

**A case for removing barriers to the legal recognition of transgender identity in
Botswana**

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This work is dedicated to those of us who exist in the margins.

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SUMMARY

This mini-dissertation is a critical analysis of the judgment in *ND v Attorney General and the Registrar of National Registration*, decided by the Botswana High Court. The analysis is conducted with a view to making an argument for removing barriers to legal gender recognition for transgender persons in the context of Botswana. The study uses critical feminist theory and identity-based critiques of dominant cultural practices to contest the objectivity of the judgment. In addition, it demonstrates how the approach adopted by the Court reinforces exclusionary and hierarchical norms that further marginalise non-binary and gender non-conforming persons who fall under the transgender umbrella.

The mini-dissertation argues that the Court in this case not only pathologised transgender identities but made legal recognition conditional on medical interventions. This position was adopted, notwithstanding a restrictive public health policy environment that precludes gender affirming treatment and which makes access to such services income-based. The study demonstrates that this approach violated understandings of international human rights law which call for self-determination as the basis for legal gender recognition without any restrictive requirements. The mini-dissertation argues that the Court reduced the inquiry into one characterised by paternalism, which conceptualises gender identity within a normative social framework that views gender as a binary antithetic. It demonstrates how the judgment perpetuates gendered power relations and reinforces monolithic expressions of gender. The candidate proposes more balanced approaches to legal gender recognition, in tandem with international standards and responsive to the lived experiences of transgender persons in Botswana. These approaches call for the depathologisation and destigmatisation of gender identity and recommend the recognition of gender plurality and ending gender registration.

LIST OF ABBREVIATIONS AND ACRONYMS

SOGIESC	sexual orientation, gender identity, expression and sex characteristics
LGBTI	lesbian, gay, bisexual, transgender and intersex
ASDSS Act	Alteration of Sex Description and Sex Status Act
DSM	Diagnostic and Statistical Manual of Mental Disorders
APA	American Psychiatric Association
WHO	World Health Organisation
ICD	International Classification of Diseases and Related Health Problems
GIGESC Act	Gender Identity, Gender Expression and Sex Characteristics Act

CHAPTER 1: INTRODUCTION

1.1 Introduction

This chapter provides an overview of the mini-dissertation, it sets out the issues to be discussed and the questions to be answered by this research. The chapter sets out the approaches to the research as well as tools for analysis and provides the overall structure of the mini dissertation.

The chapter begins with a brief outline of the context in relation to the experiences of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in Botswana and sets out the problems identified in relation to legal gender recognition in Botswana. It then discusses the methodology used as well as current knowledge and theoretical contributions to the study of transgender identities. Thereafter, the chapter examines the limitations of the mini-dissertation and sets out the importance of the study. Finally, the chapter sets out the structure of the paper.

1.2 Background

The societal attitude towards the LGBTI community in Botswana can at best be described as unaccommodating and at worst, hostile. As observed by Tabengwa and Nicol, 'Botswana society is highly conservative with many practices and stereotypes which privilege some and exclude or deny other groups, such as lesbians, gays, bisexuals, trans-gender, intersex and sex workers, the right to exist'.¹ That said, a study on attitudes towards homosexuals in Africa shows a growing acceptance of homosexuals in Botswana.² According to the study, 43% of Botswana citizens expressed acceptance of neighbours who are homosexual.³ Similarly, the Botswana courts have continued to make progressive pronouncements on the rights of LGBTI persons. Most markedly, in a unanimous High Court decision poised to set the pace for juridical recognition of LGBTI rights in Africa, Botswana decriminalised same-sex sexual practices between consenting adults in private.⁴ Finding in favour of the applicant, the Court in *Letsweletse Motshidiemang v Attorney General & another*, determined that the 'regulation of conduct deemed indecent, done in private between consenting adults, is a violation of the constitutional right to privacy and liberty'.⁵ This finding by the Botswana High Court ran counter to a recent decision by the Kenya High Court, dealing with an almost identical application, but which found that laws criminalising same-sex sexual conduct do not offend the right to privacy and dignity.⁶

¹ M Tabengwa & N Nicol 'Sexual rights and the LGBTI movement in Botswana' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 340.

² B Dulani & others 'Good neighbours? Africans express high levels of tolerance for many, but not for all' (2016) *Afrobarometer Dispatch no 74*, 1-27.

³ As above, at 11.

⁴ F Viljoen 'Botswana court ruling is a ray of hope for LGBT people across Africa' 12 June 2019 <http://theconversation.com/botswana-court-ruling-is-a-ray-of-hope-for-lgbt-people-across-africa-118713> (accessed 2 September 2019).

⁵ *Letsweletse Motshidiemang v Attorney General with Lesbians, Gays and Bisexuals of Botswana as amicus curiae* Botswana High Court Case no MAHGB-000591-16 (unreported) at 128.

⁶ *EG v Attorney General consolidated with JM & others v Attorney General & others* (2019) Kenya High Court Petition nos. 150/2016 & 234/2016 (unreported).

In another landmark ruling pertaining to the registration of an LGBTI organisation, the Botswana Court of Appeal affirmed the constitutional rights of LGBTI persons to assembly, association and expression and asserted that equal protection of the law extended to everyone without distinction.⁷ Similarly, in *ND v Attorney General & another*, a case dealing with legal gender recognition for transgender persons, the High Court found that a refusal by the Registrar of National Registration to change the gender marker on a transgender applicant's identity document had interfered with his right to dignity.⁸ The case, popularly referred to as the *Gender marker* case, was a momentous case that confirmed that transgender persons form part of the diverse and rich nation of Botswana. It set a precedent that allows transgender persons in Botswana to alter gender markers on all their official identity documents to align them with their experienced gender identity. Closer scrutiny of the judgment, however, reveals that the medical approach to transgender identities adopted by the Court failed to consider the lived experiences of transgender persons in Botswana and how these affect access to legal gender recognition. As a starting point, the Court adopted a highly pathologising view of transgender persons, thereby making gender affirming surgery and hormonal therapy prerequisites for legal gender recognition.⁹ This is notwithstanding the fact that there is restricted access to gender affirming surgery and hormonal therapy within the Botswana public health management system, making such access resource based. Secondly, the heavy reliance on medical evidence to determine gender identity has a paternalistic effect which disregards autonomy and violates rights to dignity and self-determination. This also means self-identified transgender persons who have no access to the support of medical specialists are precluded from legal gender recognition.

The absence of a legislative or policy framework on legal gender recognition has exacerbated the barriers to legal gender recognition. This has meant that administrative requests for changes in gender markers are left to the unfettered discretion of those dealing with the requests. The absence of guidelines and standards on gender marker changes, coupled with the restricted access to medical transition increases the risk of violation of the rights of transgender persons. This dissertation explores the implication of the findings of the *Gender marker* case on the lives of transgender persons in Botswana. It further considers more inclusive and wholistic approaches to legal gender recognition that Botswana can consider in the development of policies for legal gender recognition to ensure the elimination of barriers to legal recognition for all transgender persons.

⁷ *Attorney General v Thuto Rammoge & Others* (2016) Botswana Court of Appeal Case no CACGB-128-14 (unreported).

⁸ *ND v Attorney General & the Registrar of National Registration* (2017) Botswana High Court Case no MAHGB-000449-15 (unreported).

⁹ The Court relied on evidence that the applicant had been diagnosed with gender identity disorder and had undergone hormonal therapy and surgery to determine that he was indeed a transgender man. It further placed emphasis on his physical appearance and expression to qualify the assertion that he ought to be recognised as a man (paras 17-22).

1.3 Problem statement

The Court in the *Gender marker* case was seized with a challenge by a transgender man, against the refusal to alter the gender marker on his national identity document (*omang*) to reflect his self-identified gender.¹⁰ The applicant who had been diagnosed with gender identity disorder, widely referred to as gender dysphoria, had undergone hormonal therapy and gender affirming surgery to make his body congruent with his gender identity.¹¹ These procedures altered his physical and outward appearance and gave him a masculine appearance.¹² Because of the divergence in the information contained in his *omang* and his physical appearance, the applicant applied to have his gender marker altered to align it with his identity as a man.¹³ The request was denied premised on the assertion that sex assigned at birth determines the contents of one's *omang*.¹⁴ Thereafter the applicant lodged an application with the High Court arguing that the refusal to have his gender marker altered violated his constitutional rights.¹⁵ Finding in his favour, the Court found that the Registrar of National Registration had unreasonably exercised his discretion by failing to take into account the applicant's psychological male identity and refusing to issue a new *omang*. It found that by so doing, the Registrar of National Registration had failed to protect the applicant's inherent dignity.¹⁶

In its efforts to understand the applicant's transgender identity, a novel issue for the Court, it relied on psychological and medical evidence adduced by the applicant's doctors and physicians.¹⁷ The medical approach was informed by comparative case law which establishes that in the absence of legislative guidance, courts must consider medical evidence establishing the gender of the applicant.¹⁸ This had the consequent effect of pathologising transgender identities and building the perception that transgender persons suffer from a mental condition, albeit a curable one. In addition, by following the medical approach, the Court unwittingly created a medical criterion for legal gender recognition. It appears that it was not enough for the applicant to have determined his gender identity himself, he had to demonstrate that his discernment was supported by findings by medical practitioners and that they had recommended that his gender marker be amended. Moreover, the Court placed great emphasis on the applicant's physical and outward appearance and expression, stating in part that 'he now has a full beard on his face, and has developed broad shoulders, taut muscles and a deep masculine voice'.¹⁹ This suggests that had the applicant not undergone any medical treatment, his chances of success would have been drastically reduced.

¹⁰ *ND v Attorney General & another* (n8), para 17.

¹¹ As above, para 19.

¹² As above, para 21.

¹³ As above, para 4.

¹⁴ As above.

¹⁵ As above, para 5.

¹⁶ As above, para 122.

¹⁷ As above, para 12.

¹⁸ As above, paras 69-71.

¹⁹ As above, para 67(d)).

