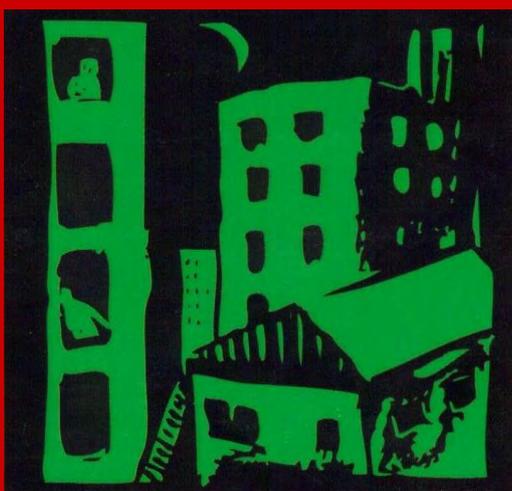


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## Failure to recognise a third gender option: unfair discrimination or justified limitation?

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### ABSTRACT

*This article seeks to answer the question of whether the State's failure to recognise a third gender option for transgender non-binary individuals amounts to unfair discrimination or whether this limitation could be justified. After a brief conceptual framework is discussed, the article looks at the right to equality as found in section 9 of the Constitution of the Republic of South Africa, 1996. Thereafter the article explores whether the non-recognition of a third gender option could be found to be discrimination on a ground listed in the Constitution, as well as whether it could be found to amount to an analogous ground. It is opined that non-recognition of a third gender option does amount to discrimination on the analogous ground of gender identity. It is further submitted that no justification for this limitation of the right to equality would be upheld by a competent court.*

**Keywords:** Transgender; discrimination; unfair discrimination; third gender option; justified limitation; equality.

## 1 INTRODUCTION

With the rise of social movements globally, more 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 these previously ignored and marginalised groups coming out, changes have been, and continue to need to be, made in the legal landscape to make the law accommodating and inclusive of these minorities. One such group is 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 nor male. This article will therefore look at the implications of not allowing transgender persons who identify as neither female or male (non-binary) to register as a third option in accordance with their non-binary gender identity, and whether this non-recognition infringes their right to equality as enshrined in the Constitution of the Republic of South Africa, 1996 (Constitution).

When the 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 option by various States, either directly through legislation, or because of constitutional or other litigation.

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 that they do not identify with either the categories “male” or “female”.<sup>1</sup>

In 2014, the Supreme Court of India, following judgments rendered 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.<sup>2</sup>

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<sup>1</sup> See the ruling in *NSW Registrar of Births, Deaths and Marriage v Norrie* 2014 HCA 11.

<sup>2</sup> See *National Legal Services Authority v Union of India & others* AIR 2014 SC 1863. See also *Sunil Babu Pant & Ors v Nepal Government* writ no 914 of 2007; *Dr Mohammad Aslam Khaki & Anr v Senior*

California now also allows a person to choose to be identified as a third gender option on their driver's licence;<sup>3</sup> the European Union passed a Resolution that European Parliaments should "consider including a third gender option in identity documents for those who seek it"<sup>4</sup>; 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;<sup>5</sup> 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" in the birth register, noting that it was time for a third gender option to be recognised, but leaving the enactment into law of a third gender option up to the legislature.<sup>6</sup> Despite the promotion of these rights for non-binary individuals, there is still considerable pushback 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.<sup>7</sup>

These developments which have occurred all over the world raise the question whether the prohibition of unfair discrimination in section 9 of the Constitution similarly requires the recognition of a third gender option.

This article will first look at the conceptual framework of the terminology necessary to grapple with this topic. Then the concept of equality will be discussed by outlining how it has been interpreted and understood by the Constitutional Court. Thereafter, the article will consider the difference between differentiation, discrimination and unfair discrimination. Finally, the article will explore whether an infringement could be found in the listed grounds of sex, gender or sexual orientation, as well as whether this amounts to unfair discrimination. It will further be argued that an analogous ground of discrimination exists. Should there be found to be unfair discrimination on either a

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*Superintendent of Police (Operation) Rawalpindi* PLD 2013 SC 188; *The National Legal Services Authority v Union of India & others* AIR 2014 SC 1863 was cited with approval in the recent judgment of *Fortuin J in September v Subramoney NO & others* (EC10/2016) [2019] ZAEQC 4 (23 September 2019).

<sup>3</sup> Brown M "Female, male or non-binary: California legally recognizes a third gender option 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/> (accessed 17 April 2018).

<sup>4</sup> Richards C, Bouman WP, Seal L, Barker MJ, Nieder TO & T'Sjoen G "Non-binary or genderqueer genders" (2016) 28 *International Review of Psychiatry* 95 at 97.

