours' of non-binary transgender persons.

²⁵² *Minister of Finance v Van Heerden* supra note 247 para 23.

²⁵³ *Ibid.*

²⁵⁴ Catherine Albertyn 'Law, gender and inequality in South Africa' (2011) 39(2) *Oxford Development Studies* 139 at 140-1.

²⁵⁵ *Ibid* at 141.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

5.3 Distinguishing differentiation and discrimination

It is necessary at this point to distinguish between differentiation and discrimination, due to the bearing these concepts have on the rest of this section. It is only discrimination which is prohibited by the Constitution. In fact, the Constitution not only ‘tolerates difference’, but ‘acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation’.²⁵⁸ This right to be different relates to what Albertyn identifies as the ‘recognition’ aspect of equality. Albertyn notes that:

‘Social inequalities result in patterns of inclusion and exclusion in which the identity, culture, values and behaviours of a particular group are stigmatised, marginalised and/or denigrated, while another group is affirmed or privileged. Such exclusion may reflect or result in increased vulnerability to physical and psychological and to political marginalisation. Claims arising out of these inequalities tend to emphasize what Nancy Fraser has called ‘recognition’, asserting the social identities and values of the excluded group.’²⁵⁹

The law may legitimately differentiate between persons. As long as the law does not infringe on s9(1) of the Constitution, in that it ‘does not deny equal protection or benefit of the law, or does not amount to unequal treatment under the law’, it is valid. In *Sarrahwitz v Maritz NO*²⁶⁰ the Court remarked on the centrality of differentiation to equality jurisprudence:

‘Differentiation is the centrepiece of the equality jurisprudence including our constitutional right to equality. S9 of our Constitution seeks to uproot two kinds of differentiation from our legal landscape: (i) the one that results in unfair discrimination; and (ii) the one that results in mere differentiation’.²⁶¹

The Court further noted that:

‘A differentiation between people or classes of people will fall foul of the constitutional standard of equality, if it does not have a legitimate purpose advanced to validate it. If the legislation under attack lacks that rational connection, then it violates the right to equal protection and benefit of the law as a result of the uneven conferment of benefits or imposition of burdens by the legislative scheme without a rational basis. This ‘would be an arbitrary differentiation which neither promotes public good nor advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes inasmuch as it breaches the rational differentiation standard set by s9(1) thereof.’²⁶²

Thus, the benchmark for determining whether differentiation is valid, is the standard of rationality. In other words, if the differentiation is rationally connected to the purpose it seeks to achieve, it will be valid and constitutionally permissible. Thus, a statute, provision or action whose purpose is to advance equality or other worthwhile societal goals through differential treatment will generally not be found to discriminate (unfairly) against a person or group of

²⁵⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73 para 135.

²⁵⁹ Catherine Albertyn op cit note 254 at 255.

²⁶⁰ *Sarrahwitz v Maritz NO* 2015 (4) SA 491 (CC).

²⁶¹ *Ibid* para 51.

²⁶² *Ibid* para 54.

people. Thus it is only specific kinds of differentiation which are impermissible, namely differentiation which is arbitrary, irrational, or amounts to ‘naked preference’, and it must be proved that differentiation which is being challenged on Constitutional Grounds falls into one of these specific categories. Once this is proved, further enquiries must be made to determine the differentiation amounts to discrimination. If the claimant cannot prove the differentiation falls into one of the categories above (arbitrary, irrational, ‘naked preference’), any argument that unfair discrimination has taken place fails immediately.

If there is no rational connection, further enquiries must be made to determine whether a constitutional challenge should be mounted, as is discussed next.

5.4 Formal and Substantive Equality

Two forms of equality can be identified, namely formal equality and substantive equality. It is important to distinguish between the two as it will impact on one’s understanding and application of the right to equality. With formal equality, the requirement is that everyone is treated the same; there is the requirement that there be ‘sameness of treatment’.²⁶³ Differing economic and social circumstances are ignored. It is thought that inequality can be ‘eliminated by extending the same rights and entitlements to all in accordance with the same ‘neutral norm’ or ‘standard of measurements’.²⁶⁴ All that is required in terms of formal equality is ‘that all persons are equal bearers of rights’.²⁶⁵ In terms of this understanding of equality, as long as everyone is treated the same, no discrimination can occur.²⁶⁶ Thus, in terms of formal equality, all children would be treated alike at school, regardless of whether they were able-bodied, disabled, visually impaired or intellectually disadvantaged. Despite them having differing needs, since they are being treated the same, there would be adherence to the standard of formal equality.

Substantive equality, on the other hand, ‘requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal’.²⁶⁷ Individuals must be treated as ‘substantive equals’ with the law acknowledging the differing (starting) positions of

²⁶³ Tembeka Ngcukaitobi ‘Equality’ in Iain Currie & Johan De Waal (eds) *Bill of Rights Handbook* 6ed (2013) at 213.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ Anne Smith op cit note 244.

²⁶⁷ Tembeka Ngcukaitobi op cit note 263 at 213.

individuals and groups within society.²⁶⁸ It recognises that there are ‘political, economic and social cleavages between groups’ and that inequality is systemic, with it permeating ‘the institutions of society, the economic system and power relations’.²⁶⁹ Substantive equality ‘acknowledges the complexity of inequality, its systemic nature, and its entrenchment in social values and behaviours, the institutions of society, the economic system and power relations’.²⁷⁰ Thus, instead of aiming to treat people equally, it aims at bringing about a more socially equal society. As stated by Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice*:

‘Equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality... [it] does not imply a levelling or homogenisation of behaviour but an acknowledgement and acceptance of difference.’²⁷¹

The equality clause requires a substantive approach to equality.²⁷² This can be seen from s9(2) which explicitly states that measures may be taken to redress instances of past discrimination. This was confirmed by the Constitutional Court in *AB v Minister of Social Development* where the Court noted that:

‘Coupled with other constitutional values, including human dignity and human rights and freedoms, equality — both as a value and a right — gives meaning to specific substantive constitutional rights. The right to equality provides a mechanism to achieve substantive equality which, unlike formal equality that presumes that all people are equal, tolerates difference.’²⁷³

Substantive equality has been described by the Constitutional Court as ‘remedial or restitutionary equality’.²⁷⁴ In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Court expanded that:

‘Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial cause thereof is

²⁶⁸ Anne Smith op cit note 244 at 613.

²⁶⁹ Catherine Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23 *S. Afr. J on Hum. Rts* 253 at 254.

²⁷⁰ Ibid.

²⁷¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra 73 para 132.

²⁷² See *Minister of Finance v Van Heerden* supra note 247 para 31; *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73 para 15; Arthur Chaskalson op cit note 196 para 178.

²⁷³ *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC) para 296.

²⁷⁴ Ibid para 60. See also Anne Smith op cit note 244 at 614.

eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.²⁷⁵

Thus, those who are currently still in a position of inequality, in particular those who have historically suffered inequality and injustice, must be placed in a position which enables them to be equal to all others.