It also suggests that the physical embodiment of, or 'passing' for the gender one identifies as, is another requirement for legal gender recognition.²⁰

While the use of the medical model was useful for understanding the plight of this particular applicant and indeed other transgender persons whose experiences are in tandem with the diagnosis for gender dysphoria, it places an unnecessary burden on those with different experiences. Furthermore, it has the effect of making access to a particular type of health care a condition for the enjoyment of rights.²¹ Inadvertently, the Court developed a criterion for legal gender recognition that is fraught with stumbling blocks and deterrents. The criteria reduces transgender persons to a homogenous group who all want to transition medically even though like any other group, transgender persons differ. Some transgender men for example want chest, commonly known as top surgery, but not genital surgery or only want gender affirming hormones or only want to transition socially and not medically. Others, such as gender non-conforming persons, gender queer and non-binary persons may only want flexibility in gender expression without the need to transition.²² Furthermore, the criteria enforces conformation to the medical script without considering the existing and glaring gaps in relation to access to gender affirming health care and related services. Currently, access to these services has income based implications which preclude transgender persons who have financial constraints from acquiring legal recognition and privileges those with the means.²³ The criteria developed is simplistic in that it reduces gender to hormonal and biological characteristics and disregards other attributes of gender. This impacts on the exercise of agency by transgender persons and violates their right to privacy which has been interpreted to include 'the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health.'²⁴ The dependence on medical practitioners to determine gender identity simply takes away from this agency and gives the medical profession dominion over the lives of transgender persons and makes them gatekeepers to legal recognition. Furthermore, it runs the risk of erasing diverse identities within the transgender spectrum who do not conform to bi-gendered understandings of gender, reinforcing cis-heteronormative biases.

The approach adopted by the Court is not unique to Botswana. The Alteration of Sex Description and Sex Status Act of South Africa (ASDSS Act),²⁵ for example, allows for changes of sex description on the birth records of persons, if they have undergone medical or surgical sex reassignment and have produced proof of this. Similarly, the

²⁰ Passing refers to when a transgender person's appearance leads to them being perceived as being the gender they identify with and not the gender they were assigned at birth. It is about being able to blend in and being perceived as cis gender.

²¹ FR Romeo 'Beyond a medical model: Advocating for a new concept of gender identity in the law' (2005) 36 *Human Rights Law Review* 713.

²² W Byne & others 'Gender dysphoria in adults: An overview and primer for psychiatrists' (2018) 3 *Transgender Health* 57-70, at 57.

²³ JL Koenig 'Distributive consequences of the medical model' (2011) 46 *Harvard Civil Rights-Civil Liberties Law Review* 619-646.

²⁴ General Comment 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights E/C.12/GC/22 (2016).

²⁵ Alteration of Sex Description and Sex Status Act of South Africa 49 of 2003.

Kenya High Court in affirming the gender identity of a transgender woman relied on medical evidence to the effect that the applicant had been diagnosed with 'gender identity disorder' and had begun transitioning medically.²⁶ Gender identity retains a diagnosis in both the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) and the World Health Organisation's (WHO) International Classification of Diseases and Related Health Problems (ICD).²⁷ However, on 30 May 2019, the eleventh version of the ICD (ICD-11) was launched and 'gender identity disorder' was removed from the official manual of diagnoses and reclassified as 'gender incongruence'.²⁸ 'Gender incongruence' is described as 'a feeling of anguish when an individual's identity conflicts with the sex they were assigned at birth.'²⁹ The reclassification removed transgenderism as a mental illness as contained in ICD-10 but nonetheless retained it in the classification of diseases. Even so, the update to the ICD is a welcome development that recognises and affirms gender diversity as a healthy expression of human identity and not necessarily a mental disorder.

The history of transgender identities around the world is replete with various discursive models that have been used to conceptualise transgender identities.³⁰ These include the theory of choice or self-determinism,³¹ and gender plurality³² for example. Nonetheless, current legal and social understanding of transgender persons are explored through the medical model developed by sexologists, psychologists, and endocrinologists over the past era.³³ It continues to maintain hegemony over what is valued and taken into consideration in relation to transgender identities. The medical model operates from the view that transgender identity is a psychological condition that necessitates medical treatment such as gender affirming surgery and hormonal therapy.³⁴ It invokes ideas of abnormality, disease and cure, suggesting that transgender persons cannot be allowed to exist as they are and that they must be corrected in order to be granted legal recognition. This mini dissertation seeks to unpack the inherent barriers to legal gender recognition within the medical approach adopted by the Botswana High Court in the *Gender marker* case. It further interrogates various comparative approaches to legal gender recognition and proposes alternative approaches that will remove existing barriers to legal gender recognition within the

²⁶ *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu* Judicial Review Case no 147 of 2013 (2014) Kenya Law Reports 6.

²⁷ A Muller 'Scrambling for access: Availability, accessibility, acceptability and quality of healthcare for lesbian, gay, bisexual and transgender people in South Africa' (2017) 17 *BMC International Health and Human Rights* 2 citing F Pega & JF Veale 'The case for the World Health Organisation's Commission on social determinants of health to address gender identity' (2015) 105 *American Journal of Public Health* 58-62.

²⁸ UN news "A major win for transgender rights: UN health agency drops 'gender identity disorder' as official diagnosis" <https://news.un.org/en/story/2019/05/1039531> (accessed 2 June 2019).

²⁹ As above.

³⁰ A Lee 'Trans models in prison: The medicalisation of gender identity and the eighth amendment right to sex reassignment therapy' (2008) 31 *Harvard Journal of Law & Gender* 447-471, at 451.

³¹ LK Langley 'Self-determination in a gender fundamentalist state: Toward legal liberation of transgender identities' (2006) 12 *Texas Journal on Civil Liberties & Civil Rights* 101.

³² P Currah 'Gender pluralism under the transgender umbrella' in U Leli & J Drescher (eds) *Transgender subjectives: A clinician's guide* (2006) 30.

³³ Lee (n 30).

³⁴ Romeo (n 21).

legal framework of Botswana. The research aims to support the development of policies, guidelines and standards for legal gender recognition that consider the array of human experience and influence and which are in conformity with international human rights standards.

1.4 Research questions

Main question: To what extent are transgender persons in Botswana afforded the right to legal gender recognition?

Sub-questions:

- a. What implication has the *Gender marker* case had on the actual lives of transgender persons in Botswana?
- b. What is the international and national legal position in respect of the right to legal gender recognition of transgender persons?
- c. Based on a comparative analysis of model approaches to legal gender recognition, what would be the best approach for ensuring the removal of existing barriers to legal gender recognition in Botswana?

1.5 Methodology

Critical feminist theory and identity-based critiques of dominant cultural practices such as Charles Ngwena's 'inclusive hermeneutics of Africanness'³⁵ have been used to contest the objectivity of the criteria for legal gender recognition as developed in the *Gender marker* case. These have been used to demonstrate how the pathologisation of transgender identity, including the requirement for medical transition, reinforces gender stereotypes and heteronormativity and serve to invisibilise gender identities and expressions that deviate from social norms. These methods of social critique have been used to demonstrate how systemic forms of oppression result in exclusionary and hierarchical norms that further marginalise non-binary transgender identities. Qualitative research methods have been used to gain insights into transgender persons' experiences in seeking legal gender recognition. This includes the use of comparative case studies, academic papers and other instructive writings.

1.6 Literature review

There is an abundance of literature on the experiences of transgender persons and the challenges they encounter in seeking legal gender recognition. However, most of the writings on the subject are from a global north perspective with very little writing on African perspectives and experiences. This is primarily due to the fact that until the *Gender marker* case, South Africa was the only African country which had made express provision for recognition of legal gender identity in terms of the ASDSS Act.³⁶ These writings will be localised as far as they pertain to the problems identified with the criteria developed for legal gender recognition in Botswana. Substantive

³⁵ C Ngwena *What is Africanness? Contesting nativism in race, culture and sexuality* (2018).

³⁶ Alteration of Sex Description and Sex Status Act (n 25).

discussions of this literature will be included in the various chapters of the research paper.

Comparative case law, which will be discussed in greater detail in the chapter dealing with approaches to legal gender recognition, provides guidance on various approaches to the legal recognition of transgender persons. This jurisprudence is helpful for demonstrating the issues underlying legal gender registration. There is no universal formula for determining gender identity, various courts have developed differing tests and formulas. For example, in *Corbett v Corbett*, the English Court concerned with the legal gender of a transgender woman in the context of the validity of a marriage followed the medical approach.³⁷ It took the view that chromosomal, gonadal and genital tests should be conducted and if all three correspond, that should determine a person's sex. The Court expressed the view that any surgical procedure should be ignored, and that the biological make-up of an individual is fixed at birth and cannot be changed by medical or surgical means. The principle laid out in this case has however, attracted much criticism and several jurisdictions have since departed from it. In *Attorney General v Otahuhu Family Court*, the New Zealand Family Court held that there was no social advantage in the law not recognising the validity of a marriage of a transgender person in their reassigned sex.³⁸ The Court found an adequate test to be whether the person in question has undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of a specified sex. In *In Re Kevin*, the Australian Court held that there is no 'formulaic solution' to determine the sex of an individual for the purpose of the law of marriage.³⁹ The Court found that all relevant matters need to be considered, including the person's life experiences and self-perception. Other jurisdictions have followed the self-identification model without qualification. The Supreme Court of India has gone as far as recognising a third gender category. In *National Legal Services Authority v Union of India*, the Indian Supreme Court was confronted with a wide range of transgender identities, including *Hijras* described as biological males who self-identify as 'in between man and woman' or 'neither man nor woman.'⁴⁰ The Court in this case found that self-identified gender can be either male or female or a third gender for persons who do not identify as male or female and are therefore separate.⁴¹ The Court found that determination of one's gender is to be decided by the person concerned.⁴² Similar to the Indian Court, the Supreme Court of Nepal has found that '...third gender people are also human beings as other men and women are...thus the people, other than 'men' and 'women,' including the people of the 'third gender' cannot be discriminated.'⁴³

³⁷ *Corbett v Corbett* (1970) 2 All ER 33.

³⁸ *Attorney General v Otahuhu Family Court* (1995) 1 NZLR 603.

³⁹ *In Re Kevin (Validity of marriage of transsexual)* [2001] Fam CA 1074.

⁴⁰ *National Legal Services Authority v Union of India & others* (Writ Petition no 400 of 2012 with Writ Petition no 604 of 2013) 2014 AIR (SC).

⁴¹ As above, para 70.

⁴² As above, para 74.

⁴³ *Sunil Babu Pant & Others v Nepal Government & Others* Supreme Court of Nepal (2008) 1 Writ no 9172064 BS (2007 AD) 2NJALJ 261.

