

DEVELOPING A CONCEPTUAL FRAMEWORK AGAINST DISCRIMINATION ON THE BASIS OF GENDER IDENTITY

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Introduction

The African Commission on Human and Peoples' Rights (African Commission) recently adopted a resolution on the protection of persons against violence and other human rights violations, based on their real or imputed sexual orientation or gender identity.³ The resolution is an important recognition of the need to protect the rights of those marginalised and vulnerable groups within society who are at increased risk of abuse and human rights violations due to their perceived or actual status.⁴

While mainstream media in southern Africa increasingly vilifies and stigmatises persons based on their perceived or actual sexual orientation or gender identity, international and regional human rights bodies and courts have adopted a more nuanced understanding of the rights of persons who face such discrimination.

The United Nations High Commissioner for Human Rights remarked in 2006 that:

Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provide public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights.⁵

This paper examines how courts in various jurisdictions have emphasised the universality of rights – irrespective of a person's sexual orientation or gender identity. The paper focuses on transgender and intersex persons and presents the African philosophical framework of *ubuntu* as a conceptual framework through which the rights of such persons should be respected and protected.⁶

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- 3 Adopted at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April to 12 May 2014, available at <http://www.achpr.org/sessions/55th/resolutions/275/>.
- 4 Statement of the Office of the UN High Commissioner for Human Rights to the International Conference on LGBT and Human Rights, Montreal, 26 July 2006, available at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/B91AE52651D33F0DC12571BE002F172C?opendocument>.
- 5 Statement of the Office of the UN High Commissioner for Human Rights to the International Conference on LGBT and Human Rights, Montreal, 26 July 2006, available at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/B91AE52651D33F0DC12571BE002F172C?opendocument>.
- 6 C Bandawe "Psychology Brewed in an African Pot: Indigenous Philosophies and the Quest for Relevance" (2005) 18 *Higher Educ Pol'y* 289.

Understanding terminology

Society tends to categorise persons based on their sex (male or female), gender (masculine or feminine), and sexual orientation (heterosexual, bisexual, asexual, or homosexual).⁷ The assumption in society is that a person's sex and gender is the same and that a person's default sexual orientation is heterosexual (being sexually attracted to the opposite sex).⁸ Often, there is very little discussion and understanding of what these categories mean, or acceptance that not everyone fits neatly within them and that the categories are, in fact, far more flexible than we perceive them to be.

A person's *sex* is biologically determined – it depends on a person's genetics, hormones, anatomy, and physiology.

Whether a person is classified as male or female at birth depends on whether the predominant anatomical and physiological characteristics of the person, at that time, are either male or female. This is not a simple matter and there are cases when persons have been incorrectly labelled male or female because they presented ambiguous genitalia at birth, or because their sexual and/or reproductive features and organs were not clearly male or female. It is estimated that in about 1 in every 5000 births, the distinction between male and female is not clear.⁹ In such cases, a person is often allocated a specific sex, and it only becomes apparent upon puberty or later that the person also carries biological characteristics of the other sex. Such persons are referred to as being *intersex*.

A person's *gender* is socially constructed. Society tends to ascribe certain roles, behaviours, and attributes to a person, as being either male or female. Over the years, some of these roles and attributes have been challenged. For example, women are increasingly challenging traditional notions of femininity, which preclude them from wearing pants or miniskirts or working in certain sectors – while men are challenging notions of masculinity which absolve or preclude them from playing a more active role in raising their own children.

Gender identity refers to a person's deeply felt internal and individual experience of being male or female and how they choose to fit within society's construction of gender roles and attributes. Often, if a person's sex is male, that person also takes on a gender identity that is, to a greater or lesser extent, masculine. For example, the person might choose to wear clothes or have a hairstyle that corresponds with that society's construction of gender.