Substantive equality thus refers to the means used to ‘level the playing field’. In relation to transgender non-binary persons, levelling the playing field would, as a starting point, dictate that they are afforded a gender registration possibility which more closely aligns with their gender identity. In order to effectively address this absence of substantive equality, the non-recognition of a third gender must be explored in terms of s 9 of the Constitution, the analysis of which will be undertaken next.

5.5. *The s9(3) analysis*

As the question is whether, by not recognising a third gender, law providing for only the binary male and female categories is discriminatory, my argument here will centre on a s9(3) analysis. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 consequently is not relevant as the principle of subsidiarity does not apply when it is alleged the law is unconstitutional.²⁷⁶ s9(3) states that:

‘The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’.

For a s9(3) analysis, it must first be determined whether there has been differentiation which constitutes discrimination (the difference between these two concepts is explained above) and, should it be found that there is discrimination, upon which ground the discrimination is occurring. Next, this thesis will review whether the discrimination is unfair and thus in contravention of the right to equality. This is the legal test for s9(3) infringements as developed by the Constitutional Courts, encompassing a two-stage approach to claims of a violation of s9(3), the equality clause. This two-stage approach to the analysis of equality

²⁷⁵ Ibid. See also Anne Smith op cit note 244 at 614.

²⁷⁶ In terms of the principle of subsidiarity, one cannot ‘directly invoke the Constitution’ in order to enforce a right if legislation has been enacted to realise that right. When it is alleged that a right has been infringed, the legislation which gives effect to the right must be relied upon first. See *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 para 53. However, where it is alleged that legislation is unconstitutional, the Constitution may be directly relied upon. See further Pierre de Vos & Warren Freedman ‘Administrative Justice’ in Pierre de Vos & Warren Freedman (eds) *Constitutional Law in Context* (2014).

claims is necessary as there may be instances when, although there is evident discrimination, it is found to be fair in the circumstances.²⁷⁷

As said, it must be determined whether there is discrimination; if there is no discrimination, the enquiry will stop there. In order for there to be discrimination, there must first be a law or conduct which ‘differentiates between people or categories of people’.²⁷⁸ Differentiation is expected in the law, it is when this differentiation is on an illegitimate ground that it will amount to discrimination.²⁷⁹

When differentiation is proven on one of the grounds specified in s9(3), discrimination will have been established. If it is not one of the grounds listed in s9(3), discrimination can still be established where people or categories of people are differentiated upon based on ‘attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner’.²⁸⁰ These not listed grounds: they are often referred to as ‘analogous grounds’. They are termed analogous grounds as they will be analogous to the listed grounds, in that, like the listed grounds which ‘relate to attributes or characteristics that impact on human dignity’, an analogous ground will ‘have a similar relationship and impact’.²⁸¹ The relationship between dignity and equality as pointed out in Chapter 4 can thus once again be seen. In short, an analogous ground will exist when a person is differentiated upon based on a characteristic or attribute that may have an impact on their human dignity. For example, in *Hoffmann v South African Airways*²⁸², South African Airways (SAA) has refused to employ the appellant due to the fact that he was HIV-positive. The court found that ‘In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity’.²⁸³ It was thus found that SAA’s refusal to employ the appellant constituted unfair discrimination based on his HIV-positive status.

²⁷⁷ *Harksen v Lane* NO 1998 (1) SA 300 (CC) para 45.

²⁷⁸ *Ibid* para 42. *Harksen v Lane* was decided before PEPUDA, hence the inclusion of ‘conduct’.

²⁷⁹ Tembeka Ngcukaitobi op cit note 263 at 222.

²⁸⁰ *Harksen v Lane* supra note 277 para 50.

²⁸¹ Tembeka Ngcukaitobi op cit note 263 at 236.

²⁸² *Hoffmann v South African Airways* 2001 (1) SA 1.

²⁸³ *Ibid* para 28.

In proving an analogous ground, the individual claiming discrimination must present ‘an appropriate comparator’.²⁸⁴ The person claiming discrimination must thus show that there is a group who are treated better than he or she is in the same circumstances. Once it has been determined that there is discrimination, the analysis turns to whether the discrimination is unfair, whether discrimination is found on an analogous ground or on a listed ground. However, as is discussed immediately below, unfairness on a listed ground is easier to prove.

There is a crucial distinction between proof of discrimination on a listed and on an analogous ground. Where discrimination is on a listed ground, in terms of s9(5), it is presumed to be unfair unless the opposite is proved to be true. Thus, the claimant will only need to prove there was discrimination, after which the onus will shift to the defending party to prove that the discrimination was not unfair. Where discrimination is on an analogous ground, there is no presumption of unfairness to assist the claimant. The burden of proof is thus reversed. This makes it harder to establish a constitutional violation of s9 when analogous grounds are alleged as opposed to the defendant needing to prove the discrimination is fair; the applicant will need to prove it is unfair.

The types of discrimination can further be categorised as either direct or indirect. s9(3) of the Constitution not only prohibits direct discrimination but also discrimination which occurs in an indirect manner. Consequently, all forms of discrimination are prohibited.²⁸⁵ Indirect discrimination was defined in *City Council of Pretoria v Walker*²⁸⁶, as any conduct which results in discrimination despite appearing to be on the face of it neutral.²⁸⁷ As Fredman notes, the focus is on the impact rather than the treatment: ‘while direct discrimination requires showing that the less favourable treatment was ‘because of’ the protected characteristic, it is the disparate impact of an apparently neutral requirement that establishes a prima facie case of indirect discrimination’.²⁸⁸ The Court in the *Walker* case observed that ‘the inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed... evinces a

²⁸⁴ *Legal Aid South Africa v Magidiwana and Others* 2015 (6) SA 494 (CC).

²⁸⁵ Tembeka Ngcukaitobi op cit note 263 at 238.

²⁸⁶ *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC).

²⁸⁷ Ibid para 31.

²⁸⁸ Sandra Fredman ‘The reason why: unravelling unfair discrimination’ (2016) 45(2) *ILJ* at 231. See further with regard to direct discrimination Simon Forshaw & Marcus Pilgerstorfer ‘Direct and indirect discrimination: Is there something in between?’ (2008) 37(4) *ILJ* 348 where they note that direct discrimination is the idea that like persons should be treated alike or, in the very least, not in a disparate manner ‘on grounds of a protected characteristic’. Direct discrimination thus does not ‘seek to evaluate substantive outcomes; rather it looks for form’.

concern for the consequence rather than the form of conduct'.²⁸⁹ Thus the effect of the action, as opposed to the type of action, determines whether discrimination has taken place. For example, in the *Walker* case, the respondent contended that the differential basis upon which water and electricity were tarified by the appellant (the City Council of Pretoria) indirectly discriminated on him on the basis of race. Old Pretoria, a historically white area, was being charged on tariff basis differently to the townships of Atteridgeville and Mamelodi, historically black areas (residents of old Pretoria was being charged a metered rate equal to actual consumption while residents of Atteridgeville and Mamelodi were charged flat rates). While the policy appeared neutral as it did not explicitly differentiate on the basis of race but rather by geographical area; but, by placing a heavier burden on residents of old Pretoria than on residents of Atteridgeville and Mamelodi in respect of debt-collection as well as of how they were tarified, the policy indirectly discriminated on the basis of race. The effect of the practices was to place a more onerous burden on white residents than black residents due to the historic racial compositions of the areas. The Court agreed with the respondent, finding that apartheid had resulted in race and geography becoming 'inextricably linked' and that while imposing a geographical standard may appear neutral, it could 'in fact be racially discriminatory'.²⁹⁰