Various theories have been advanced to rationalise the use of medical approaches to legal gender recognition. For example, Deyi writing from a South African perspective finds that the law is built on a hierarchical and essentialist conception of gender and that this has resulted in the erasure of transgender persons who do not conform to this idea of gender.⁴⁴ She argues that bi-gendered conceptions of identity have resulted in institutional and informational erasure of transgender persons, culminating in exclusionary legislation and policies.⁴⁵ Deyi observes that the continued development of legislation and policy reliant on bi-sexed or gendered systems with no alternatives results in the erasure of persons who fall outside of those gender constructs.⁴⁶ She argues that a demolition of conventional understandings of gender is critical for ensuring the inclusion of all gender minorities.⁴⁷ In line with this argument, Baril and Trevenen argue that ableist and cisnormative systems of power are the basis of the requirement for transgender persons to justify their transitions in terms that are comprehensible to medical, political and cultural norms.⁴⁸ They contend that if cisnormative and ableist assumptions are not challenged, social, cultural and political contexts will always assume something must be 'wrong' to change genders for example.⁴⁹ Similarly, Butler states that there are sexual and gender norms that condition what and who will be legible for legal recognition and what and who will not.⁵⁰ She finds that the performativity of gender is connected to the differential ways of allocating recognisability and that to be a subject of recognition one must comply with certain norms that govern recognition.⁵¹

1.7 Limitation of the study

Several issues and controversies are raised by the research which cannot be sufficiently addressed as they would require a concerted focus to be properly interrogated. Still, they are key to the full recognition and protection of transgender persons. These include the question of access to gender affirming health care and related services as part of the enjoyment of the right to the highest attainable standard of health. The established criteria for legal gender recognition has grave socio-economic implications for transgender persons, who cannot afford private health care. This is because the Botswana public health system currently only avails gender affirming treatment to intersex persons. If legal recognition is contingent on medical transition but access to gender affirming care and treatment is restricted, then transgender persons are placed in a conundrum that essentially denies them the enjoyment of a full range of their fundamental human rights. In addition, this introduces the unsavoury element of unsafe self-medication and procurement of hormones from

⁴⁴ B Deyi 'First class constitution, second class citizen: Exploring the adoption of the third-gender category in South Africa' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 128, at 130.

⁴⁵ As above, at 132.

⁴⁶ As above.

⁴⁷ As above, at 137.

⁴⁸ A Baril & K Trevenen 'Exploring ableism and cisnormativity in the conceptualisation of identity and sexuality 'disorders'' (2014) 11 *Annual Review of Critical Psychology* at 393.

⁴⁹ As above, at 408.

⁵⁰ J Butler 'Performativity, precarity and sexual politics' (2009) 4 *Revista de Antropología Iberoamericana* (*Journal of Iberoamerican Anthropology*), i-xiii.

⁵¹ As above, iv.

unreliable sources which do not consider the physiological requirements and biological make-up of the person taking them. Needless to say, these may have serious health consequences. Although these are pertinent issues to be interrogated, they are not addressed in detail in the current research paper which has narrowed its focus on addressing barriers to legal recognition of transgender persons in Botswana.

1.8 Significance of the study

The research may inform the formulation of policy to enhance the lived experiences of transgender persons and allow transgender persons to gain recognition of their identities through self-identification without the need to undergo hormonal therapy or gender reaffirming surgery if they choose to forego the procedures or do not have access to gender affirming care.

1.9 Structure

The following outline sets out the structure of the research paper:

The second chapter of the research focuses on building an understanding of transgender identities and the different discursive models for conceptualising and understanding transgender identities and experiences. This includes an interrogation of the different approaches employed by activists in the field of transgender rights as well as the different discursive theories on building inclusive societies. The chapter examines the challenges to legal gender recognition that existed prior to the *Gender marker* case and demonstrates their cumulative implications on the lives of transgender persons.

The third chapter focuses on the law as it pertains to transgender persons. This includes a critical analysis of the *Gender marker* case and its implications on the actual lived realities of transgender persons in Botswana. The chapter considers whether transgender persons have benefited from the development of the criteria for legal gender recognition and whether the criteria has the effect of being exclusionary. In addition, the chapter examines international principles and standards on gender identity and whether these were reflected in the finding of the *Gender marker* case. A comparative analysis

The fourth chapter conducts a theoretical analysis of the *Gender marker* case, highlighting the inherent biases in the Court's approach. It considers different approaches to legal gender recognition that could be replicated in Botswana based on a comparative analysis of legal systems that have made progress in relation to legal gender recognition, through advancements in jurisprudence and the adoption of laws. The analysis is conducted with the aim of informing best practices and identifying lessons for removing existing barriers to legal gender recognition. Some of the considerations include the implications and benefits of doing away with gender registration or removing sex descriptors from identity documents. The chapter further explores the possibility of a third gender as a recognisable category for legal gender recognition in Botswana, including the administrative challenges likely to arise as a result of adopting such an approach.

The fifth and final chapter sets out the conclusions and recommendations for building more pluralistic and inclusive societies that safeguard the rights of all members of society, including non-normative sexualities and identities.

CHAPTER 2: THE IMPLICATIONS OF LEGAL RECOGNITION ON THE ACTUAL LIVES OF TRANSGENDER PERSONS IN BOTSWANA

2.1 Introduction

This chapter has a sociological focus and concentrates on the experiences of transgender persons broadly, and on seeking legal gender recognition, specifically. It examines the existing barriers to legal gender recognition and the implications these have on the actual lives of transgender persons. It considers the different discursive models for understanding transgender identities, including the justifications advanced for the use of the medical model.

As a starting point, the chapter unpacks the terminology that is often employed in relation to gender identity and gender expression. Thereafter the chapter briefly discusses the history of discourse on transgender identities and experiences and how these have impacted on the lives of transgender persons today. Bringing the issue closer to home, the chapter then considers the experiences of transgender persons in the broader African context as a precursor to a discussion on the lived experiences of transgender persons in Botswana. The chapter concludes with a summary of the issues highlighted in this chapter and how they relate to the discussions in the following chapter.

2.2 Terminology

Any inquiry relating to the experiences of transgender communities must be grounded on a firm understanding of the concepts 'sex' and 'gender' and their individual components as well as the term 'transgender' itself. This is crucial for furthering understanding of transgender identities and their inimitable experiences of discrimination in seeking recognition and inclusion. 'Sex' is commonly used to refer to whether a person is physically and biologically male or female.⁵² Sex characteristics include physical traits such as a beard, breasts, chromosomes and hormones, internal reproductive organs as well as genitalia. The term 'gender' although sometimes erroneously used interchangeably with 'sex,' refers to the social and legal classes that are attributed to a person's physical sex.⁵³ These include gender roles, gender identity and gender expression. 'Gender identity' refers to a person's innate and personal experience of gender, which may or may not match the sex assigned to them at birth.⁵⁴ 'Gender expression' refers to presentations, behaviours, interests and affinities and their perception and classification as feminine or masculine or a combination of both.⁵⁵ Presentations include dress, mannerisms, behavioural patterns and names. Unlike sexual orientation or gender identity, which are usually covert and invisible, gender expression is evident, making it the most widely commented on, critiqued and regulated aspect of gender.⁵⁶ The most common socially constructed manifestation of

⁵² J Serano *Whipping girl: A transsexual woman on sexism and the scapegoating of femininity* (2007) 11.

⁵³ As above, at 24.

⁵⁴ Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity 2007.

⁵⁵ Serano (n 52) at 95.

⁵⁶ As above.

gender expression is in the performance of gender roles.⁵⁷ Gender expression may, or may not, match with a person's gender identity. 'Transgender' falls under the category of gender identity and gender expression and refers to people whose gender identity, expression, behaviour or practice falls outside of the socially constructed confines of gender norms.⁵⁸ The term has been used as an umbrella term and encompasses transgender people who have undergone physical alterations through surgery or hormonal therapy as well as those who have not such as, cross-dressers, gender non-conforming people and non-binary persons.⁵⁹ The term is used to refer to persons whose gender identity or expression is different from the sex they were assigned at birth.⁶⁰ This may be represented by a desire to live as and be accepted as the other gender and may be accompanied by feelings of anguish about one's sex and its gendered connotations.⁶¹ Some transgender persons may wish to have hormonal treatment and surgery to make their bodies congruent with their gender identities with the goal of achieving maximum psychological and physical well-being.⁶² However, not all transgender persons choose hormonal therapy or surgery, or both.

Transgender activists strongly believe that there should not be any qualifications placed on the term 'transgender' based on the ability to pass for the other gender or societal standards of appearance, hormone levels or the state of one's genitals.⁶³ This is an important assertion as such qualification undoubtedly results in the erasure of the distinctiveness of the transgender community. However, many people, including mental health professionals, still view the society as a strict binary composed of biological men and women, which is presented as directly oppositional. This is presented through the strict socio-political classification of gender as either male or female. This gender essentialist approach leaves very little room for gender fluidity or for bodies that exist outside of the binary such as non-binary and gender non-conforming persons. This is a subset of the transgender community that is often ignored. Non-binary persons are persons whose gender identity falls outside the gender binary of male and female. They are neither male nor female. Gender non-conforming persons are persons whose gender expression does not fit neatly with the gender norms of the gender they associate with or sex assigned to them at birth. Some non-binary and gender non-conforming persons may choose to undergo surgery or hormonal therapy. Equally, many choose to live in the bodies they were born in without undergoing any physical alterations. Restrictive approaches to gender recognition that view gender as a binary can result in precarious legal statuses for non-binary and gender non-conforming persons resulting in non-recognition and institutional discrimination.

⁵⁷ As above.

⁵⁸ Deyi (n 44) at 134.

⁵⁹ As above.

⁶⁰ GA Jobson & others 'Transgender in Africa: Invisible, inaccessible, or ignored?' (2012) *SAHARA Journal of Social Aspects of HIV/AIDS* 160.

⁶¹ A Mbugua 'Gender dynamics: A transsexual overview' in S Tamale (ed) *African sexualities: A reader* (2011) 238.

⁶² As above.

⁶³ Serano (n 52) at 11.

While it is common to assume that being transgender involves some kind of medical procedure or treatment, it is important to remember that many transgender persons either cannot afford to transition medically or opt not to undergo any medical interventions.⁶⁴ Furthermore, access to appropriate and adequate hormone therapy and surgery in Africa is often difficult.⁶⁵ A 2015 report by WHO indicates that there are still very few appropriate and accessible health services available to transgender persons.⁶⁶ This is often due to a lack of professional training and relevant health system standards for transgender patients. For transgender persons who wish to transition medically, the lack of access to gender affirming services can present an added burden and contribute to feelings of dysphoria. As a result, some transgender persons have been known to self-administer hormones obtained through illicit sources without medical supervision or guidance.⁶⁷ The lack of access to appropriate care and treatment can result in a myriad of health complications and contribute to poor mental health and increased exposure to sexual risk.⁶⁸ In a context where medical transition is a requirement for legal gender recognition, the lack of access to gender affirming treatment can present a massive barrier to legal gender recognition.