In some cases, a person's gender identity is not entirely congruent with their sex. A person can be born a man, but may feel inherently female, and feel unhappy being classified as male. A *transgender* person is someone who has a gender identity that is different from his or her birth sex.¹⁰ A transgender person who has undergone or who wants to undergo medical procedures such as gender-affirming surgery or hormone treatment – so that the body is more aligned to the

7 See "What Do We Mean by 'Sex' and 'Gender'" World Health Organisation, available at <http://www.who.int/gender/whatisgender/en/index.html>.

8 See MD Mambulasa "The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation" in this publication.

9 See M Blackless "How Sexually Dimorphic Are We? Review and Synthesis" (2000) 12 *Am J Hum Biology* 151; K Haas "Who Will Make Room for the Intersexed?" (2004) 30(1) *Am JL & Med* 41.

10 See American Psychological Association *Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression* (2011) 1, available at <http://www.apa.org/topics/lgbt/transgender.pdf>.

gender identity – is sometimes described as a *transsexual*.

Sexual orientation refers to a person's enduring pattern of emotional, romantic, and/or sexual attractions.¹¹ Notably, a person does not choose to be homosexual (attracted to the same sex – gay or lesbian), heterosexual (attracted to the opposite sex – “straight”), bi-sexual (attracted to both sexes), or asexual (not attracted to any sex).¹²

Acknowledging difference

Instead of acknowledging sexual and gender diversity within all societies, many societies respond negatively to persons whose sex, gender, or sexual orientation is perceived to be different from the norm. Gays, lesbians, intersex persons, and transgender persons are at risk of stigma, violence, and persecution in many societies. People – including children – who experience discrimination because of their gender identity, are often alone, lack family support, and are at risk of depression, trauma, and even suicide. Such persons are also more likely to experience difficulties in accessing services, including healthcare services.

Studies show that transgender persons – particularly persons who are born male but present a female gender identity (male-to-female persons) – have a high rate of HIV,¹³ and a high level of risk of HIV transmission.¹⁴ Yet, transgender persons experience significant barriers in accessing healthcare services that are safe, that protect confidentiality, and that respect their dignity.¹⁵

What is important to recognise is that an individual is much more than purely his or her sex, gender, or sexual orientation. For the most part, it should not matter how a person looks or who they are attracted to. Nor does a person's sex, gender identity, or sexual orientation reveal anything about the morality or religious beliefs that the person holds.

The recognition of a human being as a person with inherent dignity is a fundamental tenet of human rights discourse – a discourse rooted in the notion of universality of rights. However, while the right to be treated with dignity and equality is entrenched in international human rights law, it is far from secure. Increasingly, states, politicians, religious leaders, and the media counter the human rights discourse with arguments against the acceptance of persons whose sexual orientation or gender identity is deemed unacceptable. Such arguments claim validity by relying on rhetoric about religious and cultural values, but this rhetoric is often misplaced. Instead of responding to this rhetoric, we seek to put forward an alternative view which suggests a less anachronistic way

11 Definition of the American Psychological Association – see <http://apa.org/topics/lgbt/index.aspx>. The Yogyakarta Principles defines it as follows: “Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.” This latter definition was cited with approval in *Naz Foundation v Government of NCT of Delhi and Others*, 7455/2001 (HC). E Cameron “Sexual Orientation and the Constitution: A Test Case for Human Rights” (1993) 110 SALJ 450.

12 American Psychological Association *Answers to Your Questions for a Better Understanding of Sexual Orientation and Homosexuality* (2008) 2, available at <http://www.apa.org/topics/lgbt/orientation.pdf>.

13 C Beyrer “LGBT Africa: A Social Justice Movement Emerges in the Era of HIV” (2012) 9(3) *J Soc Aspects of HIV/AIDS Research Alliance* 177.

14 GA Jobson *et al* “Transgender in Africa: Invisible, Inaccessible, or Ignored?” (2012) 9(3) *J Soc Aspects of HIV/AIDS Research Alliance* 160.

15 C Beyrer “LGBT Africa: A Social Justice Movement Emerges in the Era of HIV” (2012) 9(3) *J Soc Aspects of HIV/AIDS Research Alliance* 177.

of perceiving each other, while at the same time explaining how this interrelates with a human rights-based approach.