Furthermore, in *S v Jordan*²⁹¹, the court acknowledged that 'in many situations it will be easier to establish the fairness of indirect discrimination than that of direct discrimination'.²⁹² This is because the 'injury... to the members of the group on whom the measure happens to target may be less severe than if they had been targeted by direct discrimination'.²⁹³ When indirect discrimination is alleged, evidence which proves the discriminatory effect of the law or action will need to be adduced as it may not be immediately

²⁸⁹ *City Council of Pretoria v Walker* supra note 287 para 31.

²⁹⁰ *Ibid* para 32.

²⁹¹ *S v Jordan* 2002 (6) SA 642.

²⁹² *Ibid* para 67. In *Jordan* the majority and minority differed on whether indirect discrimination had taken place. The case concerned, *inter alia*, whether s20(1)(aA) of the Sexual Offences Act 23 of 1957 was unconstitutional as it indirectly discriminated against women on the basis of gender. It was argued that, as the majority of sex workers are women, by only prosecuting the solicitor of sex for money and not the client, the provision had the effect of discriminating against women. The court split 5 to 6 with the majority finding that no indirect discrimination had taken place. According to the majority, in terms of both the common law and the Riotous Assemblies Act 17 of 1956, the customer commits an offence, with the Riotous Assemblies Act prescribing the same punishment for the customer and the prostitute. That, in practice, clients were not charged with an offence was not a problem with the law but with its enforcement and thus not relevant to the question of whether the s20(1)(aA) of the Sexual Offences Act was unconstitutional.

²⁹³ *Ibid*.

apparent (as it is with direct discrimination).²⁹⁴ My thesis takes the primarily position that non-recognition of a third gender is direct discrimination - at least in terms of formal registration of one's gender identity on passports, birth certificates and the like. However, non-recognition of a third gender could also lead to indirect discrimination, one example being in terms employment equity. Employment equity is used as a means to uplift previously disadvantaged designated groups, primarily in employment and procurement. As non-binary persons are not identified as a designated group due to the fact that they are not recognised in law, they do not qualify for employment equity status. This is but one of many examples one could find of indirect equality resulting from non-recognition of a third gender.

The deciding factor in the determination of unfairness is the impact the discriminatory law or measure has against a person. The Constitutional Court has listed factors which can be taken into account in an unfairness enquiry, however, this is not a closed list and other relevant factors could also be taken in account. The Court must take into account:

'(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. In *Hugo*, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair;

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.²⁹⁵

²⁹⁴ With direct discrimination, the discrimination is overt and thus obvious to all parties. Limited evidence is thus needed to prove said discrimination. With indirect discrimination, the discrimination is not overt, but it is rather the impact which is discriminatory, hence evidence may need to be led to prove said discriminatory effect.

²⁹⁵ *Harksen v Lane* supra note 277 para 50.

Thus, the court must look at the position of the victim in society and whether they form part of a previously disadvantaged group, the purpose of the statute or provision and whether the discrimination has impaired the victims' dignity.²⁹⁶ In essence, a sort of proportionality analysis is undertaken by the courts. If the person is previously disadvantaged, the court will be more inclined to find that the discrimination has been unfair. Looking at the position of the complainant in society has to do with redressing the inequalities of the past. In this sense 'the discrimination on a complainant is gauged against the background of a history marked by racialism, racism and sexism'.²⁹⁷ This therefore connects to the concept of substantive equality. Courts have thus looked at the former vulnerability of particular groups within the South African context. Factors which are indicative of vulnerability are past patterns of disadvantage and subordination, being a member of a minority group in South Africa as well as where the complainant is part of a group which is subjected to stereotyping and bias.²⁹⁸

Homosexuals, both male and female, have been identified as such a vulnerable group who are more susceptible to discrimination. I argue here that transgender individuals, having less protection and rights even than homosexual persons, are more vulnerable than lesbians and gays and thus would also fall under the Court's definition of a vulnerable group.

As I stated, it must be noted that the *Harksen* test does not prescribe a closed list of factors which can be taken into account in determining whether discrimination is fair or unfair. As the jurisprudence relating to equality develops, more factors may be identified as relevant in the determination of unfairness.²⁹⁹ When assessing the unfairness of an action or provisions 'the factors have to be assessed "objectively", taking into account their cumulative effect in order to come to a conclusion whether the discrimination has been fair or not'.³⁰⁰

5.6 *Is the non-recognition of a third gender unconstitutional?*

Drawing together the discussion that has already been undertaken, my discussion now turns to an application of the law to the particular issue at hand, namely whether the non-recognition of a third gender is in breach of the constitutional guarantee to equality. The following sections address first whether there is unfair discrimination on a listed ground, whereafter I consider

²⁹⁶ *Hoffmann v South African Airways* supra note 282 para 27.

²⁹⁷ Rosaan Kruger 'Equality and unfair discrimination: refining the Harksen test' (2011) 128 *S. African. L. J.* 479 at 491.

²⁹⁸ *Ibid* at 493.

²⁹⁹ Pierre de Vos 'Equality for all: a critical analysis of the equality jurisprudence of the Constitutional Court' (2000) 63 *THRHR* 62 at 74.

³⁰⁰ *Ibid*.

whether there is an argument to be made for unfair discrimination on an unlisted (analogous) ground.

5.6.1 Unfair discrimination on the listed ground of sexual orientation.

As stated in Chapter 2.6, sexual orientation and transsexualism are not the same. Sexual orientation relates to who a person is sexually and physically attracted to, while transsexualism relates to a person's gender identity. However, as previously noted, this distinction seems to have been overlooked by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister for Justice*.³⁰¹ By stating that the term sexual orientation is wide enough to include transsexuals, the Court effectively pronounced that a transgender person who has undergone medical or surgical treatment and is therefore a transsexual can claim to be discriminated against on the listed ground of sexual orientation. Thus, taking the Constitutional Courts decision at face value, albeit incorrect, the situation as it currently stands is that transgender persons who have undergone medical or surgical treatment (and thus to whom the Alteration of Sex Act applies) can claim that non-recognition of a third gender constitutes discrimination based on sexual orientation. Then as a listed ground, this discrimination is presumed to be unfair and the onus will fall on the State to prove that it is not. When looking at the factors which a Court will take into account in determining fairness, it is difficult to conceive of a situation in which the discrimination would be found to be justified.³⁰² Firstly, transgender persons occupy a position as a vulnerable group, with their dignity often being infringed, and them being the subject of much prejudice due to society's misunderstanding of their place in a binary society and of their orientation. It is arguable that they occupy an even more vulnerable position than homosexuals, who have been the subject of much human rights jurisprudence. Secondly, denying them the right to be recognised as a third gender denies them

³⁰¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73.