2.3 A brief history of transgender identities and experiences

Many terms used to describe transgender persons today were not in existence as recent as ten years ago or were virtually unknown. In fact, most terms that were widely used and accepted then are now considered outdated or offensive now. Similarly, views and opinions about transgender persons have continuously shifted. Like homosexuality, the medical study of transgender persons began in earnest in the 19th century albeit with a conflation of gender identity and sexual orientation.⁶⁹ The attribution of gender variance as a psychopathology has been credited to Krafft-Ebing (1886), however, the ‘surgical construction’ of gender was popularised by George Jorgensten who went to Denmark as a man and returned to the United States as a transgender woman in 1967.⁷⁰ Many physicians and psychiatrists at the time perceived transgenderism as a delusional condition requiring psychotherapy and reality testing.⁷¹ It was in this cultural context that research on gender identity made its way into scientific analysis. Despite these prevailing negative framings of gender identity, physicians like Harry Benjamin are credited for popularising the term ‘transsexual’ as it is currently understood and for raising awareness on transgender identities within the medical profession.⁷² Benjamin was among the first physicians to

⁶⁴ As above, 31.

⁶⁵ As above.

⁶⁶ ‘*Sexual Health, Human Rights and the Law*’ World Health Organisation Report 2015.

⁶⁷ S Winter & others ‘Synergies in health and human rights: A call to action to improve transgender health’ (2016) 388 *The Lancet* 318-321.

⁶⁸ As above.

⁶⁹ J Drescher ‘Transsexualism, gender identity disorder and the DSM’ (2010) 14 *Journal of Gay and Lesbian Mental Health* 111.

⁷⁰ As above.

⁷¹ As above.

⁷² Some members of the transgender community, however, find the term ‘transsexual’ offensive and derogatory and prefer the generic term transgender.’

experiment with hormonal and surgical therapy for the treatment of individuals with gender dysphoria.⁷³

Modern medicine and psychology have been at the forefront of investigation and building understandings of transgender identities.⁷⁴ Medical experts continue to shape and frame how transgender communities are perceived.⁷⁵ This stems from the perception of medicine as authoritative, thorough and objective notwithstanding the fact that historically medicine has been manipulated to perpetuate systems of oppression such as justifying slavery and the anti-Semitic hysteria of the 1980s. The pathologisation of transgender identities has not escaped this manipulation. As a starting point, the influences of oppositional sexism and essentialist assumptions about the connection between sex and gender continue to be apparent in medical discourses about transgender identities.⁷⁶ As a result pathologisation still plays a role in reinforcing gender hierarchies and disparities between normative genders and non-normative genders.⁷⁷ Transgender persons throughout the world continue to have their access to basic human rights curtailed or denied on the basis of pathologisation.⁷⁸ While some physicians have demonstrated an interest and commitment to creating a safer, more inclusive world for non-normative sexualities and genders, others have served to erase these identities.⁷⁹ The legacy of these latter experts has resulted in the perception of transgender experiences as abnormalities and as psychopathologies.⁸⁰ Although advocates for the medical model have argued against the treatment of transgender persons as mentally ill and have indeed been successful in changing opinions regarding the authenticity of gender-variant identities, they can be said to be partly responsible for the continued pathologisation of transgender identities. They are criticised as being responsible for the slow change in cultural attitudes about gender because of their essentialist approaches to gender identity. Conversely, however, it has been argued that the medical model has facilitated access to health care services for transgender persons. This once again stems from the perception of medicine as authoritative. There are many issues that attach to the diagnoses of transgender identities as mental disorders. These include the discriminatory effect it has on gender diverse persons and the stigmatising nature of a mental illness diagnosis.

Transgender persons were first pathologised by the WHO through ICD-9 in 1975.⁸¹ This is a manual used by clinicians and researchers globally to diagnose and categorise mental disorders. It is one of the key instruments that have influenced views about transgender persons along with the DSM, a manual published by the American

⁷³ Drescher (n 69).

⁷⁴ Serano (n 52) at 115.

⁷⁵ As above.

⁷⁶ GY Ansara 'Cisgenderism in medical settings. Challenging structural violence through collaborative partnerships' in I Rivers & R Wards (eds) *Out of the ordinary: LGBT lives* (2012) 93-111.

⁷⁷ As above, at 96.

⁷⁸ JT Theilen 'Depathologisation of transgenderism and international human rights law' (2014) 14 *Human Rights Law Review* 327-342.

⁷⁹ Serano (n 52) at 115.

⁸⁰ As above, at 116.

⁸¹ World Health Organisation (WHO) *International Statistical Classification of Diseases and Related Problems 9th revision-ICD-9* (1975).

Psychiatric Association (APA). These manuals determine how mental disorders are diagnosed and treated, they also impact public perceptions. Both these manuals classify transgenderism as a medical condition that can be treated. 'Trans-sexualism' was first included in the ICD-9 chapter on 'mental disorders' and coded under 'neurotic disorders and personality disorders' along with 'sexual deviations.' Following suit 'gender identity disorder,' defined as an incompatible difference between a person's internal sense of gender and the expectation society has for their gender, was included in the third edition of the DSM (DSM-III) in 1980.⁸² The diagnosis of 'gender identity disorder' was maintained until May 2019 when it was reclassified as 'gender incongruence' in the fifth edition of the manual (DSM-V) and categorised as 'gender dysphoria.' The replacement of the diagnostic names was done with the aim of reducing stigma against transgender persons and ensuring clinical care to persons who feel they are a different gender to their assigned sex.⁸³ Recommended treatment for gender dysphoria includes counselling, hormonal therapy, gender reassignment surgery and social and legal transition.⁸⁴

The various editions of the DSM since DSM-III have approached gender diversity from the view that a discrepancy between the assigned sex (physical sex) and the psychological sex or gender, signal a psychiatric disorder.⁸⁵ Prior to the adoption of DSM-V, a Work Group on Sexual and Gender Identity Disorders was convened to consider revising the gender identity diagnoses. The Work Group, charged with removing the condition as a psychiatric condition, declined to do so on the basis that this would jeopardise access to health care.⁸⁶ A similar working group was set up by WHO in its process of developing the eleventh revision of ICD (Working Group on Sexual Disorders and Behaviours).⁸⁷ The working group received recommendations from civil society organisations, activists and governments of member states to remove transgender identities from its classification of mental disorders. Criticisms levelled against the continued psycho-pathologisation of transgender identities centred on the stigmatisation that accompanies being labelled as mentally ill in most cultures.⁸⁸ The working group acknowledged that there is substantial evidence of the link between stigmatisation of transgender persons and the classification of gender diversity as a mental disorder. They further acknowledged that this has contributed to challenges with acquiring legal recognition, human rights abuses and restricted access to healthcare.⁸⁹ Nonetheless, similar to the DSM work group, the working group

⁸² American Psychological Association Diagnostic and Statistical Manual of Mental Disorders 3rd edition- DSM-III (1980).

⁸³ DSM-V Fact sheet on Gender Dysphoria, American Psychiatric Association (2013) available at <https://www.psychiatry.org/psychiatrists/practice/dsm/educational-resources/dsm-5-fact-sheets> (accessed on 20 June 2019).

⁸⁴ As above.

⁸⁵ PT Cohen-Kettenis & F Pfäfflin 'The DSM diagnostic criteria for gender identity disorder in adolescents and adults' (2009) 2 *Archives of Sexual Behavior* 499-513.

⁸⁶ DSM-V Factsheet (n 83).

⁸⁷ International Advisory Group for the Revision of ICD-10 Mental and Behavioral Disorders.

⁸⁸ GM Reed & others 'Disorders related to sexuality and gender identity in the ICD-11: Revising the ICD-10 classification based on current scientific evidence, best clinical practices, and human rights conditions' (2017) 16 *World Psychiatry Journal* 209.

⁸⁹ As above.

recommended retaining gender incongruence in the ICD-11 to safeguard access to health services.⁹⁰ The principal difference between the two expert groups was that the WHO working group recommended removing gender dysphoria from categorisation as a mental and behavioural disorder to 'conditions related to sexual health' whilst the DSM work group retained it as a mental condition. In addition, the WHO working group recommended abandoning terms such as 'opposite sex' and 'anatomic sex' in the definitions of gender incongruence and replacing them with less binary terms like 'experienced gender' and 'assigned sex'.⁹¹ The DSM work group recommendations were silent on the use of binary language and such terms can still be found in the DSM-V.

While not abandoning the medical approach to transgender identities, the recommendations of the WHO working group are arguably more progressive as they are relatively more responsive to the need and experiences of transgender persons in their diversity than the DSM work group. The subsequent reclassification of gender dysphoria as a sexual health issue rather than a mental illness is demonstrative of a growing sensitivity to gender diversity. That said, the failure to completely remove the classification of transgender experiences as pathologies or conditions that can be treated in the ICD-11, demonstrates a resistance to the complete acceptance of gender variant experiences. Retaining such classification is not only stigmatising, it also makes transgender persons objects of science and medicine rather than autonomous subjects capable of determining their own identities. This places medical practitioners as authorities and paternalistic gatekeepers of transgender experiences and by extension, legal gender recognition.

2.4 Transgender identities in the broader African context

African cultures throughout the continent have a history of recognising and accepting gender non-conforming individuals within communities, or at the most remaining apathetic towards their existence, as demonstrated by historical and anthropological research.⁹² Although varying in degrees of acceptance, 'gender crossing' has been identified as common in communities such as the Nigerian *Hausa bori* cult, the *Maale* of Southern Ethiopia and among the Swahili speakers on the coast of Kenya.⁹³ However, with the advent of colonialism and the conceptualisation of 'African sexualities' as primitive and backwards and in need of taming and civilising,⁹⁴ attitudes towards transgender persons have grown steadily repressive. Now riddled with transphobic and negative attitudes, stemming from a context which criminalises same-sex behaviour between consenting adults, attitudes towards the transgender community in Africa can be said to be more hostile.⁹⁵ Across Africa, transgender persons are forced to battle with prevalent experiences of discrimination and social

⁹⁰ As above.

⁹¹ As above.

⁹² SO Murray 'Africa: Sub-saharan, pre-independence' in CJ Summers (ed) *GLBTQ: An encyclopedia of gay, lesbian, bisexual, transgender and queer culture* (2004) 160-163.

⁹³ As above

⁹⁴ S Nyanzi 'Unpacking the [govern]mentality of African sexualities' in S Tamale (ed) *African sexualities: A reader* (2011) 447.