Conceptual framework against discrimination

Despite the variety of different cultures in Africa, there are commonalities that unite the African experience. Philosophers highlight a theme in the African experience that commonly defines the purpose of life and the nature of human conduct – *ubuntu*.¹⁶

The very fabric of traditional African life centres on community and belonging to a community of people. The concept of *ubuntu* is captured in the Sotho saying: “*Umuntu ngumuntu ngabantu*” (a person is a person through persons). In Western philosophy, human identity lies in its individualistic approach, as captured in the philosophy: “I think, therefore I am”. *Ubuntu*, on the other hand, posits, “I am because you are, and because you are, therefore I am”.¹⁷ The communal embeddedness and connectedness of a person to other persons is illuminated by this saying. Hence, the individual is affected by what happens to the whole group, as the whole group is affected by what happens to the individual.¹⁸

It follows then that discrimination against gays, lesbians, transgender persons, and intersex persons violates this concept of *ubuntu*. South African philosopher, Shutte,¹⁹ writes:

The concept of *ubuntu* embodies an understanding of what it is to be human and what is necessary for human beings to grow and find fulfilment. It is an ethical concept and expresses a vision of what is valuable and worthwhile in life.²⁰

A person cannot develop to their full potential when confronted with discrimination. *Ubuntu* asserts, therefore, that any discrimination against a member of the community is discrimination against all. If I discriminate against you, because you are different, I have dishonoured not only you, but also myself and the community. The community’s well-being and mine are dependent on your well-being. Archbishop Tutu writes: “My humanity is caught up, is inextricably bound up, in (yours). We belong in a bundle of life.”²¹ *Ubuntu* encourages us to value others, because in doing so, we value ourselves.

Traditional African morality is known for its concern with human welfare, and hence *ubuntu* also means humanness. South African writer Letseka²² argues that individuals who strive for and fully embrace the notion of *ubuntu* as their goal – are driven by a humanist concern for treating others with fairness, which is crucial to personal well-being. Acknowledging and understanding the difference of transgendered persons, for example, is therefore consistent with the principles of *ubuntu*.

16 See F Diedrich (ed) *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* First Edition (2011).

17 JS Mbiti *African Religions and Philosophy* Second Edition (1989) 219.

18 HJ Sindima *Drums of Redemption: An Introduction to African Christianity* (1994).

19 A Shutte *Ubuntu: An Ethic for a New South Africa* (2001).

20 *Id* 2.

21 DM Tutu *No Future without Forgiveness* (1999) 31.

22 M Letseka “African Philosophy and Educational Discourse” in P Higgs *et al* (eds) *African Voices in Education* (2000) 179.

Entitlement to rights without discrimination

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.²³

The African Charter on Human and Peoples' Rights (ACHPR) is a living example of the tone of *ubuntu*, as discussed above. The ACHPR explicitly provides in article 2 that “*every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.*”²⁴ Article 3 states that *every individual shall be equal before the law and entitled to equal protection of the law.* Articles 4 and 5 emphasise that *every human being is entitled to respect for the integrity of his person and the dignity inherent in a human being and recognition of his legal status.* Similar rights are contained in most national constitutions.

Significantly, the African Commission's resolution on sexual orientation and gender identity, cited earlier, places gender identity and sexual orientation in the list of grounds upon which discrimination is prohibited under article 2 of the ACHPR. This approach was also followed by the United Nations Committee on Economic, Social and Cultural Rights (CESCR), which recognised several other prohibited grounds in a non-exhaustive list.²⁵ These included health status, age, disability, nationality, marital and family status, sexual orientation, and gender identity.²⁶

While some people are quick to retort that discrimination based on sexual orientation and gender identity is not prohibited in national constitutions, comparative jurisprudence suggests a more cogent approach to this question. Courts have recognised that the list of grounds upon which discrimination is prohibited is not a closed list, and that discrimination on analogous grounds is also prohibited.²⁷ The Canadian Supreme Court, for example, explains the thread running through analogous grounds as follows:

[W]hat these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.²⁸

The South African Constitutional Court, in *Hoffmann v South African Airways*,²⁹ explains that

23 Article 28 of the African Charter on Human and Peoples' Rights.

24 Own emphasis in italics.

25 See K Nyirenda “An Analysis of Malawi's Constitution and Case Law on the Right to Equality” and MD Mambulasa “The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation” in this publication.