<sup>5</sup> See BVerfG "Order of the First Senate of 10 October 2017 (1 BvR 2019/16)" available at [http://www.bverfg.de/e/rs20171010\\_1bvr201916en.html](http://www.bverfg.de/e/rs20171010_1bvr201916en.html) (accessed 24 February 2021).

<sup>6</sup> Rechtbank Limburg, 25 May 2018, C/03/232248 / FA RK 17-687, ECLI:NL:RBLIM:2018:4931.

<sup>7</sup> Unknown "Vatican issues guidance questioning modern gender identity" BBC News 10 June 2019 available at <https://www.bbc.com/news/world-europe-48584892> (accessed 12 June 2019).

listed or an analogous ground, the article discusses whether such infringement can be justified in terms of the section 36 limitation of rights provision of the Constitution.

## 2 A BRIEF CONCEPTUAL FRAMEWORK

First, 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 are highlighted are ever evolving, with the 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, they are often misapplied, with subgroups of identities being “lumped” together incorrectly. This conflation of terms is not only made by uninformed members of the general public, but also by higher organs<sup>8</sup> that are expected to be experts or to have done more extensive research on this topic. Some of these concepts are listed in section 9(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 section 9(3)), but discrimination on the basis of these characteristics has the potential to impact a person’s dignity and thus has a similar impact to those listed grounds (for example, discrimination on the basis of HIV status) which are not presumed to be unfair.<sup>9</sup> A nuanced understanding of the correct terminology is thus critical to the development of arguments relating to unfair discrimination as is discussed further in the article.

### 2.1 The distinction between sex and gender and gender identity

Sex is traditionally understood as “the classification of a person as male or female”.<sup>10</sup> It is based on specific “anatomical and physiological” differences between men and women.<sup>11</sup> In layman’s terms, it is the biological distinction between men and women.<sup>12</sup>

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<sup>8</sup> For instance, government departments and courts. See, for example, the discussion of *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) in part 2.2 below.

<sup>9</sup> 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).

<sup>10</sup> Anonymous “GLAAD media reference guide: transgender” available at <https://www.glaad.org/reference/transgender> (accessed 22 August 2018).

<sup>11</sup> Newman T “Sex and gender- what’s the difference?” *Medical New Today* 07 February 2018 available at <https://www.medicalnewstoday.com/articles/232363.php> (accessed 22 August 2018) and 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> (accessed 05 October 2019).

<sup>12</sup> Siann G *Gender, sex and sexuality: contemporary psychological perspectives* Abingdon : Taylor & Francis (1994) at 3; Newman LK “Sex, gender and culture: issues in the definition, assessment and treatment of gender identity disorder” (2002) 7(3) *Clinical Child Psychology and Psychiatry* 352; Pryzgodna J &

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.<sup>13</sup> 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.<sup>14</sup> This practice has been condemned by many intersex persons as well as by the United Nations.<sup>15</sup>

Unlike sex, gender is a social construct.<sup>16</sup> 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 as norms, roles, and relationships of and between men and women”.<sup>17</sup> It is the “manner in which culture defines and constrains the differences between men and women”.<sup>18</sup> In other words, gender typically refers only to the “behavioural, social and psychological characteristics of men and women”.<sup>19</sup> Thus, the gender which you are expected to identify with is more often than not informed by your sex. The roles men

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Chrisler JC “Definitions of gender and sex: the subtleties of meaning” (2000) 43(7/8) *Sex Roles* 553 at 554.

<sup>13</sup> Hermer L “Paradigms revised: intersex children, bioethics & the law” (2002) 11 *Annals Health L* 195 at 196.

<sup>14</sup> See Sloth-Nielsen R “Gender normalisation and the best interest of the child’ (2018) 29(1) *Stell Law Review* 48. See also Mills L & Thompson S “Parental responsibilities and rights during the ‘gender reassignment’ decision-making process of intersex infants” (2020) *International Journal of Children’s Rights* 547.

<sup>15</sup> 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 Document No A/HRC/28/68; Pansieri F “Human Rights for all: protection and promotion of the human right of LGBTI individuals- from local communities to global organisations” Keynote address delivered on 20 November 2015 at the United Nations Human Rights Office of the High Commissioner, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16798&LangID=E> (accessed 03 January 2019).

<sup>16</sup> See Newman (2002) at 352. See generally South African Litigation Centre (2016) and also Manoek S-L, Mbwana J, Ludwig S, Kheswa S, Brown B & van der Merwe L *Police sensitisation training manual: a guide for South African Police Service (SAPS) officers to the rights of sex workers and the LGBTI community* Cape Town : Women’s Legal Centre (2014).

<sup>17</sup> World Health Organization “Gender equity and human rights” available at <http://www.who.int/gender-equity-rights/understanding/gender-definition/en/> (accessed 24 August 2018).

<sup>18</sup> See Siann (1994) at 3.