⁹⁵ Jobson & others (n 60).

exclusion.⁹⁶ Transgender persons experience stigma and discrimination in their daily lives, including at work, at home, walking on the streets and using public facilities such as banks, hospitals and airports because they do not fit in with gender norms.⁹⁷ In addition, their gender non-conformity continuously exposes them to the threat of violence. Transgender persons are often required to disclose intimate and personal details to strangers in order to access routine services, this violates their privacy and dignity. Moreover, having a gender identity that is not reflected in official identity documents effectively denies transgender persons their rights to citizenship.⁹⁸

The degree of recognition of transgender persons in Africa varies from country to country, with countries like Sudan and Mauritania being on the most repressive end of the scale and South Africa at the most progressive.⁹⁹ Although many of the laws used in these contexts are mainly meant to punish lesbians, gays and bisexuals, they invariably affect transgender persons because of the common confusion of gender identity for sexual orientation. The confusion about the two terms results from essentialist assumptions that gender necessarily flows from sex.¹⁰⁰ This leads to the misconstruction of transgender identities as a deviation from the normative and thus fitting within the classification of homosexuality.¹⁰¹ South Africa remains the only country in Africa with express legislation that recognises and protects transgender persons. The ASDSS Act of South Africa was enacted to enable transgender and intersex persons undergoing gender affirming treatment to change their names and the gender-markers in their identity documents.¹⁰² Upon successful alteration of the gender marker the applicant can then alter their sex description on other official documents such as drivers' licences and educational qualifications to reflect their self-identified gender.¹⁰³ The only other African country that has affirmed the right to legal gender recognition is Kenya even though it previously abdicated from the opportunity to expand the meaning of the term sex to include intersex persons.¹⁰⁴ However, in contrast to this determination to maintain existing gender categories, in *Republic v Kenya National Examinations Council & another*, the Kenya High Court issued an order compelling the Kenya National Examinations Council (KNEC) to recall the certificate of a transgender applicant and issue her with a new one bearing her preferred name and devoid of a gender marker.¹⁰⁵

2.5 Transgender identities in the context of Botswana

Like in other African countries, the absence of a legal framework for the recognition and protection of sexual minorities in Botswana has exacerbated social exclusion,

⁹⁶ 'Laws and policies affecting transgender persons in Southern Africa' (2016) Southern Africa Litigation Centre (SALC) Booklet, at 1.

⁹⁷ As above.

⁹⁸ As above.

⁹⁹ Both Sudan and Mauritania retain the death penalty for male same-sex sexual conduct.

¹⁰⁰ Deyi (n 44) at 135.

¹⁰¹ As above.

¹⁰² As above, at 144.

¹⁰³ As above, 145.

¹⁰⁴ *Richard Muasya v Attorney General & others* Petition 27 of 2007 Kenya High Court.

¹⁰⁵ *Republic v Kenya National Examinations Council & another* (n 28).

stigma in social institutions and the denial of rights.¹⁰⁶ In a research report on the mental health and wellbeing of LGBTI people in East and Southern Africa, it is shown that transgender persons in Botswana experience violence more often than the general population.¹⁰⁷ Similarly, experiences of sexual violence are significantly higher among transgender and gender non-conforming persons than with other sexual minorities.¹⁰⁸ Despite the fact that there is no law in Botswana which makes it illegal to identify as homosexual and indeed transgender, and despite clarifications to this effect by the High Court in *Thuto Rammoge & others v Attorney General & another*,¹⁰⁹ transgender persons continually face harassment and are often subjected to arbitrary arrest and detention.¹¹⁰ Public officials have been known to use other laws, especially the Penal Code,¹¹¹ which contains provisions which, even though facially neutral, criminalise same-sex sexual practices between consenting adults, to harass transgender persons.¹¹² In addition, law enforcement officers have been known to charge transgender persons under offences relating to nuisance, idle and disorderly conduct and vagrancy, especially transgender persons who also engage in sex work.¹¹³ In June 2019, however, the Botswana High Court declared sections 164 and 165 of the Penal Code *ultra vires* the Constitution as they violate rights to privacy and liberty.¹¹⁴ The Attorney General has since noted an appeal on the basis that the High Court exceeded its jurisdiction by overruling the decision of the Court of Appeal in *Kanane v The State*.¹¹⁵

The Rainbow Identity Association of Botswana (RIA), an organisation that advocates for the recognition and inclusion of transgender and intersex persons in Botswana, has noted some of the challenges faced by transgender persons in obtaining documents reflecting their gender identity. In a contribution to a stakeholder report submitted to the second cycle of the Universal Periodic Review on Botswana, RIA noted that the procedure for legal gender recognition is unsystematic and unclear.¹¹⁶ It criticised the requirement on applicants to submit to courts, medical reports concerning their gender identity without the benefit of the cooperation of the Ministry of Health to enable approval of the medical report.¹¹⁷ In addition, Botswana does not

¹⁰⁶ LL Mpelega 'Interpretation of lived experiences of transgender people in Gaborone Botswana' Master of Education research essay, University of Botswana, 2013 at 6.

¹⁰⁷ A Müller & others 'Are we doing alright? Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in East and Southern Africa: Research report based on a community-led study in nine countries' (2019), at 138.

¹⁰⁸ As above.

¹⁰⁹ *Thuto Rammoge & others v Attorney General & another* [2014] Botswana High Court case no. MAHGB-000175-13 unreported, at paras 52 and 62.

¹¹⁰ SALC booklet (n 96) at 21.

¹¹¹ Penal Code of Botswana Chapter 08:01 1964.

¹¹² Sections 164, 165 and 167 of the Penal Code criminalise 'unnatural offences' interpreted to mean acts of anal penetration, 'gross indecency' interpreted to mean oral stimulation as well as attempts to commit such acts.

¹¹³ Section 176 of the Penal Code creates the offence of common nuisance, section 179 relates to idle and disorderly conduct and section 182 makes it an offence to be a rogue or vagabond which relates to loitering.

¹¹⁴ *Letsweletse Motshidiemang v Attorney General* (n 5).

¹¹⁵ Notice and grounds of appeal in *Attorney General v Letsweletse Motshidiemang* case no. CACGB-157-2019 Botswana Court of Appeal.

¹¹⁶ Universal Periodic Review (second cycle) Botswana Stakeholder Report, 2012, para 22.

¹¹⁷ As above.

offer gender affirming surgery as part of national health services. Hormone therapy is available at government hospitals but given at the discretion of medical practitioners who often display transphobic attitudes and consider being transgender a lifestyle choice rather than an inherent part of gender identity.¹¹⁸

2.6 Conclusion

The discussions in this chapter demonstrate that although transgender people are divided by the diversity of their backgrounds and experiences, they invariably have similar concerns derived from the commonality of their oppression.¹¹⁹ Throughout the world, transgender persons face high levels of stigma, discrimination, violence, abuse, marginalisation and social exclusion.¹²⁰ Intersecting social, cultural, legal and economic factors have coalesced to keep transgender persons at the fringes of society.¹²¹ The vulnerability of transgender persons is worsened by laws that criminalise transgender identities and cross dressing as well as the lack of inclusion of transgender persons in legal and policy frameworks.¹²² In the context of Botswana, the unsystematic procedure for legal gender recognition continues to act as a barrier to legal recognition. This is compounded by the restricted provision of gender affirming treatments and services within the public health management system.

The discussions show that historically, transgender persons were perceived negatively and were treated as delusional and requiring psychotherapy. Although much progress has been made towards the understanding of gender diversity as a healthy form of human expression, medicine and psychology continue to have hegemony on how transgender persons are perceived. This has resulted in the continued psycho-pathologisation of transgender experiences, which has been criticised for fuelling stigma and discrimination against transgender persons. Moreover, pathologisation reinforces gender hierarchies and inequalities between transgender persons and cis-gender persons. That said, advocates for the medical model have argued that it facilitates access to gender affirming health services. It has been demonstrated, however, that transgender persons are not a homogenous group and have varying experiences and needs. Not all transgender persons want to have hormonal treatment and surgery for example. Even if they did, access to appropriate and adequate gender affirming treatment and services is often difficult or unavailable. The takeaway, therefore, is that medical intervention requirements for legal gender recognition can act as a barrier to recognition for many transgender persons. Moreover, restrictive and essentialist approaches to gender which view the society as a strict binary, can result in precarious legal statuses for transgender persons who do not conform to binary understandings of gender.

Having set out the lived experiences of transgender persons, it is now important to consider how requirements for medical interventions as a prerequisite for legal gender

¹¹⁸ As above.

¹¹⁹ Mbugua (n 61) 244.

¹²⁰ OBK Dingake 'The state of human rights in relation to key populations, HIV and sexual and reproductive health' (2018) 26 *Reproductive Health Matters* 46-52.

¹²¹ As above, 48.

¹²² As above.

recognition violate understandings of human rights. The next chapter unpacks the law as it relates to legal gender recognition and sets out international human rights standards in relation to gender identity and expression.

CHAPTER 3: INTERNATIONAL AND NATIONAL LEGAL POSITION IN RESPECT OF THE RIGHT TO LEGAL GENDER RECOGNITION OF TRANSGENDER PERSONS

3.1 Introduction

This chapter addresses the following question: What is the legal position under international human rights law and the Botswana national legal framework on the possibilities and requirements for legal gender recognition? The chapter examines general principles in relation to gender identity and expression and sets out the established legal standards. It discusses the right to legal registration and how it relates to the specific situation of transgender persons who do not want to or are unable to undergo actual sex reassignment. In addition, the chapter considers comparative jurisprudential developments in relation to legal gender recognition.

The chapter begins with an interrogation of the international human rights framework. It considers human rights principles and standards developed within the United Nations human rights system as well as the African human rights system. Thereafter the chapter examines the Botswana legal framework and conducts an analysis of how the rights of transgender persons are protected nationally. The chapter goes on to analyse the *Gender marker* case and evaluate its implications for transgender persons in Botswana. It considers whether the Court's approach had the effect of developing protected categories whilst excluding others and examines the resultant unintended consequences. The chapter is concluded with a summary of key findings in terms of the legal position.

3.2 The international human rights framework and transgender identities

Gender identity has increasingly been recognised and affirmed within the international human rights framework, with issues of gender identity being considered and incorporated into legal instruments and standards. This has led to an understanding of the distinct violations pertaining to gender identity and expression. The Yogyakarta Principles (YP+10)¹²³ and other authoritative human rights instruments form the basis for the protection of the human rights of transgender persons and can be used to tackle discrimination based on gender identity. In addition, classic human rights principles such as non-discrimination, the right to dignity, the right to privacy and equality before the law can be invoked to protect the rights of transgender persons. International human rights law makes provision for the right to legal gender recognition and sets standards for gender registration. The discussion that follows sets out the position in relation to legal gender recognition within the body of international human rights law.