26 CESCR General Comment No. 20 at paras. 28-35.

27 The Hong Kong Court of Appeal held that sexual orientation is a proscribed ground for discrimination analogous to race and sex. *Secretary for Justice v Yao Yuk Lung Zigo and Lee Kam Chuen* [2007] 10 HKC FAR 335 (CA); *Leung TC William Roy v Secretary of Justice* [2006] 4 HKLRD 211 (CA).

28 *Corbiere v Canada* [1999] 2 SCR 203 at para. 13.

29 [2000] ZACC 17. This case is also discussed in M Mambulasa “The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation” and P Patel “Realising the Full Potential of Civil and Political Rights for Marginalised Populations in African Countries” in this publication.

cases of alleged discrimination require an inquiry into the extent to which the discrimination interfered with the person's inherent dignity:

The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.³⁰

Essential to jurisprudence on equality and non-discrimination, is the notion of universality of rights. The South African Constitutional Court, in *Minister of Home Affairs and Another v Fourie and Another*,³¹ reasoned as follows:

A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society ... The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.³²

Discrimination against transgender and intersex persons and the role of the courts

Discrimination against transgender and intersex persons occurs throughout the world. Such discrimination is largely rooted in ignorance and prejudice. We note a number of recent examples below which illustrate the nature of discrimination faced by transgender persons and the role that the courts can play to ensure redress when their rights have been violated.

Discrimination in Schools

Two cases emphasise the difficulties transgender children experience in school.

In *Doe v Yunits and Others*,³³ the Superior Court of Massachusetts in the United States upheld the right of a person to wear a school uniform that matches her gender identity, as part of the right to freedom of expression. The case concerned a teenager who was biologically male, but who wore female clothes to school. A psychologist found that the teenager had gender identity dysphoria, and that preventing her from wearing clothes consistent with her gender identity could harm her mental health:

30 *Id* at para. 27.

31 [2005] ZACC 19.

32 *Id* at para. 60.

33 2000 WL 33162199 (Mass Super Ct).

[B]y dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being, as attested to by her treating therapist. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her identity.³⁴

In January 2014, the Maine Supreme Court in the United States handed down its decision in a case brought by the parents of a transgender student.³⁵ At issue was whether or not a statutory provision regarding access to sanitary facilities in schools conflicted with the Maine Human Rights Act. The judgment summarises the facts as follows:

[3] Susan Doe is a transgender girl. She was born male, but began to express a female identity as early as age two. Beginning in the first grade, she attended Asa Adams School in Orono. Susan generally wore gender-neutral clothing to school until her third-grade year, when her identity as a girl became manifest. At that time, the school principal first became aware that Susan was transgender.

[4] All third and fourth grade students at Asa Adams used single-stall bathrooms. Susan used the single-stalls girls' bathroom with the support and encouragement of school staff. In the third grade, teachers and students began referring to Susan as "she". By fourth grade, Susan was dressing and appearing exclusively as a girl

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[6] By the time she was preparing to enter the fifth grade, Susan had received a diagnosis of gender dysphoria, which is the medical term for psychological distress resulting from having a gender identity different from the sex that one was assigned at birth. School officials recognised that it was important to Susan's psychological health that she lived socially as a female. They did not interpret 20-A MRS section 6501,³⁶ or any other law, as prohibiting a person with Susan's diagnosis from using the girls' bathroom.