³⁰² It should be noted that of the factors which the court would need to consider, international law and foreign law would need to be taken into account. As stated in Chapter 3.7, section 39(1) of the Constitution states that courts 'must consider international law' and that they 'may consider foreign law'. In s39(1), no distinction is made between binding and non-binding international instruments. See *S v Makwanyane* op cit note 175 para 34. For more on non-binding instruments see *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC). However, there have been questions as to how much weight a court should place on international law. Furthermore, s223 of the Constitution states that 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. It is thus submitted that the *Yogyakarta Principles* and *Yogyakarta +10* detailed in Chapter 3.7, although not binding, must be considered by the Court in interpreting the right to equality and the right to dignity, as representative of the current status of international principles on transgender rights and freedoms. These principles must further be used when interpreting the legislation outlined in Chapter 3 in order to ensure that the laws are as consistent as possible with this international legal instrument. See further the reference to these principles in the case of *September v Subramoney* supra note 3.

their very identity and infringes on their dignity. This absence in the law does not seek to achieve a worthy societal goal or bring about equality. It is hard to think of a legitimate reason for denying transgender binary individuals the right to be legally recognised as a third gender, but I return to this question in more detail in Chapter 5.7 below.³⁰³ Thirdly, as established in Chapter 1, their fundamental rights are routinely infringed through a denial of their orientation in various ways and in various settings. I conclude that the factors underlying unfair discrimination would be easily established.

But, in case the Constitutional Court reneges on their previous statement that sexual orientation is wide enough to include transsexuals, or comes to a better and more nuanced understanding of the crucial distinctions I explained in Chapter 2, it is necessary for me to determine whether unfair discrimination could be found on another ground not listed in s9(3).

5.6.2 *Unfair discrimination on the analogous ground of gender identity.*

As previously stated, if one claims that there is indeed discrimination which is occurring on a ground not listed in the Constitution, it will need to be proved as a ground analogous to one of the listed grounds. The specified grounds have a commonality, namely that they:

‘have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features’.³⁰⁴

Hence, the grounds which are listed ‘relate to attributes or characteristics that impact on human dignity’.³⁰⁵ Analogous grounds should therefore also have these features and there will need to thus be a similar impact to those found contained in the listed grounds for the court to find in favour of an analogous ground being present. Unspecified grounds should be ‘measured against the specified grounds and a wide-ranging approach should be followed’.³⁰⁶

Gender non-conforming persons’ expression of their gender identity has been used to oppress and marginalise them in society. They are often subject to violence, seen as ‘less than’ gender conforming persons, and stigmatised. Furthermore, gender identity is an expressive dimension of human life. Measured against the specified grounds, expression of gender identity

³⁰³ For more, see Chapter 5.7 below.

³⁰⁴ *Harksen v Lane NO* supra note 277 para 49

³⁰⁵ Tembeka Ngcukaitobi op cit note 263 at 236.

³⁰⁶ Marie McGregor & Wilhelmina Germishuys ‘The taxonomy of an “unspecified” ground in discrimination law’ (2014) 35(1) *Obiter* 94 at 95.

of gender non-conforming persons thus shares many of the characteristics of the specified grounds and can consequently be found to be analogous to those grounds listed in the Constitution. Furthermore, with the German Constitutional Court finding that gender identity is an essential element of their right to personality, and personality and identity being essential elements of dignity as established by South African case law, the argument for gender identity to be found to be an analogous ground to those found in the equality clause is strengthened. When gender identity is infringed, their innate sense of who they are and by implication their dignity is infringed. It is difficult to see how this would not amount to unfair discrimination based on their gender identity not conforming to outdated, societal ideas about how gender being binary.

In the German Constitutional Court case, the Court found that not allowing a person to be registered as a third gender also discriminated against on the basis of sex. Although article 3(3) of the Basic Text only specifically mention males and females, the court found that the article equally applied to person who identify as neither male or female.³⁰⁷ This was found despite the fact that the drafters of the Basic Text in 1949 probably never conceived the notion of a third gender. Furthermore, the argument that amendments to the Basic Text failed to include gender identity in article 3(3) was rejected by the Court, with the Court stating that gender identity was included under sex.³⁰⁸ If these arguments are accepted, it could thus also be proved that gender identity is analogous to the listed ground of sex.

The impact of the differentiation that is taking place based on the analogous ground must be determined by the court. The same factors which are taken into account by the court in a determination of unfairness on a listed ground will similarly be taken into account in the determination of unfair discrimination on an analogous ground.³⁰⁹ It is for the same reasons set out in 5.5.1 above which lean toward a finding of unfair discrimination. Specifically, transgender persons are vulnerable members of society, subject to much prejudice and stigmatisation. In *Hoffmann v South Africa Airways*, persons suffering from HIV were found to be a vulnerable group due to, *inter alia*, the victimisation, prejudice and stigmatisation they suffered at the hands of the public.³¹⁰ Transgender persons are frequently shunned by their families. They are often overlooked for employment opportunities, lose their jobs as a result of

³⁰⁷ 1 BvR 2019/16 supra note 6 para 56 and 68.

³⁰⁸ Ibid para 62.

³⁰⁹ These were the factors outlined in *Harksen v Lane* supra note 277. The case dealt with discrimination on the basis of marital status which was not a listed ground under the Interim Constitution.

³¹⁰ *Hoffmann v South African Airways* supra note 282 para 28.

expressing their gender identities in the workplace, or are forced to live according to the gender they do not conform with/ hide their gender identities in order to prevent them from losing their jobs. They are a misunderstood group in society, with many groups within society seeing them as ‘lesser’ due to them being seen as ‘different’. I therefore submit that there will be a similar finding here that they constitute a vulnerable group.

Moreover, in terms of the requirement that one needs to adduce an ‘appropriate comparator’, I submit that one need only look toward every person who identifies with the gender assigned to them at birth, namely cisgender persons. Additionally, I argue, there is a better comparator in the form of transgender persons whose gender identity corresponds to the binary male or female.

With reference to the quoted text from *Harksen v Lane* cited earlier in this subsection, it is submitted that gender identity is not an ‘immutable biological attribute or characteristic’ but it definitely does constitute an associational aspect of the life of a non-binary transgender person, It in informs by which pronoun they are called, which bathroom they use, how they are seen by others and how they are able to associate in society generally.

There is no worthy societal goal which denying persons their gender identity seeks to serve. There are no advantages to forcing non-binary transgender persons from being recognised according to their gender identity, with no benefit from the law as it currently stands and non-binary transgender persons being disadvantaged. Lastly, as was found in Chapter 4, their fundamental dignity is often infringed.

Thus, it can be seen that unfair discrimination can be found on both the grounds of sexual orientation and on the analogous ground of gender identity.