3.2.1. The Yogyakarta Principles

The YP+10 developed by a team of human rights experts to supplement the original 29 Yogyakarta Principles,¹²⁴ are a set of internationally recognised principles that can

¹²³ Yogyakarta Principles Plus 10- Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 2017.

¹²⁴ Yogyakarta Principles (n 54).

be used to address violations of the rights of LGBTI persons. The principles provide an authoritative position on how international human rights law applies to issues of sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC). Principle 31 of the YP+10 provides for the right to legal recognition. The principle provides as follows:

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

The principle calls on states to ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, thereby ending registration of sex and gender in identity documents.¹²⁵ It further calls on states to ensure access to mechanisms to change names based on the self-determination of the applicant.¹²⁶ Where sex and gender continue to be registered, the principle requires states to ensure access to mechanisms that legally recognise and affirm each person's self-identified gender identity,¹²⁷ make available a multiplicity of gender marker options,¹²⁸ and ensure that no eligibility criteria such as medical or psychological interventions and or psycho-medical diagnosis are used as prerequisites to change name, legal sex or gender.¹²⁹ Similarly, Principle 32 provides that everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of SOGIESC. Although this principle specifically addresses incidences of coerced or uninformed modification of sex characteristics, it speaks to the issue of self-determination, a core concern for transgender persons who may be forced to undergo surgery or hormonal therapy in order to qualify for legal gender recognition. On the right to the highest attainable standard of health, the YP+10 call on states to ensure access to gender affirming healthcare, provided by the public health system or if not so provided, that the costs be covered or reimbursable under private and public health insurance schemes.¹³⁰

The YP+10 make express provision for the right to legal gender recognition without any eligibility criteria. They recognise that requirements for medical or psychological interventions used as prerequisites to change name, legal sex or gender are an unnecessary burden to transgender persons. State action, including judicial findings, that do not conform to these standards violate international human rights law.

3.2.2. The United Nations human rights system

The recognition of gender identity as a universally protected ground against discrimination has also been demonstrated by various UN bodies. UN special

¹²⁵ Principle 31(a).

¹²⁶ Principle 31(b).

¹²⁷ Principle 31(c)(i).

¹²⁸ Principle 31(c)(ii).

¹²⁹ Principle 31(c)(iii).

¹³⁰ Principle 17(l).

procedures and treaty bodies have taken note of the special and precarious circumstances in which transgender persons find themselves. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has, for example, highlighted the killings of transgender persons.¹³¹ The brutal nature of killings of transgender persons, usually inflicted with severe violence and charged with strong emotional components of anger and rage where also highlighted in a joint UN Women and OHCHR Model Protocol for the investigation of gender-related killings of women.¹³² The UN High Commissioner for Refugees has also addressed problems encountered by transgender persons in applying for asylum or refugee status.¹³³

These bodies have also spoken out against the pathologisation of transgender identities for legal gender recognition. In 2015 a selection of UN agencies released a joint statement on the rights of LGBTI persons and specifically called for legal gender recognition without stringent and abusive requirements.¹³⁴ The Committee on Economic, Social and Cultural Rights (Committee on ESCR), in General Comment 22, has also found that regulations requiring transgender persons, to be treated as mental or psychiatric patients, or requiring that they be 'cured' or 'treated,' violate rights to sexual and reproductive health.¹³⁵ The Committee on ESCR further found that laws and policies that indirectly perpetuate coercive medical practices, including hormonal therapy and surgery or sterilisation requirements for legal recognition of one's gender identity, constitute violation of state responsibility to respect human rights.¹³⁶ Similarly, following a country visit to China, the Special Rapporteur on extreme poverty also observed in his report that the requirements under Chinese law for sex reassignment surgery, a procedure that is expensive and not covered by health insurance and which requires a diagnoses of mental illness, was a barrier to legal gender recognition for transgender persons.¹³⁷ The UN High Commissioner for Human Rights (OHCHR) has stressed that in order to fulfil their human rights obligations, states must respect the physical and psychological identity of transgender persons by legally recognising self-identified gender without additional requirements that may violate rights.¹³⁸ This sentiment has been echoed by various treaty bodies in their recommendations to specific countries including the Committee on the Elimination of all forms of Discrimination against Women (CEDAW) which criticised Switzerland for the persistence of gender reassignment surgery targeting transgender persons, including

¹³¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender sensitive approach to arbitrary killings A/HRC/35/23 (2017).

¹³² UN Office of the High Commissioner for Human Rights & UN Women Latin American Model Protocol for the investigation of gender-related killings of women (Femicide/Feminicide) (2015).

¹³³ UN High Commissioner for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (2008).

¹³⁴ UN Office of the High Commissioner for Human Rights, Joint UN statement on ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people (2015).

¹³⁵ General Comment 22 (n 24) para 23.

¹³⁶ As above, para 58.

¹³⁷ Report of the Special Rapporteur on extreme poverty and human rights on his mission to China A/HRC/35/26/Add.2 (2017) para 41.

¹³⁸ Report of the UN High Commissioner for Human Rights on discrimination and violence based on sexual orientation and gender identity A/HRC/29/23 (2015).

involuntary medical treatment.¹³⁹ In 2017 the Human Rights Committee dealt with its first individual case on the right to legal gender recognition in *G v Australia*.¹⁴⁰ The Committee held that Australia's policy forcing married transgender persons to divorce as a requirement for legal gender recognition violated their rights to privacy, family life as well as the right to be free from discrimination. In a later review of Australia, the Committee stated that the state should take necessary measures to remove surgery and marital status requirements for sex marker changes on births, deaths and marriage certificates, considering the Committee's views on the case.¹⁴¹

The UN General Assembly has issued several resolutions calling on states to ensure the protection of the rights of transgender persons. In 2011 the UN Human Rights Council (HRC) adopted a resolution on human rights, sexual orientation and gender identity expressing grave concern at incidences of violence and discrimination based on sexual orientation and gender identity.¹⁴² The HRC further commissioned a study on the scope and extent of these violations which demonstrated a pattern of human rights violations on the basis of sexual orientation and gender identity. Another Resolution was issued in 2014 to update the report with a view to sharing good practices and ways to overcome violence and discrimination in the application of international human rights law and standards.¹⁴³ In 2016 the HRC appointed an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity to assess the implementation of existing human rights instruments. Three reports each to the HRC and the UN General Assembly have been issued under this mandate, exploring the root causes of violence and discrimination based on sexual orientation, gender identity and sex characteristics and making recommendations to states to improve conditions. In 2017 the Independent Expert stated that the prevalent practice of denying transgender persons recognition of their self-identified gender, even with gender realignment surgery, leads to violence and discrimination.¹⁴⁴ The report on protection against violence and discrimination based on sexual orientation and gender identity, further contained an invitation to destigmatise and depathologise transgender identities to ensure respect for all persons without distinction.¹⁴⁵ The latest report by the Independent Expert, presented to the HRC in June 2019 recommended that states enact gender recognition laws concerning the rights of transgender persons to change their names and gender

¹³⁹ Convention on the Elimination of all forms of Discrimination against Women concluding observations on the combined fourth and fifth periodic reports of Switzerland CEDAW/C/CHE/CO/4-5 (2016), para 38.

¹⁴⁰ *G v Australia* Communication no 2172/2012 (2017) CCPR/C/119/D/2172/2012.

¹⁴¹ International Covenant on Civil and Political Rights, Human Rights Committee concluding observations on the sixth periodic report of Australia CCPR/C/AUS/CO/6 (2017), para 28.

¹⁴² UN General Assembly Resolution on human rights, sexual orientation and gender identity A/HRC/RES/17/19 (2011).

¹⁴³ UN General Assembly Resolution on human rights, sexual orientation and gender identity A/HRC/RES/27/32 (2014).

¹⁴⁴ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity on the promotion and protection of all human rights, civil, political, economic, social, cultural rights, including the right to development A/HRC/35/36 (2017).

¹⁴⁵ As above, para 58.

markers on identification documents.¹⁴⁶ In the report, the Independent Expert called on states to enact procedures that are quick, transparent and accessible, without abusive conditions and respectful to the principle of free and informed choice and that of integrity.¹⁴⁷ The mandate of the Independent Expert was renewed by the HRC in July 2019, a move taken to demonstrate the growing support of the UN in tackling violations faced by transgender and other gender diverse persons.

The international human rights framework very clearly recognises the right to legal gender recognition. Its position towards stringent requirements for legal recognition is also apparent. Requirements for surgical and hormonal treatments as prerequisites for legal gender recognition violate international law. States ought to destigmatise and depathologise transgender identities to ensure respect for the rights of transgender persons. Moreover, they must enact procedures for legal gender recognition that are accessible and based on the principle of self-determination.

3.3. The African human rights system

There is no express mention of legal gender recognition within the framework of the African human rights system. However, through the issuance of Resolutions, General Comments and other communications, the African Commission has affirmed the freedom from discrimination based on gender identity. That said, there is always room for improvement and the African human rights system can be further strengthened to provide adequate protection for transgender persons against discrimination on the basis of gender identity and expression.

Protection of transgender persons against violence and discrimination in Africa is anchored on two binding treaties: The African Charter on Human and Peoples' Rights (African Charter), 1981, and the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol), 2003. The African Charter observes the rights to equality and equal protection of the law, freedom from discrimination and the rights to life, dignity and integrity. Even though not specifically enumerated as categories of protection, gender identity and expression are by implication protected in terms of article 3 of the African Charter dealing with equality before the law and equal protection of the law.¹⁴⁸ The Maputo Protocol imposes obligations on states to take specific measures to combat violence against women regardless of their sexual orientation or gender identity.¹⁴⁹ In 2014 the African Commission on Human and Peoples' Rights (African Commission) adopted Resolution 275, which expresses grave concern about the increasing violence and other human rights violations against persons based on their real or perceived sexual orientation or gender identity.¹⁵⁰ The Resolution urges

¹⁴⁶ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity Resolution A/HRC/41/45 (2019), para 98.

¹⁴⁷ As above.

¹⁴⁸ Article 3(1) of the African Charter provides : 'Every individual shall be equal before the law and 2. Every individual shall be entitled to equal protection of the law'.

¹⁴⁹ See article 2 of the Maputo Protocol, which deals with elimination of discrimination against women, read together with the definition of 'woman,' which refers to any person of the female 'gender' (and not 'sex').

¹⁵⁰ African Commission on Human and Peoples' Rights, Resolution 275 on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity (2014).

states to take action to stop violence and ensure adequate remedies are provided to victims of violence.