In middle school, after an incident in which a boy mockingly followed Susan into the girls' bathroom, she was told to refrain from using the girls' bathroom and to use the staff bathroom instead. The matter received media attention and the family subsequently moved from the district. The Court held that – by excluding Susan from the girls' bathroom – the school treated her "differently from other students solely because of her status as a transgender girl", and that this amounted to discrimination.

Mead J, who concurred with the finding, but who dissented on the remedy, held:

[30] A civilised society protects its citizens from discrimination that is based on petty prejudices and mean-spirited exclusionary practices. The [Maine Human Rights Act] identifies classes of persons who are entitled to specific protections from such discrimination. The Legislature has included sexual orientation as one of the categories entitled to protection, and rightfully so. Considering the issue presented here, transgendered persons who live their lives as a member of the sex with

34 *Id* at *3.

35 *John Doe et al v Regional School Unit 26* 2014 ME 11 (Maine SC).

36 The section provides that schools must provide clean toilets in school buildings, which shall be separated according to sex, and accessible only by separate entrances and exits.

which they identify face unique challenges with regard to public multiple-user bathrooms. It is simply unreasonable to expect a transgendered person to enter a bathroom designated for use by the sex with which they do not identify. Doing so is likely to provoke confrontation, or even violence. If transgendered people are prohibited from using bathrooms designated for the sex with which they identify, they are left with no practical recourse in most public settings. This result is simply untenable.

The failure to recognise a person's gender identity at school can also have consequences for an individual later in life. This was the case in *Republic v Kenya National Examinations Council and Attorney General, Ex Parte AMI*,³⁷ where the applicant brought a judicial review application against the Kenya National Examinations Council for its refusal to effect a change in name and gender marker on the applicant's Certificate of Secondary Education. In October 2014, the Kenya High Court ordered that a new certificate be issued without a gender marker.

Discrimination in Society

In April 2014, the Supreme Court of India, in *National Legal Services Authority v Union of India and Others*,³⁸ recognised the rights of transgender persons. The case related to members of the broader³⁹ transgender community who claimed that non-recognition of their gender identity violated their right to equality before the law, their right not to be discriminated against based on sexual orientation and gender identity, their right to freedom of expression, including expression of their self-identified gender, and their right to personal autonomy.

Radhakrishnan J recognised the prejudice and discrimination faced by transgender persons in society:

[1] Seldom, our society realises or cares to realise the trauma, agony and pain which the members of transgender community undergo, nor appreciates the innate feelings of the members of the transgender community, especially those whose mind and body disown their biological sex. Our society often ridicules and abuses the transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change

...

[55] [D]espite constitutional guarantee of equality, Hijras/transgender persons have been facing extreme discrimination in all spheres of the society. Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity ... non-recognition of identity of Hijras/transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field

37 JR Case No. 147 of 2013.

38 Writ Petition 400 of 2012 and 604 of 2013 (SC), available at <http://supremecourtindia.nic.in/outtoday/WC40012.pdf>.

39 The case dealt with persons whose gender identity, gender expression, or behaviour does not conform to their biological sex. The case included persons who do not identify with being either male or female, and who describe themselves as a third gender – these are hijras, who do not have reproductive capacity as either men or women and include: intersex persons, and persons who strongly identify with the gender opposite to their biological sex.

of employment, education, healthcare etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often.

The judgment emphasised that gender identity is one of the most fundamental aspects of life that relates to a person's intrinsic sense of being male, female, transgender, or transsexual, and that a person's self-identified sexual orientation or gender identity is integral to his or her personality and is one of the most basic aspects of self-determination, dignity, and freedom.⁴⁰

The Court held that the right to freedom of expression includes “the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc.”⁴¹ The Court held that “recognition of one's gender identity lies at the heart of the fundamental right to dignity”.⁴² Finally, the Court reaffirmed its holding from 2008 in *Anuj Garg v Hotel Association of India*⁴³ that:

[P]ersonal autonomy includes both the negative right of [sic] not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty ...⁴⁴