<sup>19</sup> See Pryzgodna & Chrisler (2000) at 553.

and women are expected to play differs from society to society.<sup>20</sup> It is the expected “social and cultural role of each sex within a given society”.<sup>21</sup> 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”.<sup>22</sup> As society changes, gender roles change.<sup>23</sup>

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 (for example. 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’”.<sup>24</sup> It is the “core sense of the self as male, female or somewhere on the spectrum outside the binary”.<sup>25</sup> Despite this common understanding, there are differing views on whether or not gender identity is still actually a social construct. For instance, in terms of essentialist views on gender identity, one’s gender identity is “natural”, ie “it is natural for those born male to act masculine... while those born female are supposed to act feminine”.<sup>26</sup>

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”.<sup>27</sup> I, however, subscribe to the essentialist view of gender identity, believing it is innate, while gender is the social construct.

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<sup>20</sup> See Siann (1994) at 3.

<sup>21</sup> See generally Newman (2018). See also Pryzgodna & Chrisler (2000) at 553, noting that “to people who study it, gender indicates something about socialised behavioural patterns”. See further Unger RK “Towards a redefinition of sex and gender” (1979) 43(11) *American Psychologist* 1085 at 1085 where she introduces the term “gender” “for those characteristics and traits socio-culturally considered appropriate to males and females”.

<sup>22</sup> See Unger (1979) at 1085.

<sup>23</sup> Unger (1979) at 1085.

<sup>24</sup> Stoller RJ “A contribution to the study of gender identity” (1964) 45 *The International Journal of Psychoanalysis* 220.

<sup>25</sup> Pastorski V “Gender identity and intersex conditions” in Scherpe J, Dutta A & Helms T (eds) *The legal status of intersex persons* Cambridge : Intersentia (2018) at 65.

<sup>26</sup> Nagoshi JL, Brzuzy S & Terrell HK “Deconstructing the complex perceptions of gender roles, gender identity and sexual orientation among transgender individuals” (2012) 22(4) *Feminism and Psychology* at 407.

<sup>27</sup> See Nagoshi, Brzuzy & Terrell (2012) at 407.

## 2.2 Cisgender and transgender (trans)

Cisgender is the proper term for a person whose gender identity “is on the same side as their birth-assigned sex”.<sup>28</sup> Simply, their gender identity “matches” the sex which they were assigned at birth.

The term cisgender was 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.

The concept “transgender” refers to someone whose gender identity differs from the sex assigned to them at birth.<sup>29</sup> It is an umbrella term encompassing persons who have not undergone sex reassignment surgery,<sup>30</sup> those who have, and those who have only undergone hormonal therapy.<sup>31</sup> Trans 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”.<sup>32</sup> In the book *The legal status of transsexual and transgendered persons*, Friedmann Pfafflin notes that British authors Richard Etkins and Dave King distinguished “between four types of transgenderism”:<sup>33</sup>

<sup>28</sup> See Aultman B “Cisgender” (2014) 1(1/2) *Transgender Studies Quarterly* at 61.

<sup>29</sup> Anonymous “GLAAD media reference guide: transgender” available at <https://www.glaad.org/reference/transgender> (accessed 22 August 2018). See also Manoek, Mbwana, Ludwig, Kheswa, Brown & Van der Merwe (2014). 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. Transsexual is not an umbrella term. It generally is used to describe a person who has undergone hormone therapy or sex reassignment surgery, although not always.

<sup>30</sup> See further Wroblewski P, Gustafsson J & Selvaggio G “Sex reassignment surgery for transsexuals” (2013) 20(6) *Current Opinion in Endocrinology, Diabetes and Obesity* 570; Selvaggi G & Bellringer J “Gender reassignment surgery: an overview” (2011) 8 *Nature Reviews Urology* 272.

<sup>31</sup> 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> (accessed 05 October 2019).

<sup>32</sup> See Universal Periodic Review (2016). It was in the 1970s that the term transgenderism (and by implication transgender) was coined. 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. Transgenderism thereafter became to be understood as “an umbrella term for transvestites, transsexuals and a new category, transgenderists, who moved between the sexes and genders and did not necessarily insist on specific medical treatment”. See Pfafflin F “Transgenderism and transsexuality: medical and psychological viewpoints” in Scherpe JM (ed) *The legal status of transsexual and transgendered persons* Cambridge : Intersentia (2015) at 19.

<sup>33</sup> See Pfafflin (2015) at 19, referring to Etkins R & King D *The Transgender Phenomenon* (2006).

“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.”<sup>34</sup>

In this article the focus is on the third and fourth categories 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”.<sup>35</sup> 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 option is a step towards the elimination of legal gender categorisations.