Building on the framework of Resolution 275, the African Commission included in its 60th session agenda, items pertaining to sexual orientation, gender identity and sex characteristics, including ‘corrective’ rape and the development of training programs for law enforcement as well as increasing efforts to ensure protection of human rights defenders.¹⁵¹ In 2018 the African Commission held a joint dialogue with the Inter-American Commission on Human Rights and the UN human rights mechanisms on sexual orientation and gender identity.¹⁵² This was a follow up to a similarly themed dialogue held in 2015. The participants of the dialogue emphasised the applicability of human rights standards to LGBTI persons and highlighted states’ obligation to create an enabling environment for the effective enjoyment of rights without discrimination.¹⁵³

3.4 The Botswana national legal framework and transgender identities

Sections 3 to 19 of the Botswana Constitution set out fundamental rights and freedoms applicable to everyone without distinction.¹⁵⁴ Section 3 prohibits discrimination on the grounds of sex even though the section and its interpretation does not explicitly refer to or include gender. The Court of Appeal of Botswana has also stated that ‘as a society, once we recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings...we must accord them the human rights which are guaranteed by the Constitution to all persons, by virtue of their being human, in order to protect their dignity.’¹⁵⁵ On the question of legal gender recognition, the National Registration Act of Botswana provides a framework for the regulation of national identity and provides for the registration of all citizens of Botswana.¹⁵⁶ The National Registration Regulations issued under section 23 of the National Registration Act set out the particulars to be contained in national identity cards (*omang*). These are a recent photograph, a unique identity number, names, age, date and place of birth, colour of eyes and the sex of the card holder. There are no express provisions within the National Registration Act that provide for legal gender recognition for transgender persons. This has created a barrier to legal gender recognition as the absence of an explicit framework for legal gender recognition exposes gender registration to an exercise of unfettered discretion. That said, the National Registration Act makes

¹⁵¹ Final Communiqué of the 60th Ordinary Session of the African Commission on Human and Peoples’ Rights (2017) <https://www.achpr.org/sessions/info?id=269> (accessed on 2 October 2019).

¹⁵² Inter-American Commission on Human Rights, African Commission on Human and Peoples’ Rights and United Nations human rights mechanisms ‘Joint thematic dialogue on sexual orientation, gender identity and intersex related issues’ (2018), 1-132.

¹⁵³ As above, at 8.

¹⁵⁴ Constitution of Botswana 1966.

¹⁵⁵ *Attorney General v Thuto Rammoge & others* (2016) Botswana Court of Appeal Case no CACGB-128-14 (unreported), at para 60.

¹⁵⁶ National Registration Act of Botswana 1986.

provision for changes in particulars.¹⁵⁷ Additionally, the Births and Death Registration Act allows for changes in forenames.¹⁵⁸

3.4.1 Detailed legal position/legislation

As indicated above, prior to the *Gender marker* case there was no specific law on legal gender recognition. Nevertheless, there are provisions in the National Registration Act which provided a window of opportunity for transgender persons to alter their gender markers, but which were unfortunately never tested. For example, section 16 of the National Registration Act as set out above, does not define ‘material change in particulars.’ This created an opportunity for a wide interpretation of the term, including one that recognises social and medical gender transition as a material change in a person’s particulars. Similarly, section 17 of the National Registration Act allows a person to update the photograph in their identity card.¹⁵⁹ If changes in personal appearance due to physical growth are enough to warrant an update of one’s identity documents surely so should physical changes due to a difference in gender expression. Another provision that could potentially be used to argue for changing details contained in identity documents is section 13 of the Births and Deaths Registration Act of Botswana, which allows for changes to forenames in the birth register for persons with ‘a settled wish and intention to change their forename(s).’¹⁶⁰ Similar to the above position, it can be argued that identifying as transgender and using names typically associated with the other gender, demonstrates a settled wish and intention to change one’s gendered details. However, until the *Gender marker* case, the efficacy of these provisions to provide legal gender recognition for transgender persons remained untested.

3.4.2 Recent case law

The *Gender marker* case pivoted around the interpretation of section 16 of the National Registration Act. The applicant in the case, a transgender man, born a woman and with female biological characteristics, submitted that a change from female to his

¹⁵⁷ Section 16 states that (1) where the registrar is of the opinion that any change in the particulars relating to a registered person materially affects his registration, he shall record the change and notify the Registrar of National Registration of the circumstances and recommend that the person concerned should be issued with a new identity card. (2) The Registrar of National Registration shall, if he is satisfied that the change materially affects the person’s registration, cancel the identity card issued to that person and issue a new identity card to him. (3) The particulars relating to the new identity card and its holder shall be recorded in the national register and the register of the area in which that person is registered.

¹⁵⁸ Births and Deaths Registration Act of Botswana 1968, section 13.

¹⁵⁹ Section 17 states that (1) every registered person may, whenever he is satisfied that his personal appearance has changed so as to make it likely that his identity as certified by the identity card may be questioned, apply to the registrar of the area in which he is registered for the issue of a new card with a more recent photograph and shall, when issued with a new identity card by the Registrar of National Registration, surrender his existing identity card to the registrar to be cancelled and destroyed. (2) The registrar of the area in which the person is registered, and the Registrar of National Registration shall cause the changes to be recorded in the relevant registers.

¹⁶⁰ Section 13(3)(a) provides that the registrar must be satisfied that the person has a settled wish and intention to be and to continue to be generally known by the new forename or forenames either in substitution for or in addition to the forename or forenames under which his birth was registered.

psychologically self-identified male gender fell within the ambit of section 16.¹⁶¹ The applicant submitted evidence by way of affidavit, to the effect that from an early age he had felt a disharmony between his biological sex and the gender identity he innately identified with.¹⁶² The applicant sought psycho-social support and was diagnosed with gender identity disorder.¹⁶³ Persons with this 'condition' find that the sex assigned to them at birth does not correspond with their felt gender or feel a discrepancy between their experienced gender and the gender they were assigned at birth.¹⁶⁴ Following consultation with psychologists and physicians, the applicant underwent hormonal therapy and sex reassignment surgery to make his body congruent with his gender identity.¹⁶⁵ These procedures altered his physical appearance and were said to be irreversible and permanent.¹⁶⁶ However, even with the gender affirming treatment, the applicant faced challenges in relation to the gender description in his *omang* which continued to reflect his gender as female.¹⁶⁷ Because of the discrepancy in the gender marker and his physical appearance, the applicant reported having experienced discrimination, stigma and harassment and being subjected to humiliating interrogations by institutions he sought services from to explain his peculiar circumstances.¹⁶⁸ As a result, the applicant filed an application with the Registrar of National Registration to have his gender marker amended. The request was refused on the basis that gender markers are determined by the sex assigned at birth.¹⁶⁹ The applicant then challenged the decision before the High Court. The applicant argued that the refusal to change his gender marker was unconstitutional and that his right to equal protection of the law as guaranteed by section 3 of the Botswana Constitution, right to freedom from inhuman and degrading treatment as guaranteed by section 7, right to privacy as guaranteed by section 9, right to freedom of expression as guaranteed by section 12, and the right to protection from discrimination as guaranteed by section 15 were violated. The Registrar of National Registration, represented by the Attorney General, argued that his wide-ranging discretion was limited in this case, particularly as Botswana employed a system where sex was determined at birth. He argued that identity documents issued by the state reflect sex and not gender identity and that the applicant sought to change his sex and not gender.¹⁷⁰ He argued further, that there was no conclusive medical or legal position that could determine when a person's sex has changed.¹⁷¹ The Registrar of National Registration argued that the law did not make provision for changes of gender markers and that in the absence of an enabling statute the change could not be allowed.¹⁷² Lastly, the Registrar of National Registration insisted that the decision to undergo gender re-orientation was that of the applicant and as result no state responsibility

¹⁶¹ *ND v Attorney General & another* (n 8) para 48.

¹⁶² As above, para 17.

¹⁶³ As above, para 18.

¹⁶⁴ As above.

¹⁶⁵ As above, para 22.

¹⁶⁶ As above, para 21.

¹⁶⁷ As above.

¹⁶⁸ As above.

¹⁶⁹ As above, para 4.

¹⁷⁰ As above, para 27.

¹⁷¹ As above, para 53.

¹⁷² As above, para 57.

arose.¹⁷³ On the question of violation of constitutional rights, the Registrar of National Registration stated that by denying the applicant's application to change the gender marker on his identity document, he was in fact, upholding his right to equal treatment and freedom from discrimination.¹⁷⁴ This, he argued, was premised on the fact that he does not register and change particulars of any individual based on their desire alone or coupled 'with an unproven medical or legal threshold as to what constitutes a change in particulars.'¹⁷⁵

In response to the Registrar of National Registration's submissions, the Court noted that an exercise of discretion should take into account all the relevant circumstances to make a decision that is reasonable and justifiable. In this case relevant circumstances were said to include the medical evidence presented by the applicant as well as the recommendations made by his physicians that the gender marker should be altered to align it with his male identity.¹⁷⁶ The Court noted that the Act does not state whether the changes to a person's particulars should be involuntary or can be 'self-inflicted.'¹⁷⁷ Rejecting the argument that the absence of a law on legal gender recognition meant that the change to gender markers could not be made, the Court cited comparative case law which establishes that in the absence of legislative guidance, courts must take into account medical evidence establishing the gender of the applicant.¹⁷⁸ The Court found that the state has a duty to uphold the fundamental rights of every person and to promote tolerance, acceptance and diversity within a constitutional democracy.¹⁷⁹ It found that this includes taking all necessary legislative, administrative and other measures to ensure that procedures exist for all state-issued identity documents which reflect a person's gender or sex to reflect their self-defined gender.¹⁸⁰

The issues and findings

The issues for determination by the Court were whether the Registrar of National Registration's failure to issue the applicant with a new identity document correctly reflecting his gender as male violated his constitutional rights, and whether the Registrar's justification for the limitation of the applicant's constitutional rights was reasonable and justifiable.

The Court determined that gender identity constitutes the core of one's sense of being and is an integral part of a person's identity. It found that having an identity document that correctly reflects self-identified gender is fundamental to the right to dignity and freedom of expression.¹⁸¹ The Court expressed the sentiment that by permitting changes to gender markers, the Registrar of National Registration would be giving effect to the spirit and purport of the Constitution and extending much needed help to

¹⁷³ As above, para 27.5 (erroneously recorded as 24.5).

¹⁷⁴ As above para 27.4 (erroneously recorded as 24.4).

¹⁷⁵ As above, para 27.3 (erroneously recorded as 24.3).

¹⁷⁶ As above, para 47.

¹⁷⁷ As above, para 40.

¹⁷⁸ As above, paras 69-71.

¹⁷⁹ As above, para 80.

¹⁸⁰ As above.