Two similar cases were adjudicated in Pakistan and Nepal. In 2009, the Supreme Court of Pakistan, in *Dr Mohammad Aslam Khaki and Another v Senior Superintendent of Police (Operation) Rawalpindi and Others*,⁴⁵ dealt with a constitutional petition filed on behalf of hijras (individuals who identify as transgender). The case was significant, because the Court identified the discrimination, stigma, and exclusion faced by this group within society, and ordered social-welfare mechanisms to respond within a month to recommendations made by the Court to improve their situation. The judgment looked at problems faced in the areas of inheritance, registration of identity, voting, employment, and schooling.

The Supreme Court of Nepal, in *Sunil Babu Pant and Others v Nepal Government*,⁴⁶ dealt with the denial of civic rights to men who dress and identify as feminine, and also the targeted police abuse experienced by this group because of their non-conforming gender expression. The Court emphasised the right to non-discrimination, the right to privacy, and the universality of rights.

It is important to note that historical and anthropological research across Africa has shown that cultures across the continent historically recognised – and often accepted – gender non-conforming individuals as members of their communities.⁴⁷

40 *National Legal Services Authority v Union of India and Others* Writ Petition No. 400 of 2012 and No. 604 of 2013 (SC) at paras. 19-20.

41 *Id* at para. 25.

42 *Id* at para. 69.

43 (2008) 3 SCC 1.

44 *National Legal Services Authority v Union of India and Others* Writ Petition No. 400 of 2012 and No. 604 of 2013 (SC) at para. 69.

45 Constitution Petition No. 43 of 2009 (SC).

46 Writ Petition No. 917 of 2007 (SC).

47 See GA Jobson et al “Transgender in Africa: Invisible, Inaccessible, or Ignored?” (2012) 9(3) *J Soc Aspects of HIV/AIDS Research Alliance* 160.

Discrimination and Freedom of Association

The Supreme Court of Justice in Argentina has held that failure to allow registration of an organisation for transgender persons amounted to discrimination. In *Asociación Lucha por la Identidad Travesti-Transsexual v Inspección General de Justicia*,⁴⁸ the Court held that a limitation of the right to freedom of association risked isolating social groups that already had difficulty integrating into society. The Court held that there was no rational connection between the differential treatment imposed on the plaintiff and a legitimate state objective.

Similarly, the High Court of Kenya, in *Non-Governmental Organisations Co-ordination Board and Attorney General v Transgender Education and Advocacy and Others*,⁴⁹ held that the refusal to register a transgender organisation amounted to discrimination on the basis of gender or sex and thus constituted an unreasonable exercise of discretion⁵⁰.

Discrimination, Privacy, and Bodily Integrity

The High Court in Kenya has emphasised the right to dignity in cases relating to transgender and intersex persons. In the case of *ANN v Attorney General*,⁵¹ a transgender woman was stripped in public by police, in order to determine her sex. Ngugi J held that, despite a person's choice in relation to his/her mode of dressing and gender identity, the person retained the inherent worth and dignity to which all humans are entitled.⁵² The police action was found to have violated her right to dignity and privacy.

In *Muasya v Attorney General and Others*,⁵³ an intersex person who was born with both male and female genitalia, was convicted of robbery and sent to a male-only prison. The Kenya High Court held that invasive body searches and the manner of examination in prison amounted to inhuman and degrading treatment. The Court ordered that the applicant be accommodated separately from male convicts in prison.

Discrimination and Hate Speech

The South African Equality Court, in *Lallu v Van Staden*,⁵⁴ held that a neighbour's verbal abuse of a transgender person amounted to harassment, hate speech, and unfair discrimination. The Court awarded damages for infringement of the plaintiff's dignity and also costs for remedial psychological counselling.

48 CS 21/11/06 (SCJ).

49 JR Miscellaneous Appl. No. 308A of 2013 (HC).

50 See also *Rammoge and Others v Attorney General*, Case No. MAHGB-175-13, where the High Court of Botswana held that the refusal to register an organisation which lobbied for the rights of gays and lesbians violated the right to equal protection of the law as well as the rights to freedom of expression, association and assembly.