5.7 s9(3), S36 and the Limitation Analysis

In order for s36 to apply, there must first be a law of general application. This is expressly stated by s36(1):

‘(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors...’

While one may contend that there is no law which allows for the recognition of a third gender, so there is no infringement imposed by a law of general application. In what follows, I put forward arguments to substantiate (in the alternative) the recourse to the limitation’s analysis.

5.7.1 *Infringement by Omission*

I contend that the law as it stands inherently infringes on the rights non-binary transgender persons due to the omission in law to allow for a third gender. Laws (as discussed in Chapter 3 of this thesis) which apply to the gender binary of male and female apply generally to the public at large, and thus an omission in these laws would be subject to a s36 analysis. This is supported by the Constitutional Court which has found that the absence of a specific provision or law may also qualify as a law of general application. In *J v Director General, Department of Home Affairs*³¹¹, the Court found that the provisions of the Children's Status Act 82 of 1987 infringed on the applicants' constitutional rights because it failed to provide for the partner in a lesbian homosexual relationship to be registered as the parent of the baby born to her partner. This was deemed to be an unfair limitation on her right to not be discriminated against on the basis of sexual orientation and marital status. Similarly, in *Du Toit and Another v Minister of Welfare and Population Development*³¹², the Court also found that the absence of provisions allowing for the joint adoption of children to unmarried same sex partners constituted discrimination on the basis of sexual orientation, as the applicants were precluded from marrying by virtue of being in a homosexual relationship. In both these cases it was the absence of an inclusionary law which applied to the general public which was found to have been limiting of the respective rights of the applicants.

5.7.2 *Common Law*

I contend further that the categorisation of gender into the binary male and female is a construct of the common law. In the common law of marriage, for instance, only marriage between males and females are recognised.³¹³ Similarly, the statutory distinction between the age of consent to marriage of girls and boys is based on the common law distinction of their respective capacity to act which is in turn based on a binary understanding of gender. Of course, it could be argued that the common law division into two genders is based on canon law. While it is not possible in the scope of this thesis to develop this argument fully, if it were to be accepted that the distinction between male and female (only) is rooted in common law, then it would be

³¹¹ *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC).

³¹² *Du Toit and Another v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC).

³¹³ In *KOS v Minister of Home Affairs* supra note 160, Binns-Ward AJ held that the Marriage Act of 1961 governed only solemnization and registration of marriages whereas the other consequences of marriage were governed by common law. See para 81.

incumbent on the courts to develop the common law to address the unconstitutional lacuna brought about by the non-recognition of a third gender.³¹⁴

5.8 Limitations Analysis: could the state justify the infringement?

As it is the core rights of dignity and equality which are alleged to be infringed, the arguments put forward by the state will need to be strong. Once it is shown that there has been an infringement in a law of general application,³¹⁵ for said limitation to be found to be justified a proportionality test will need to be undertaken to see if said limitation is reasonable and justifiable.³¹⁶ S36 itself sets out factors the courts can take into account in the determination of whether a rights violation is justifiable, namely:

- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.’

In *S v Bhulwana*,³¹⁷ the Court, summarising this approach which was set out in *S v Makwanyane*,³¹⁸ stated that:

‘The Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into the fundamental rights, the more persuasive the grounds of justification must be’.³¹⁹

The state could put forward the following arguments in order to justify the limitation on the right to dignity as well as the right to equality. Firstly, it could be argued by the Department of Home Affairs that the computer systems would not be able to cope with processing a new sex/gender. This argument would most probably fail, as the inability of computer systems to manage processing is not an excuse for the violation of rights.³²⁰

³¹⁴ By way of example, in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* Case CCT/320/17 (at the time of writing yet to be reported), the Constitutional Court ruled that the common law defence of reasonable chastisement was incompatible with s10 as well as s12(1)(c) of the Constitution.

³¹⁵ The laws of general application relevant to the recognition of a third gender include, *inter alia*, the Alteration of Sex Act, the Identification Act, the Births and Deaths Registration Act, The Marriages Act, The Recognition of Customary Marriages Act and the Civil Unions Act.

³¹⁶ Pierre de Vos & Warren Freedman ‘The Limitation of Rights’ in Pierre de Vos and Warren Freedman (eds) *South African Constitutional Law in Context* (Juta 2014).

³¹⁷ *S v Bhulwana* 1996 (1) SA 388 (CC).

³¹⁸ *S v Makwanyane* supra note 175.

³¹⁹ *S v Bhulwana* supra note 317 para 18.

³²⁰ See *Kos and Others v Minister of Home Affairs* supra note 160. In *Kos*, it was noted that altering the sex of a person who was married under the Marriage Act would ‘confuse the [computer] system’ and that the system

Secondly, the state could argue that the cost of recognising a third gender would be too burdensome for the state to bear. The likely costs would include amending legislation, creating new computer programs, issuing new identity documents, creating new bathrooms in public spaces and so forth. This is not an exhaustive list. If the Department of Home Affairs would argue that the cost is too burdensome, as it did in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offender (NICRO) and Others*³²¹, it would need to prove that there is proper justification for limiting the right to equality. A limitations analysis would thus kick in, including looking at whether there are less restrictive (and with the costs argument, cheaper) means to achieve this purpose. For instance, by enacting a law of general application which amends all other legislation by recognising a third gender and places a duty on the state and institutions to progressively realize this new gender through, for example, the staggered creation of infrastructure (such as gender-neutral bathrooms). Further, since the issuing all identification documents after the first one has to be paid by it is submitted that the cost to the state would be negligible as it would be the applicants themselves who bear the cost. Lastly on the argument that the computer systems which capture details of the population would need to be amended, the Department of Home Affairs has already been instructed to ‘update’ the programmes used in *KOS v Minister of Home Affairs*.³²² As an instruction to change the program was given to them by the High Court, any arguments that a system change is unfeasible would realistically not pass muster.

It is submitted that the cost of recognising a third gender is not a justification for the violation of the right to equality, or would at least be hard to prove empirically, especially when considering the right to equality is one of the foundational values of the Constitution. Therefore

would not allow one of the applicant’s alteration of sex as they were married in terms of the Marriage Act. See para 46 and 60.

³²¹ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offender (NICRO) and Others* 2005 (3) SA 280 (CC). The case centred around the Electoral Law Amendment Act, which effectively deprived convicted prisoners who were serving prison sentences without the option of paying a fine the right to vote in the National Elections. One of the arguments put forward by the State was that it would be too costly to set up mobile registration and voting stations to accommodate prisoners. The Court noted that the right to vote is fundamental in South Africa, due to its past of disenfranchisement. Provision was made for awaiting trial prisoners and those who were serving a sentence with the option of a fine, but were in prison due to the fact that they could not afford said fine. The Department of Home Affairs gave no indication of the actual costs which would be involved in allowing those excluded from registering to vote and from voting to support the assertion that the costs were too burdensome. For this and other reasons the Constitutional Court ordered that those prisoners who were disenfranchised be allowed to register and vote in the elections.

³²² *KOS v Minister of Home Affairs* supra note 160.