Sexual orientation and transsexualism are often confused and used interchangeably and/or incorrectly. While sexual orientation has to do with one’s sexual preferences (to whom a person is sexually attracted ), transsexualism has to do with a person’s gender identity (the gender with which they identify). 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.<sup>36</sup>

In *National Coalition for Gay and Lesbian Equality v Minister of Justice (National Coalition (1999))*, the Constitutional Court made the error of categorising transsexualism as a sub-category of sexual orientation.<sup>37</sup> In the majority judgement, Ackermann J states :

“The concept of ‘sexual orientation’ as used in s 9(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-

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<sup>34</sup> See Pfafflin (2015) at 19.

<sup>35</sup> See Pfafflin (2015) at 19-20.

<sup>36</sup> 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,

<sup>37</sup> See *National Coalition (1999)*.

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.”<sup>38</sup>

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 seemed to be under the misconception that transsexualism is a sexual orientation. The Constitutional Court’s erroneous interpretation of the term could, in fact, lead to the conclusion that transsexuals are indeed directly 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.<sup>39</sup>

### 3 EQUALITY

#### 3.1 The concept of equality

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.<sup>40</sup> In response to South Africa’s history of inequality, “the Constitution is an emphatic renunciation of our past in which inequality was systematically entrenched”.<sup>41</sup> 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’”.<sup>42</sup> 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*<sup>43</sup> (*Van Heerden* (2004)) the Constitutional Court held :

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<sup>38</sup> See *National Coalition* (1999) at para 21.

<sup>39</sup> While there are transgender individuals who do identify as exclusively male or female (and who are thus binary), there are an increasing number of trans persons who do not identify as male or female but rather have a non-binary gender identity. Dutch courts (Rechtbank Limburg, 25 May 2018, C/03/232248 / FA RK 17-687, ECLI:NL:RBLIM:2018:4931) 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 as “the gender cannot be determined”. There are further persons who “move between genders in a fluid way”.

<sup>40</sup> Smith A “Equality constitutional adjudication in South Africa” (2014) 14 *AHRLJ* 609 at 609-610.

<sup>41</sup> See *Brink v Kitchoff NO* 1996 (4) SA 197 at para 33. Although this case was decided under the Interim Constitution, due to the similarities between section 8 in the Interim Constitution and section 9 in the final Constitution, jurisprudence on s 8 is still relevant.

<sup>42</sup> See Smith (2014) at 610.

<sup>43</sup> *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

“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.”<sup>44</sup>

The right to equality is guaranteed in section 9 of the Constitution.<sup>45</sup> In *President of the Republic of South Africa v Hugo (Hugo (1997))*<sup>46</sup> the Constitutional Court explained the purpose of section 9, with specific emphasis on non-discrimination. It noted :

“[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 groups. 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.”<sup>47</sup>

Equality as included in the Constitution’s Preamble aims to “restore and protect the equal worth of everyone... [and] establish a socially just society”.<sup>48</sup> “Restore”, in this context, means to single out previously disadvantaged and “invisible” groups, which makes this dimension of equality especially relevant.

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

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<sup>44</sup> See *Van Heerden (2004)* at para 22.

<sup>45</sup> Section 9 of the Constitution states: “ (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.”

<sup>46</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

<sup>47</sup> See *Hugo (1997)* at para 117.

<sup>48</sup> See *Van Heerden (2004)* at para 23.

identity is rendered invisible in the eyes of the law. This already leads one to the preliminary conclusion that recognition of a different gender identity would restore equality rights and reaffirm their 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’”.<sup>49</sup>

There are generally two types of harm which are associated with section 9, 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”.<sup>50</sup> It is the harm caused by social inequality which is relevant here, as it will be determined whether non-recognition of a third gender option has resulted in the exclusion of the “identity, norms and behaviours” of non-binary transgender persons.

### 3.2 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 part. 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”.<sup>51</sup> This right to be different relates to what Albertyn identifies as the “recognition” aspect of equality. Albertyn notes :

“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.”<sup>52</sup>

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<sup>49</sup> See *Van Heerden* (2004) at para 23.

<sup>50</sup> Albertyn C “Law, gender and inequality in South Africa” (2011) 39(2) *Oxford Development Studies* 139 at 140-141.

<sup>51</sup> See *National Coalition* (1999) at para 135.

<sup>52</sup> See Albertyn (2011) at 255.

In *Sarrahwitz v Maritz NO & another* (Sarrahwitz (2015)),<sup>53</sup> 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. Section 9 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.”<sup>54</sup>

The Court further noted :

“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 section 9(1) thereof.”<sup>55</sup>

Thus, the benchmark for determining whether differentiation is valid, is the standard of rationality. 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 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 that 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.

The equality clause requires a substantive approach to equality.<sup>56</sup> This can be seen from section 9(2) of the Constitution which explicitly states that measures may be taken

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<sup>53</sup> See *Sarrahwitz v Maritz NO* 2015 (4) SA 491 (CC).

<sup>54</sup> See *Sarrahwitz* (2015) at para 51.