51 [2013] eKLR, Petition No. 240 of 2012.

52 *Id* at para. 52.

53 Petition No. 705 of 2007.

54 Roodepoort Equality Court Case No. 3 of 2011.

Legal recognition of gender identity

Some of the tools used by society to grant status and recognition to a person, are the identity document and birth certificate. Increasingly, courts and legislatures have recognised that failure to recognise a person's gender identity, where it is different from that person's biological sex, is harmful to the person and deprives him or her of a range of rights, including the rights to privacy, self-determination, and dignity.

The legal issues discussed by the courts in such cases have included whether:

- A person whose gender identity differs from their biological sex can request a change in the gender marker on their identity documents;
- A person should be required to undergo a medical procedure, such as gender-re-assignment surgery⁵⁵ or sterilisation,⁵⁶ prior to such a change in gender marker, or whether self-identification in that gender is sufficient;⁵⁷
- The change in gender marker would apply to all identity documents, including the birth register;⁵⁸ and
- A person who does not identify fully as either male or female, can be classified as “unspecified” or “other”, as opposed to “male” or “female”.⁵⁹

Whether a person can change the gender marker on an identity document has been a pertinent issue for a number of courts. The issue was succinctly framed as a rights issue in Argentina in *In Re KFB*.⁶⁰ In that case, the applicant had filed a petition requesting that the sex and name on his birth certificate be amended to match his gender identity. The Family Tribunal held that the right to privacy includes the right to define a person's personal identity. The Tribunal continued that a person's psychological sex was part of his/her identity and superseded his/her biological sex. Grappling with a remedy, the Tribunal ordered that a note be made in the margin of the original birth certificate and register, noting the change of sex, and that all other identity documents could be changed accordingly.

55 Various courts have ruled that a requirement of surgery prior to allowing a change in gender marker violates the right to self-determination and physical integrity. *Michael v Registrar General Births, Deaths and Marriages* FC FAM-2006-004-02325 (New Zealand FC); *AB v Western Australia*, 244 CLR 390 (HC).

56 Forced sterilisation, as a requirement for legal recognition, was challenged in the Swedish Administrative Court of Appeal, in Stockholm in *Swedish Social Insurance Agency v NN* Case No. 1968-12 (ACA). The Court ruled that the requirement of sterilisation in the Swedish Gender Recognition Act violated the rights to dignity and non-discrimination in the European Convention on Human Rights.

57 Argentina passed a law in 2012 that recognises the right of all persons to recognition of their gender identity. Article 3 of the Gender Identity Law, 2012, states that, “all persons can request that the recorded sex be amended, along with the changes in first name and image, whenever they do not agree with the self-perceived gender identity.” Gender re-assignment surgery is not a pre-requisite for such a request.

58 In South Africa, the Alteration of Sex Description and Sex Status Act, 2003, allows transgender persons and intersex persons to apply for an alteration in the sex description in the birth register, after which they can be issued with a new birth certificate and identity document. The Act does not require any specific medical intervention.

59 In Germany, the Civil Status Act, 2013, allows parents to register intersex children as “not specified”. The law also added category “X” to “M” and “F” under the gender classification in passports.

60 Sup. Const 19/10/2001, 2 (30 April 2001) (FT).

In *In Re Change of Name and Correction of Family Register*,⁶¹ the Supreme Court of Korea held that a family register was supposed to reflect a person's true gender, which is not only determined by biological factors. The Court thus allowed an amendment to the family register – even though the law only allowed for changes in the case of error or omission. Notably, that case, and others, were limited to instances where the transgender person had completed genital reconstruction surgery.