‘the burden of justifying the limitation falls at the first hurdle and it is not necessary to engage in the proportionality analysis that would have been necessary’.³²³

Thirdly, it could be argued that the recognition of a third gender is not enough, as it does not cater for those who do not feel as though they identify with said third gender. As was explained in chapter 2, there are multiple genders and gender identities. By forcing non-binary individuals into a third gender, they are still being boxed into a category they may feel they do not identify with. They may prefer to identify as genderless, with no gender marker on their records. It is, however, submitted that while the recognition of a third gender may not be sufficient to facilitate the accommodation of everyone, it is a step towards a more inclusive society which views gender as more fluid.³²⁴ This would follow the Dutch Court’s judgment, allowing a non-binary individual to register their gender as ‘gender cannot be determined’³²⁵ and the German Constitutional Courts ruling that gender may be registered as ‘indeterminate’.³²⁶

It is thus submitted that given that the rights to dignity and equality are fundamental rights, the limitation to the rights have no purpose, that the extent of the limitation to the right to dignity and equality are immense, with gender identity and sexual orientation being fundamental to a person’s sense of self and their dignity, and that there is no relationship between limitation and its purpose, reliance on the limitations clause would fail. As there is no purpose to the infringement, there cannot be any less restrictive means to achieve it. The infringement of rights could therefore not be justified.

5.8.1 Challenges to specific legislation

In the alternative to the above two proposals, it could be alleged that specific legislation which manifestly refers to the binary male and female is unconstitutional as a result of its under-inclusivity. An obvious case in point is the Births and Deaths Registration Act (as was discussed in Chapter 3) which does not allow a child to be registered at birth outside of male or female. As noted in Chapter 1.2 this has already been decided by courts in Germany and the Netherlands. The respective pieces of legislation which could be challenged on constitutional grounds for their under-inclusivity include the Alteration of Sex Act and the Identity Act, for example.

³²³ *Minister of Home Affairs v NICRO* supra note 321 para 51.

³²⁴ See Chapter 2 where the varieties of gender identities are discussed in detail.

³²⁵ ECLI:NL:RBLIM:2018:4931 supra note 7.

³²⁶ 1 BvR 2019/16 supra note 6.

5.9 Conclusion.

The equality clause has been used to redress the inequalities of our past, allowing for a society built on non-discrimination and equality of opportunity to grow. It has further been an important tool to give rights and recognition to vulnerable groups who have been misrepresented or not represented at all.

S9(3) is the Constitutional provision to be utilised when it is alleged that legislation is discriminatory. Discrimination can occur on a ground listed in s9(3) or on a ground which is unlisted (a so-called analogous ground). It is submitted that non-recognition of a third gender violates the equality clause on both the listed ground of sexual orientation and analogous ground of gender identity. Although transsexualism and sexual orientation are two different things (as explained extensively in Chapter 2.6), due to the Constitutional Court erroneously conflating the two concepts, transgender persons can now claim that they are protected by the listed ground of sexual orientation in 9(3). It is further submitted that should the Constitutional Court renege on this classification, transgender persons could claim discrimination on the analogous ground of gender identity. This is due to the detrimental impact of being denied a true expression of their gender identity. Due to their position as a vulnerable group, it is inconceivable that the limitations to their rights could be justified by the State.

It can thus be concluded that non-binary transgender individual's right to equality and right to non-discrimination is being severely infringed by the state not recognising their gender identity.

In the concluding chapter that follows, the main conclusions of this thesis will be drawn together in order to address the research question posed in chapter 1. Finally, recommendations for reform will be proposed.

CHAPTER 6 – CONCLUSION

In this thesis, I sought to determine whether South Africa should recognise a third gender for non-binary transgender individuals, in line with the Constitution's commitment to equality and dignity. In other words, does the non-recognition of a third gender for non-binary transgender persons violate their right to dignity and equality as enshrined in the Constitution?

In Chapter 1, it was noted that the option of a third, neutral gender marker has become available for those who do not identify as either male or female in many foreign jurisdictions in recent years. This raises the question whether South Africa should follow suit. Chapter 1 further outlines the lived realities of transgender individuals and how their rights are infringed daily. This discussion demonstrates the relevance of this research in South Africa.

Chapter 2 provides a conceptual framework for this thesis. How a person chooses to classify themselves is part of how they want society to identify them, and this contributes to their identity. Sex, gender and sexual orientation are foremost distinguished from one another. Sex is traditionally understood as the biological differences between men and women. Gender, on the other hand, is generally understood as being a social construct in that it is how cultures and societies classify men and women based on behavioural, social and psychological characteristics. Despite common understandings of sex and gender as inherently distinct, there are those now who argue that sex is similarly a social construct.

Gender identity is how a person identifies themselves as opposed to how society believes they should present themselves. While there are some who believe it is also a social construct; I conform to the belief that gender identity is innate and not influenced by the view of society. Sexual orientation and gender identity are not the same thing, despite often being conflated. The distinction between cisgender, transgender, transsexual and trans is also discussed in this Chapter. Importantly here, it is noted that in *National Coalition for Gay and Lesbian Equality v Minister of Justice*³²⁷, the Constitutional Court erred, lumping transsexualism as a sub-category of sexual orientation, despite transsexualism not being a sexual orientation. This erroneous categorisation has implications for my discussion of unfair discrimination in Chapter 5. Lastly, the terms non-binary, binary, gender queer and gender fluid are defined.

In Chapter 3, I explored the legislation which I deemed most applicable to this thesis. The pieces of legislation I chose were those which directly impact the lives of transgender persons at present, along with those which would be most directly affected should a third

³²⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73.

gender be recognised. I discuss the Alteration of Sex Act, which was enacted in 2003 largely as a result of increasing litigation against the Department of Home Affairs. The Alteration of Sex Act allows transgender and intersex persons to change their identity documents in order to reflect their true gender identity as opposed to the gender that was assigned to them at birth. As the Alteration of Sex Act makes provision for applicants to have had surgical or medical treatment, gender reassignment surgery is not a requirement, meaning those who have chosen to opt for other medical treatment such as hormone therapy are not excluded from the Alteration of Sex Act's application. The language used in the Alteration of Sex Act is problematic in that it does not make provision for non-binary transgender individuals. It thus assumes that sex is binary.

Chapter 3 further considers the Identification Act 68 of 1997. The Identification Act, *inter alia*, regulates the population register and the issuing of identity cards. However, I submit that the language used in the Identification Act is problematic as it refers only to the gender specific pronouns 'he' and 'she' and not gender neutral terms 'they' and 'them', thereby upholding the notion of gender as binary and linked to a person's sex. I submit that allowing for a gender neutral gender marker (a 'third gender') in terms of the Identification Act would address many real concerns I raised in this Chapter.³²⁸

I next examine the Births and Deaths Registration Act 51 of 1992. I find that the language used in the Births and Deaths Registration Act is predominantly gender neutral. The only reference to gender pronouns is in chapter IV, with the Births and Deaths Registration Act exclusively referring to male gender pronouns. As it is unlikely that these provisions only apply to males, I submit that any reference to one gender applies equally to the other gender. As a result of the above, I argue that there is no impediment to the Births and Deaths Registration Act also applying, without amendment, to any other gender(s) which become legally recognised.