<sup>55</sup> See *Sarrahwitz* (2015) at para 54.

<sup>56</sup> 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”. Substantive equality, on the other hand,

to redress instances of past discrimination. This was confirmed by the Constitutional Court in *AB & another v Minister of Social Development (AB & another (2017))* where the Court noted :

“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.”<sup>57</sup>

Substantive equality has been described by the Constitutional Court as “remedial or restitutionary equality”.<sup>58</sup> In *National Coalition (1999)*, 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 eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.”<sup>59</sup>

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 option must be explored in terms of section 9 of the Constitution, the analysis of which will be undertaken next.

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“requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal”. See Ngcukaitobi T “Equality” in Currie I & De Waal J (eds) *Bill of Rights Handbook* 6<sup>th</sup> ed Cape Town: Juta (2013) at 213. Substantive equality 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”. See Albertyn C “Substantive equality and transformation in South Africa” (2007) 23 *South African Journal on Human Rights* 253 at 254. See also Van Heerden (2004) at para 31; *National Coalition (1999)* at para 15; Chaskalson A “Human dignity as a foundational value of our constitutional order” (2000) 16(2) *South African Journal on Human Rights* at 193.

<sup>57</sup> See *AB & another (2017)* at para 296.

<sup>58</sup> See *AB & another (2017)* at para 60. See also Smith (2014) at 614.

<sup>59</sup> See Smith (2014) at 614.

### 3.3 The section 9(3) analysis

For a section 9(3) analysis, it must first be determined whether there has been differentiation which constitutes discrimination (as explained above) and, should it be found that there is discrimination, upon which ground the discrimination is occurring. Next, it must be determined whether the discrimination is unfair and thus in contravention of the right to equality. This two-stage approach to the analysis of equality claims is necessary, as there may be instances when, although there is evident discrimination, it is found to be fair in the circumstances.<sup>60</sup>

As stated, 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”.<sup>61</sup> Differentiation is expected in the law, it is when this differentiation is on an illegitimate ground that it will amount to discrimination.<sup>62</sup>

When differentiation is proven on one of the grounds specified in section 9(3), discrimination will have been established. If it is not one of the grounds listed in section 9(3), discrimination can still be established where people or categories of people are differentiated upon grounds 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”.<sup>63</sup> These not listed grounds are often referred to as “analogous grounds”. 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”.<sup>64</sup> For example, in *Hoffmann v South African Airways* (*Hoffmann* (2001)),<sup>65</sup> South African Airways (SAA) had 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”.<sup>66</sup> It was thus found that SAA’s refusal to employ the appellant constituted unfair discrimination based on his HIV-positive status.

In proving an analogous ground, the individual claiming discrimination must present “an appropriate comparator”.<sup>67</sup> The person claiming discrimination must thus show that there is a group who are treated better than he or she is in the same

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<sup>60</sup> See *Harksen v Lane NO* 1998 (1) SA 300 (CC) at para 45.

<sup>61</sup> See *Harksen v Lane NO* (1998) (1) SA 300 (CC) at para 42.

<sup>62</sup> See *Ngcukaitobi* (2013) at 222.

<sup>63</sup> See *Harksen v Lane NO* 1998(1) SA 300 (CC) at para 50.

<sup>64</sup> See *Ngcukaitobi* (2013) at 236.

<sup>65</sup> See *Hoffmann v South African Airways* 2001(1) SA 1 (CC).

<sup>66</sup> See *Hoffmann* (2001) at para 28.

<sup>67</sup> *Legal Aid South Africa v Magidiwana & others* 2015 (6) SA 494 (CC).

## FAILURE TO RECOGNISE A THIRD GENDER OPTION

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.

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 section 9(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 section 9 when analogous grounds are alleged instead of the defendant needing to prove the discrimination is fair; the applicant will need to prove it is unfair.

This argument adopts the primary position that non-recognition of a third gender option is direct discrimination, at least in terms of formal registration of one's gender identity on passports, birth certificates and the like.<sup>68</sup> The deciding factor in the determination of unfairness is the impact the discriminatory law or measure has on 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 into account. The court must consider:

“(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

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<sup>68</sup> However, non-recognition of a third gender option could also lead to indirect discrimination, one example being in terms of 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 inequality resulting from non-recognition of a third gender option. Indirect discrimination was defined in *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), as any conduct which results in discrimination despite appearing on the face of it to be neutral.

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.”<sup>69</sup>

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 victim’s dignity.<sup>70</sup> 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”.<sup>71</sup> 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.<sup>72</sup>

Homosexuals, both male and female, have been identified as such a vulnerable group who are more susceptible to discrimination. It is argued 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.

It must be noted that the *Harksen* test does not prescribe a closed list of factors which can be considered 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.<sup>73</sup> 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”.<sup>74</sup>

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<sup>69</sup> See *Harksen v Lane NO* 1998 (1) SA 300 (CC) at para 50.