Over the years, however, courts and legislatures have recognised that the notion that a person must have undergone genital reconstruction surgery, before being allowed to change his/her gender marker, infringes on various human rights. In 2008, for example, the New Zealand Family Court, in *Michael v Registrar-General of Births, Deaths and Marriages*,⁶² recognised that gender re-assignment surgery carries risks and could not be imposed on someone. In that case, the applicant was classified as female, but had lived as a male from a young age. Doctors, psychologists, and psychiatrists testified that the applicant was a man in terms of his identity, appearance, manner, and outlook. Similarly, the Tribunal of Justice of Rio de Janeiro, in Brazil, in the 2010 case of *In Re Gesa*,⁶³ held that where a person's sex is not congruent with his/her gender identity, failure to change the person's gender marker on the identity documents would expose them to discrimination and this warranted a change – irrespective of whether or not reconstructive surgery had taken place.

The European Court of Human Rights (ECHR) has, similarly, held that failure to change a person's gender marker violates his/her right to privacy and exposes the person to discrimination.⁶⁴ The ECHR reasoned that gender recognition resulted in no concrete or substantial hardship or detriment to the public interest, and that “society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost”.⁶⁵

The importance of a person being able to choose his/her gender identity has increasingly been recognised by the courts – including in recent cases relating to intersex persons and persons whose gender identity is not strictly male or female.

The Supreme Court of the Philippines, in *Republic of the Philippines v Cagandahan*,⁶⁶ recognised the importance of an intersex person determining the most suitable gender. The case involved a person who was born with female sex organs, but whose body produced male hormones and never developed breasts or a menstrual cycle. The applicant was identified as female at birth, but in adulthood identified as being male – and requested a change to the gender marker on the birth certificate. A medical expert testified that the plaintiff's condition was permanent and that he had adjusted to his preferred gender identity. The Court granted permission for a change to the gender marker.

61 [2004] Seu 42 (SC).

62 FC FAM-2006-004-02325, June 2008 .

63 Case No. 0162607 (TJ).

64 In *B v France* Case No. 13343/87 (1992), the European Court of Human Rights held that the refusal to amend the civil status register to recognise the applicant's gender identity, placed the applicant in a daily situation which was not compatible with respect for her private life. In *Christine Goodwin v United Kingdom* Case No. 28957/95 (2002-VI) the European Court of Human Rights said the failure to recognise a change in gender violated the right to respect for private life.

65 *Christine Goodwin v United Kingdom* Case No. 28957/95 (2002-VI) (ECHR) at para. 91.

66 GR No. 166676 (SC).

In April 2014, the Australia High Court in *New South Wales Registrar of Births, Deaths and Marriages v Norrie*,⁶⁷ held that “[n]ot all human beings can be classified by sex as either male or female.”⁶⁸ The case concerned the applicant, Norrie, who was born with male reproductive organs and was listed as male on a birth certificate. The applicant does not self-identify as male and uses female pronouns to refer to herself. The applicant applied to the New South Wales Registrar for the sex classification on her birth record to be registered as non-specific. The Court found that the law does not give the Registrar the authority to insist that someone be registered as “male” or “female” when they do not identify with either of these categories, and that the Registrar can indicate a person’s sex as being “non-specific”.

Conclusion

Every person has the right to recognition before the law, the right to non-discrimination and equality before the law, the right to dignity, the right to privacy, the right to health, and the right to freedom from torture and other cruel, inhuman, or degrading treatment or punishment. The human experience should be one in which individuals are able to realise their full potential and contribute meaningfully to their community.⁶⁹ Transgender and intersex persons may not conform to the gender roles of society, but the concept of *ubuntu* is one in which their very humanity needs to be upheld, respected, and protected.

The law should be guided by principles of fairness that are consistent with international human rights regulations. The discussion on comparative jurisprudence suggests that, increasingly, domestic and regional courts are acknowledging that transgender and intersex persons are entitled to live according to the gender identity of their choice, and that any failure to recognise this right constitutes unfair discrimination.

67 [2014] HCA 11.

68 *Id* at para. 1.

69 World Health Organisation *Promoting Mental Health: Concepts, Emerging Evidence, Practice* (2005).