Legislation regarding solemnisation of marriages is subsequently analysed. The Marriage Act 25 of 1961 regulates civil and religious marriage between opposite sex couples. The Recognition of Customary Marriages Act 120 of 1998 regulates marriages concluded in terms of customary law. The Civil Union Act 17 of 2006 regulates civil marriages and civil partnerships between two people, whether they are of the opposite sex or the same sex. The issue with the legislation listed above is that no provisions are included relating to what should happen if one party to a marriage alters their gender in terms of the Alteration of Sex Act.

³²⁸ See Chapter 3.4.

While not an issue for civil partnerships, if a couple has entered a marriage in terms of the Marriage Act, the effect of one spouse altering their sex would be that both parties to the marriage are the same sex. This is not permitted in terms of the Marriage Act. The Department of Home Affairs held that they cannot change the sex of a person altered under the Marriage Act in terms of the Alteration of Sex Act for this very reason, which led to the 2017 case of *Kos v Minister of Home Affairs*.³²⁹ I submitted that while this case was a victory for transgender individuals in South Africa, it demonstrates the problems that are faced by transgender individuals in this country.

Furthermore, all legislation which regulates marriage in South Africa is binary orientated and thus not inclusive of non-binary persons. Non-binary individuals are thus essentially ‘left out’. I therefore propose that if a single marriage statute, as has been the subject of discussion, be enacted in South Africa, it should endeavour to be gender neutral so as not to exclude those members of society who identify as non-binary.

Chapter 3 ends with a brief look at the *Yogyakarta Principles*. Principle 2 is ‘the right to equality and non-discrimination’.³³⁰ It essentially asks States to ensure that persons are not discriminated against on the basis of their sexual orientation or gender identity, and to take any measures which may be necessary to ensure those with ‘diverse sexual orientations and gender identities’ are advanced.³³¹ They recommend that States take the necessary steps to enable a person’s ‘self-defined gender identity’ to be reflected on all identification documents.³³² 11 years after the adoption of the *Yogyakarta Principles*, the *YP+10* were adopted in order to supplement the original 29 principles and ensure that they reflect the developments which had occurred both in international law and in the human rights violations which affected persons of diverse sexual orientation and gender identity.³³³ I deem principle 31 to be the most valuable to this thesis. Principle 31 is ‘the right to legal recognition’ and, in order to achieve this right, it is recommended that, while States continue to require sex or gender to be registered, they ensure that ‘a multiplicity of gender marker options’ are made available.³³⁴ Furthermore, there should be no eligibility criteria which must be met in order for a person to change their legal

³²⁹ *KOS v Minister of Home Affairs* supra note 160.

³³⁰ *Ibid* at 10.

³³¹ *Ibid* at 11.

³³² *Ibid* at 12.

³³³ *Op cit* note 171 at 4.

³³⁴ *Ibid* at 9.

sex or gender.³³⁵ Although only a set of principles and thus non-binding international law, I contend that the *Yogyakarta Principles* and the *YP+10* are relevant to South African jurisprudence by virtue of s39(1) of the Constitution and am bolstered by their recent citing as authority in *September v Subramoney*.³³⁶ S39(1) of the Constitution requires courts to consider international law when interpreting the Bill of Rights, and the Constitutional Court has stated that this encompasses both binding and non-binding international law. I therefore submit that the *Yogyakarta Principle* and the *YP+10* are instrumental to the interpretation of the Bill of Rights, insofar as it is alleged that the rights of gender diverse persons are infringed, not adequately protected, or that rights are not sufficiently inclusive of gender diverse persons such as those who identify as non-binary.

In Chapter 4, I discuss the both the value of dignity and the right to dignity as is enshrined in the Constitution and, more importantly, whether the non-recognition of a third gender violates non-binary transgender persons' right to dignity. In its judgments, the Constitutional Court has defined dignity as, *inter alia*, 'a person's feeling of self-worth',³³⁷ 'as acknowledgement of the intrinsic worth of human beings',³³⁸ and as 'value[ing] both the personal sense of self-worth as well as the public estimation of the worth or value of an individual'.³³⁹

Section 10 of the Constitution states that 'everyone has inherent dignity and the right to have their dignity respect and protected'. Section 3 of Chapter 4 (4.3) looks at the interrelatedness of dignity and equality. The connection between these two rights has been confirmed by the Constitutional Court. It is dignity which often informs whether the right to equality has been infringed, with Courts looking for the presence or absence of violations of dignity in their determination of whether unfair discrimination has occurred. However, although the central argument put forward in my thesis is that non-recognition of a third gender violates the equality clause, as is discussed in detail in Chapter 5, it has been held that when other rights in the Bill of Rights are breached, it is often the case that the value of dignity is similarly offended.³⁴⁰ Further, the right to dignity plays an import role in rights infringement

³³⁵ Ibid.

³³⁶ *September v Subramoney* supra note 3.

³³⁷ *Le Roux v Dey* supra note 183.

³³⁸ *S v Makwanyane* supra note 175.

³³⁹ *Khumalo v Holomiso* supra note 185.

³⁴⁰ *Dawood v Minister of Home Affairs and Others* supra note 215 para 35.

litigation and adjudication, in that where there is no specific right which is infringed, the right to dignity may be invoked. In these cases, the right to dignity will be the primary right as opposed to dignity being a supplementary value to other primary rights.³⁴¹ Hence, I argued that should my primary argument not succeed, it would be pertinent to rely on dignity jurisprudence to advance my case.

I submit that, as this thesis looks at the constitutionality of a third gender through the lenses of both dignity and equality, the relationship between these two rights is important. My finding that there is an infringement of non-binary transgender persons' right to dignity affects my further examination into whether they are further being unfairly discriminated against.

Section 4 of Chapter 4 (4.4) explores dignity in its relationship to the right to identity. I submit that factors which diminish a person's sense of self-worth will necessarily influence their dignity, such as the 'ability to achieve self-identification and self-fulfilment'.³⁴² The ability to freely develop one's personality is further considered as an element of the right to dignity. Should a person be prevented from achieving personal fulfilment, their right to dignity will be infringed. A person's chosen gender identity is integral to how they identify themselves. The German Constitutional court judgement which confirms that only recognising the binary male and female genders constitutes an infringement to the dignity of person's who identify as non-binary is subsequently discussed. In the case, the German Constitutional Court found that the right to personality, as is found in the German Basic Law, was infringed. They held that 'the assignment of gender is of paramount importance for individual identity'.³⁴³ I submitted that the factors which led the German Constitutional Court to find that there had been an infringement of the German right to personality would similarly motivate for a finding that the South African right to dignity has been infringed, and provided justification for adducing German law. As a result, I argued that non-recognition of a third gender is a violation of non-binary transgender person's right to dignity.