<sup>70</sup> See *Hoffmann* (2001) at para 27.

<sup>71</sup> Kruger R “Equality and unfair discrimination: refining the Harksen test” (2011) 128 *South African Law Journal* 479 at 491.

<sup>72</sup> See Kruger (2011) at 493.

<sup>73</sup> De Vos P “Equality for all: a critical analysis of the equality jurisprudence of the Constitutional Court” (2000) 63 *THRHR* 62 at 74.

<sup>74</sup> See De Vos (2000) at 74.

#### 4 IS THE NON-RECOGNITION OF A THIRD GENDER OPTION UNCONSTITUTIONAL?

Is the non-recognition of a third gender option in breach of the constitutional guarantee to equality? The following parts address, first, whether there is unfair discrimination on a listed ground, whereafter it will be considered whether there is an argument to be made for unfair discrimination on an unlisted (analogous) ground.

##### 4.1 Unfair discrimination on the listed ground of sexual orientation

In *National Coalition for Gay and Lesbian Equality v Minister for Justice*,<sup>75</sup> the Constitutional Court, by stating that the term sexual orientation is wide enough to include transsexuals, 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 Court's decision at face value, albeit that its view is factually 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 Description and Sex Status Act applies)<sup>76</sup> can claim that non-recognition of a third gender option 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 consider in determining fairness, it is difficult to conceive of a situation in which the discrimination would be found to be justified.

First, transgender persons occupy a position as a vulnerable group in our society,<sup>77</sup> with their dignity often being infringed,<sup>78</sup> and them being the object 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 option denies them their very

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<sup>75</sup> See *National Coalition* (1999).

<sup>76</sup> 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". 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 applicant or carried out gender reassignment surgery, and a report from another medical practitioner who has medically examined the applicant to establish his or her sexual characteristics.

<sup>77</sup> See generally Deyi B "First class constitution, second class citizen: exploring the adoption of the third-gender category in South Africa" in Namwase S & Jjuuko A (eds) *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* Pretoria: PULP (2017).

<sup>78</sup> See *September v Subramoney NO & others* (EC10/2016) [2019] ZAEQC 4.

identity and infringes on their dignity.<sup>79</sup> 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 nonbinary individuals the right to be legally recognised as a third gender option. Thirdly, their fundamental rights are routinely infringed through a denial of their orientation in various ways and in various settings.<sup>80</sup> It is concluded that the factors underlying unfair discrimination would be easily established.

But, in case the Constitutional Court reneges on its previous statement that sexual orientation is wide enough to include transsexuals, or comes to a better and more nuanced understanding of the crucial distinctions between sexual orientation and gender identity, it is necessary to determine whether unfair discrimination could be found on another ground not listed in section 9(3).

#### **4.2 Unfair discrimination on the analogous ground of gender identity**

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”.<sup>81</sup>

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<sup>79</sup> In *S v Makwanyane & another* 1995 (3) SA 391(CC), 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”. It was further noted in *Khumalo v Holomisa* 2002 (5) SA 401(CC) at para 27, 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”. It is sometimes referred to as a recognition right in that it recognises the full humanity of the individual.

<sup>80</sup> See generally Deyi (2017). Further see Deyi B, Kheswa S, Theron L, Mudarikwa M, May C & Rubin M *Briefing Paper Alteration of Sex Description and Sex Status Act, No 49 of 2003* (2015) available at <https://www.transgendermap.com/wp-content/uploads/sites/7/2019/05/LRC-act49-2015-web.pdf> (accessed 28 March 2018). For instance, there are no prisons which accommodate transgender non-binary persons, South Africa having only male and female detention facilities. Furthermore, in South Africa, schoolchildren are often mandated to wear a school uniform, but these school uniforms are designated for either girls or boys. This forces a non-binary learner to conform to the school’s ideal of either a girl or a boy. These are but two examples of many.

<sup>81</sup> See *Harksen v Lane NO* 1998 (1) SA 300 (CC) at para 49.

Hence, the grounds which are listed “relate to attributes or characteristics that impact on human dignity”.<sup>82</sup> 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”.<sup>83</sup>

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. Furthermore, in the same way that the German Constitutional Court found that gender identity is an essential element of an individual’s right to personality, and since personality and identity are 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 already found in the equality clause is strengthened. When gender identity is infringed, an individual’s 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 one’s gender identity not conforming to outdated, societal ideas about how gender is binary.<sup>84</sup>

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 considered by the court in a determination of unfairness on a listed ground will similarly be considered in the determination of unfair discrimination on an analogous ground.<sup>85</sup> It is for the same

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<sup>82</sup> See Ngcukaitobi (2013) at 236.

<sup>83</sup> McGregor M & Germishuys W “The taxonomy of an ‘unspecified’ ground in discrimination law” (2014) 35(1) *Obiter* 94 at 95.

<sup>84</sup> In the German Constitutional Court case, the Court found that not allowing a person to be registered as a third gender option also discriminated against them on the basis of sex. Although art 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 nor female. This was found despite the fact that the drafters of the Basic Text in 1949 probably never conceived of the notion of a third gender option. Furthermore, the argument that amendments to the Basic Text failed to include gender identity in art 3(3) was rejected by the Court, with the Court stating that gender identity was included under sex. If these arguments are accepted, it could thus also be proved that gender identity is analogous to the listed ground of sex. For more see Botha H “Beyond sexual binaries? The German Federal Constitutional Court and the rights of intersex people” (2018) 21 *Potchefstroom Electronic Law Journal* 1.

<sup>85</sup> These were the factors outlined in *Harksen v Lane* NO 1998 (1) SA 300 (CC). The case dealt with discrimination on the basis of marital status which was not a listed ground under the Interim Constitution.

reasons set out above that impel one toward a finding of unfair discrimination. Specifically, transgender persons are vulnerable members of society, subject to much prejudice and stigmatisation. In *Hoffmann* (2001), 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.<sup>86</sup> Transgender persons are frequently shunned by their families. They are often overlooked for employment opportunities, lose their jobs as a result of expressing their gender identities in the workplace,<sup>87</sup> 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”.<sup>88</sup> It is therefore submitted that there will be a similar finding here that they constitute a vulnerable group.

With reference to the quoted text from *Harksen v Lane* cited earlier, it is submitted that gender identity is not an “immutable biological attribute or characteristic” but that it definitely does constitute an associational aspect of the life of non-binary transgender persons. It 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 being derived from the law as it currently stands. Thus, it can be seen that unfair discrimination can be found on both the ground of sexual orientation and on the analogous ground of gender identity.

#### **4.3 Section 9(3), section 36 and the limitation analysis<sup>89</sup>**

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

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<sup>86</sup> See *Hoffmann* (2001) at para 28.

<sup>87</sup> Charles M “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> (accessed 29 November 2018).

<sup>88</sup> Legal Resources Centre, Iranti.org & Gender Dynamix “Report on the civil, political and socio-economic rights of transgender and intersex persons in south Africa under the African Charter on Human and Peoples’ Rights in response to the second combined periodic report of the government of South Africa and the initial report under the protocol to the African Charter on the rights of Women in Africa” available at <https://drive.google.com/file/d/1uGzw7ljHx5umcaECJgGH0se1oHfUUw5r/view> (accessed 13 October 2020).

<sup>89</sup> In order for section 36 to apply, there must first be a law of general application. This is expressly stated in section 36(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...”.

### 4.3.1 *Infringement by omission*

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 option. Laws 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 section 36 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*,<sup>90</sup> the Court found that the provisions of the Children's Status Act 82 of 1987 infringed on the applicant's 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 unfairly discriminated against on the basis of sexual orientation and marital status. Similarly, in *Du Toit & another v Minister of Welfare and Population Development*,<sup>91</sup> the Court also found that the absence of provisions allowing for the joint adoption of children to unmarried same sex partners constituted unfair discrimination on the basis of sexual orientation, as the applicants were precluded from marrying by virtue of being in a homosexual relationship.<sup>92</sup> 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.

### 4.3.2 *Common law*

It is argued 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 marriages between males and females are recognised.<sup>93</sup> Similarly, the statutory distinction between the age of consent to marry of girls and boys is based on the common law distinction of their respective capacity to act and reproductive maturity 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.<sup>94</sup> If it were to be accepted that the distinction between male and female (only) is rooted in common law, then it would be incumbent on the courts to develop the common law to

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<sup>90</sup> See *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC).

<sup>91</sup> *Du Toit & another v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC).

<sup>92</sup> This case was decided before same sex marriage was allowed under the Civil Unions Act 17 of 2006.

<sup>93</sup> In *Kos v Minister of Home Affairs* 2017 (6) SA 588 (WCC), 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).

<sup>94</sup> Canon law refers to the law of the church. Our understanding of gender was imported from Victorian Era England, in which the church influenced the law heavily. In terms of the bible (and thus canon law), there are only two sexes, male and female.

address the unconstitutional lacuna brought about by the non-recognition of a third gender option.<sup>95</sup>

#### **4.4 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,<sup>96</sup> for a limitation to be found to be justified a proportionality test will need to be undertaken to see if it is reasonable and justifiable.<sup>97</sup> Section 36 itself sets out factors the courts can consider in the determination of whether a rights violation is justifiable, namely:

“ 36 (1)...(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*,<sup>98</sup> the Court, summarising the approach which was set out in *S v Makwanyane*,<sup>99</sup> stated :

“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.”<sup>100</sup>

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. First, it could be argued by the

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<sup>95</sup> By way of example, in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development & others* 2020 (1) SA 1 (CC), the Constitutional Court ruled that the common law defence of reasonable chastisement was incompatible with section 10 as well as section 12(1)(c) of the Constitution.