The final substantive chapter of my thesis, Chapter 5, looks at s9 of the Constitution, which guarantees the right to equality and prohibits unfair discrimination. In this Chapter I argued, and subsequently concluded, that the failure of South African law to provide for the recognition of a third gender constitutes unfair discrimination in breach of s9 of the

³⁴¹ Ibid. In the case, the Court found that as there was no specific Constitutional provision which protected family life, the primary right which was to be relied upon was the right to dignity.

³⁴² *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra note 73.

³⁴³ 1 BvR 2019/16 supra note 6 para 39.

Constitution. I noted that, as with dignity, equality is both a right and a value in the Constitution. As a value, equality is ‘core and foundational; a standard which must inform all law’.³⁴⁴ As a justiciable right in the Bill of Rights, the right to equality serves to prohibit unfair discrimination and to ensure ‘the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of a particular group’.³⁴⁵ The importance accorded to equality in South Africa is a result of the country’s apartheid regime which systematically entrenched inequality between racial groups.

I further discussed the differences between formal and substantive equality. I noted that formal equality merely requires equality of treatment. It is thought that if all persons in a society are given equal rights, then equality will be achieved. Substantive equality, however, requires that a person’s circumstances be taken into consideration. It is justified if people are treated differently if this difference in treatment will lead to a more equal society. Our Constitution requires a substantive approach to equality.

I next explained how a claim of unfair discrimination in terms of s9(3) of the Constitution is addressed by the Courts, so that this can be used to analyse whether discrimination is taking place against transgender persons who identify as neither male nor female. This discussion is set out in Chapter 5.6. S9(3) prohibits the State from unfairly discriminating against any person on any ground, including the grounds listed thereunder. However, it is only unfair discrimination which is prohibited and not simply mere differentiation between persons. It is when this differentiation amounts to unfair discrimination, that there is a violation of the right to equality generally and the right to not be unfairly discriminated against specifically.

Discrimination on a ground listed in s9(3) is automatically presumed to be unfair discrimination. If not on a listed ground, the question of whether there has been unfair discrimination will ‘depend on upon whether, objectively, the ground is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human being, or to affect them adversely in a comparably serious manner’.³⁴⁶ Non- listed grounds of discrimination are called analogous grounds. In order to prove the presence of an analogous ground a claimant should present a comparator, that is, a group who are advantaged or are treated better than the claimant in the circumstances in question. In Chapter 5.8, I suggested

³⁴⁴ *Minister of Finance v Van Heerden* supra note 247 at 22.

³⁴⁵ *President of the Republic of South Africa v Hugo* supra note 250 at 117.

³⁴⁶ *Harksen v Lane* supra note 277 at 50.

two possible comparators, namely, cisgender persons and transgender persons who identify as male or female (binary). If discrimination is alleged on an analogous ground, there is no presumption of unfairness. Thus, the claimant will need to prove to both that there is discrimination and that the discrimination is unfair. This can make discrimination claims on analogous grounds harder to prove.

In my breakdown of s9(3), I lastly looked at what factors are considered in an unfairness enquiry. The determining factor is ‘the impact of the discrimination on the claimant’.³⁴⁷ Factors to be considered in determining whether the discrimination has impacted the claimant unfairly include: the claimants’ position in society and if they are part of a group of persons who have suffered from disadvantage in the past; the nature and purpose sought to be achieved by the provision or power in question; and whether the discrimination has impaired the complainants fundamental human dignity. This is not a closed list of factors. I submitted that transgender persons fall within the Court’s definition of a vulnerable group in that they have suffered past patterns of disadvantage, they constitute a minority in South Africa and are subject to stereotyping and bias.

Gender non-conforming persons’ expression of their gender identity has been used to oppress and marginalise them in society. They are often subject to violence, seen as ‘less than’ gender conforming persons, and stigmatised. Furthermore, gender identity is an expressive dimension of human life. Measured against the specified grounds, expression of gender identity of gender non-conforming persons thus shares many of the characteristics of the specified grounds and can consequently be found to be analogous to those grounds listed in the Constitution. This is despite the Constitutional Courts erroneous pronouncement that transsexualism falls under the umbrella of sexual orientation.

My argument in favour of recognition of a third gender could raise objections by the state in that such recognition is not feasible or affordable and hence is justified. However, as the *September v Subramoney*³⁴⁸ judgment shows, there are ways to accommodate individuals who do not identify as binary which are not unduly taxing on the State.³⁴⁹

³⁴⁷ Ibid at 50.

³⁴⁸ *September v Subramoney supra* note 3.

³⁴⁹ Ibid. See para 161: ‘There are a number of simple measures available to the respondents to achieve the desired outcome without placing extra burdens on their resources...’. *In casu*, the prison authorities were ordered to return to the applicant her female underwear, make-up and jewellery, allow her to wear her long and in feminine styles and to be addressed by a female pronoun.

My final argument relates back to the legislation discussed in Chapter 3. It would not cost much for the state to adopt amendments to existing legislation or to enact new legislation such as a single marriage statute to accommodate non-binary transgender individuals. This hurdle could be overcome through the enactment of a general law of application.

The judgement handed down in *September v Subramoney*³⁵⁰ could be hailed as revolutionary in advancing the rights of transgender persons in our Constitutional dispensation, however, its limitations must not be overlooked. As Fortuin J herself noted:

‘This case is not about whether the binary model used in South Africa should be expanded to include a third gender, i.e. transgender. This binary model is therefore unchallenged and still in force.’³⁵¹

It is precisely the binary model which my thesis has sought to challenge. Using Constitutional arguments, I have shown that the non-recognition of a third gender can indeed be regarded as unconstitutional, in violation of the dignity and equality of those transgender persons who do not identify as male or female.

Specific Legislative recommendations

I recommend the enactment of a General Law of Amendment Act to amend legislation which refers to the binary male and female so that the terminology used becomes gender neutral. This will allow for the inclusion of non-binary individuals. Further, the Alteration of Sex Act must be amended to allow for alteration of one’s sex description without the requirement of undergoing surgical or medical intervention. Persons must be further permitted to alter their sex description to a non-binary and gender neutral terms. The exact term I would leave to the discretion of parliament provided that the choice of term is made in consultation with interested parties. Amendments must be made to the identification Act and the Births and Deaths Registration Act so that a gender neutral sex description can be reflected on all official identification documents.

³⁵⁰ *September v Subramoney* supra note 3.

³⁵¹ Ibid para 159. It must be noted that Fortuin J’s submission that transgender is a gender is incorrect. It is the state of not identifying with the gender ascribed to you and the body you were born into. Many transgender persons who have transitioned no longer want to be referred to as a transgender person (although they may be activist for transgender rights). They want to be recognised as the gender into which they have transitioned, should they identify fully as a binary gender. For others, transition is not about aligning their body with their gender identity, but about ‘moving away from’ the gender they know they are not, and ‘moving out of’ a body which feels wrong. To forever categorise all transgender persons as ‘transgender’ in the eyes of the law would not be appropriate.

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