<sup>96</sup> The laws of general application relevant to the recognition of a third gender option include, inter alia, the Alteration of Sex Description and Sex Status Act 49 of 2003, the Identification Act 68 of 1997, the Births and Deaths Registration Act 51 of 1992, the Marriage Act 25 of 1961, the Recognition of Customary Marriages Act 120 of 1998 and the Civil Unions Act 17 of 2006.

<sup>97</sup> De Vos P & Freedman W “The limitation of rights” in De Vos P & Freedman W (eds) *South African Constitutional Law in Context* Cape Town : OUP Southern Africa (2014).

<sup>98</sup> *S v Bhulwana* 1996 (1) SA 388 (CC).

<sup>99</sup> *S v Makwanyane & another* 1995(3) SA 391 (CC).

<sup>100</sup> *S v Bhulwana* 1996(1) SA 388 (CC) at para 18.

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.<sup>101</sup>

Secondly, the State could argue that the cost of recognising a third gender option would be too burdensome for it 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) & others*,<sup>102</sup> 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. This could be done, by enacting a law of general application which amends all other legislation by recognising a third gender option and placing a duty on the State and institutions to progressively realise this new gender through, for example, the staggered creation of appropriate infrastructure (such as gender-neutral bathrooms).

Further, since the cost of the issuing of all identification documents after the first one has to be paid by an applicant, it is submitted that the cost to the State would be negligible as it would be the applicants themselves who bear the cost. Furthermore, 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*.<sup>103</sup> As an instruction to change the program was given to it by the High Court, any arguments that a system change is unfeasible would realistically not pass muster.

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<sup>101</sup> See *Kos v Minister of Home Affairs* 2017 (6) SA 588 (WCC) at paras 46 & 60, where 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 would not allow one of the applicant’s alteration of sex to be recorded as they were married in terms of the Marriage Act.

<sup>102</sup> *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) & others* 2005 (3) SA 280 (CC). The case centred around the Electoral Law Amendment Act 34 of 2003, 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.

<sup>103</sup> See *Kos v Minister of Home Affairs* 2017 (6) SA 588 (WCC).

Lastly, the issue of reasonable accommodation must be mentioned. Reasonable accommodation is a factor a court must consider when determining the fairness of the discrimination in question.<sup>104</sup> In the case of *September v Subramoney NO & others*, a trans gender inmate petitioned for the right to inter alia wear her hair in feminine hairstyles, and to be given make-up and female underwear. The Court noted that there are a variety of reasonable steps open to government to accommodate the applicant.

“These steps should balance the competing interests raised by this dispute. They should allow for gender expression, but also not undermine the safety of the applicant or detention facilities... the relief granted in *casu* should be nuanced and make provision for a balanced enforcement of the constitutional rights of the applicant and the constitutional obligations of the respondents.”<sup>105</sup>

This case provides authority for the fact that there are always avenues open to government to accommodate trans persons which are not unduly taxing on the State.

## 5 CONCLUSION

It is submitted that the cost of recognising a third gender option is not a justification for the violation of the right to equality, or would at least be hard to prove empirically, especially when considering that the right to equality is one of the foundational values of the Constitution. Therefore “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”.<sup>106</sup>

It could be argued that the recognition of a third gender option is not enough, as it does not cater for those who do not feel as though they identify with said third gender option. There are multiple genders and gender identities. By forcing non-binary individuals into a third gender option, 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 (or “x” or “other”). It is, however, submitted that while the recognition of a third gender option 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. This would follow a Dutch court’s judgment, allowing a non-binary individual to register their gender as “gender cannot be determined”<sup>107</sup>, and the

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<sup>104</sup> See *September v Subramoney NO & others* (EC10/2016) [2019] ZAEQC 4.

<sup>105</sup> See *September v Subramoney NO & others* (EC10/2016) [2019] ZAEQC 4 at para 128.

<sup>106</sup> *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offender (NICRO) & others* 2005 (3) SA 280 (CC) at para 51.

<sup>107</sup> Rechtbank Limburg, 25 May 2018, C/03/232248 / FA RK 17-687, ECLI:NL:RBLIM:2018:4931.

## FAILURE TO RECOGNISE A THIRD GENDER OPTION

German Constitutional Court's ruling that gender may be registered as "indeterminate".<sup>108</sup>

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 rights 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.

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<sup>108</sup> BVerfG "Order of the First Senate of 10 October 2017 (1 BvR 2019/16)" available at [http://www.bverfg.de/e/rs20171010\\_1bvr201916en.html](http://www.bverfg.de/e/rs20171010_1bvr201916en.html) (accessed 24 February 2021).

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