¹⁸¹ As above, paras 83-87.

vulnerable transgender persons.¹⁸² Accordingly, the Court found that the Registrar of National Registration had unreasonably exercised his discretion. It also found that he had failed to take into account the adduced medical evidence of gender identity and by so doing failed to protect the applicant's inherent dignity.¹⁸³ The Court found violations of the right to privacy and the right to freedom of expression stating that the applicant's decision to live in accordance with his gender identity was an expression of free choice.¹⁸⁴ The Court found that non-recognition of the applicant's gender identity as well as other transgender persons denied them equal protection of the law, thereby leaving them extremely vulnerable to harassment and violence in both public and private spheres. The Court observed that this can result in extreme discrimination in all societal spaces, especially in the areas of employment, education and healthcare.¹⁸⁵ The Court concluded that the Registrar of National Registration's refusal to issue the applicant with a new identity document which reflects a change in gender marker impaired his rights to equality before the law and equal protection of the law.¹⁸⁶ The Court further found that the refusal amounted to discrimination and qualified as inhuman and degrading treatment.¹⁸⁷

Significance of the case

This case gave legal gender recognition to transgender persons in Botswana in a context rife with the systematic exclusion of non-normative gender identities. Faced with arguments that changing the applicant's gender marker would compromise the integrity of the National Identification Register, the Court stayed faithful to its role in the protection of constitutional rights and stated that rights could not be limited on the basis of mere conjecture and speculation.¹⁸⁸ The Court applied a liberal construction of section 16 of the National Registration Act thereby opening up the interpretation of 'material changes' to include self-determined gender, albeit supported by medical evidence. In arriving at its decision, the Court considered the prevalent discrimination, stigma and harassment faced by transgender persons whose gender identity is not recognised. It recognised that the acknowledgement of personal identity by the state, which includes the ability to access proper identification, is at the core of humanity and dignity.¹⁸⁹ In this regard the Court emphasised the state's and indeed wider society's duty to respect and uphold the individual right to dignity notwithstanding any difference in views in relation to gender identity.¹⁹⁰ Furthermore, the Court took note of the fact that sex cannot always be accurately identified at birth and must be viewed in light of factors such as gender identity.¹⁹¹ By so doing, the Court extended protection to other transgender persons beyond the individual applicant as well as other categories of gender diversity such as intersex persons.

¹⁸² As above, para 90.

¹⁸³ As above, para 99.

¹⁸⁴ As above, para 122.

¹⁸⁵ As above, para 130.

¹⁸⁶ As above, para 133.

¹⁸⁷ As above, paras 147 & 155.

¹⁸⁸ As above, para 187.

¹⁸⁹ As above, para 83.

¹⁹⁰ As above, para 96.

¹⁹¹ As above, para 168.

Responding to the scarcity of local authorities on gender identity, the Court opened itself to guidance from jurisprudence from international comparative case law and referred to international human rights instruments and related documents. This demonstrates a growing judicial openness to the transfer of experiences, learning and important legal development. This approach allowed the Court to interpret the Constitution as a living document that grows and evolves in responses to the changing needs and values of society.¹⁹² In addition, the Court made use of Resolution 275 of the African Commission. Even though the Court only made reference to the Resolution in relation to gender identity being a protected ground against discrimination, it can be argued that by so doing it operationalised the resolution and breathed life into its provisions.¹⁹³ The acknowledgment that the applicant had experienced discrimination and harassment as a result of his gender identity not only affirmed the Resolution but in a manner of speaking responded to the Commission's call to establish judicial procedures responsive to the needs of LGBTI persons.

Unintended consequences and missed opportunities

Acknowledging that the Court was confined to the facts as presented and was therefore limited in the way of pronouncements, there were however, some missed opportunities for extending protection to transgender persons who cannot or choose not to, undergo any medical treatment. The restrictive criteria for legal recognition developed by the Court may, in the long run have negative unintended consequences in the sense that it may act as a barrier to recognition for transgender persons whose experiences are different from those of the applicant. Notwithstanding its consideration of the original Yogyakarta Principles, which state in their definition of gender identity that it '...may involve *if freely chosen*, modification of bodily appearance or function by medical, surgical or other means...' (emphasis added),¹⁹⁴ the Court followed the medical approach to transgender identities. In so doing, the Court disregarded Principle 3 of the Yogyakarta Principles, which explicitly states that no one shall be forced to undergo medical procedures including sex reassignment surgery and hormonal therapy as a requirement for the legal recognition of their gender identity. By placing emphasis on the applicant's medical history as well as his physical appearance, the Court unequivocally created a medical requirement for recognition in defiance of the Yogyakarta Principles. This may create further barriers to legal recognition for transgender persons who do not want to or are unable to undergo actual sex reassignment.

Additionally, the Court missed an opportunity to broaden the interpretation of section 17 of the National Registration Act, read with section 16, which allows a person to update their photograph to prevent the likelihood of their identity being questioned. Building on the fact that a difference in particulars, including gender expression, can result in the questioning of identity as demonstrated by the applicant's experiences, this was an opportunity to broaden the interpretation to cover the multiplicity of gender expressions, even without medical interventions, to guard against the questioning of

¹⁹² As above, para 54.

¹⁹³ As above, para 142.

¹⁹⁴ Yogyakarta Principles (n 54).

identity. Instead, the Court limited its application based on essentialist constructions of gender expression and interpreted section 17 to mean that physical appearance is *prima facie* evidence of what should be contained in an identity document.¹⁹⁵ Furthermore, it interpreted 'material change' to mean changes to the face as well as changes to the body.¹⁹⁶ This limited interpretation of sections 16 and 17 of the National Registration Act, essentially confined application of the National Registration Act to transgender persons whose physical appearance corresponds with conventional understandings of gender and excludes those who do not. As observed in *Letsweletse Motshidiemang v Attorney General & another*, the importance of court-given definitions, where a piece of legislation contains no definitions, cannot be ignored because courts are sources of law.¹⁹⁷ The transgender community in Botswana would have benefited from a broad and inclusive interpretation that considered the existing barriers in accessing gender affirming health care and which currently have income-based implications.

The Court found that the state had an obligation to take necessary legislative and administrative measures to ensure a clear process for legal gender recognition. It acknowledged that the absence of specific laws on legal gender recognition exposed, the process to the exercise of unfettered discretion. Notwithstanding these pronouncements, the Court made no order as to the process for, or standards regulating, legal gender recognition, pending enactment of the necessary legislation. This was yet another missed opportunity that left many transgender persons unprotected. With the understanding that in a constitutional democracy, courts must be wary of taking over the legislative function and not be prescriptive in their remedial orders, the Court should have provided some guidance. This is justified by the fact that this case was an exercise in constitutional adjudication. The Court as the ultimate interpreter and arbiter of the Constitution had a duty to ensure that the constitutionally guaranteed rights of the applicant, as well as the wider transgender community, were effectively protected in the absence of clear legal guidance. It has been established that the interpretation of legislation or Acts of parliament is an interpretation of the Constitution as laws are enacted to serve the public good or public interest.¹⁹⁸ This is buttressed by section 26 of the Interpretation Act of Botswana which states that 'every enactment shall be deemed remedial and for the public good and shall receive fair and liberal construction as will best attain its object according to its true intent and spirit.'¹⁹⁹ Further to this, section 86 of the Constitution spells out that 'subject to the provisions of this Constitution, Parliament shall have power to make laws for the peace, order and good government of Botswana.'²⁰⁰ Accordingly, the courts are mandated to interpret the Constitution, and by extension legislation, as a living and dynamic document of progressive human rights.²⁰¹ In this spirit, the Botswana Court of Appeal has held in *Attorney General v Dow*, that '...the Constitution...is meant to serve not

¹⁹⁵ *ND v Attorney General & another* (n 8) para 37.

¹⁹⁶ As above, para 39.

¹⁹⁷ *Letsweletse Motshidiemang v Attorney General* (n 5), at para 94 & 95.

¹⁹⁸ As above, para 74.

¹⁹⁹ Interpretation Act of Botswana, 1966.

²⁰⁰ Botswana Constitution (n 150).

²⁰¹ *Letsweletse Motshidiemang v Attorney General* (n 5), at para 76.

only this generation but also generations yet unborn...the primary duty of judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society...'²⁰² With this understanding, the Court ought to have accorded a generous and broad interpretation of 'material change' and 'personal appearances' which would render it inclusive of all forms of gender identity and expression. Furthermore, the Court had the benefit of international law to provide guidance on standards for legal gender recognition pending the enactment of appropriate legislation. The Botswana Court of Appeal has established that courts are enjoined to have regard to relevant international law in the interpretation of domestic law.²⁰³ This means that the Court could have relied on the Yogyakarta Principles, especially Principle 3, to set a standard for legal gender recognition in Botswana which would have allowed for recognition without any restrictive processes.

3.5. Conclusion

The international human rights framework clearly recognises rights to legal gender recognition. Through the YP+10 for example, international human rights law makes express provision for the right to legal gender recognition without any eligibility criteria. The principles recognise that requirements for medical or psychological interventions used as prerequisites to change name, legal sex or gender are an unnecessary burden to transgender persons. States have a duty to take necessary steps to ensure that procedures exist for all state-issued identity documents which reflect a person's gender or sex to reflect their self-defined gender. In the context of Botswana, the *Gender marker* case confirmed that legal recognition of a person's gender identity is a part of the right to dignity and freedom of expression protected by the Constitution of Botswana. The case confirmed that having an identity document that correctly reflects self-identified gender is fundamental to the realisation of rights. That said, the medical requirement for legal gender recognition established by the case violates principles of international human rights law. It creates barriers to legal gender recognition for transgender persons who either cannot afford, or choose not to undergo, medical transition. International human rights law teaches that procedures for legal gender recognition that are not restrictive, and which do not require medical transition are important for removing barriers to legal gender recognition. The recognition of gender plurality is also critical for ensuring recognition for non-binary and gender non-conforming persons. The next chapter considers practical application of gender recognition laws, identifying best practices and inclusive approaches to legal gender registration that are responsive to the lived realities of transgender persons and that can be replicated in Botswana.

²⁰² *Attorney General v Dow* Botswana Court of Appeal [1992] BLR 119.

²⁰³ As above.

CHAPTER 4: APPROACHES TO LEGAL GENDER RECOGNITION

4.1 Introduction

Having considered the lived experiences of transgender persons and the position of the law, which calls for a broader understanding of gender identity, this chapter undertakes a theoretical analysis of the Court's approach and contests its objectivity and validity. The theoretical analysis is aimed at demonstrating how the requirement for medical interventions reinforces gender normativity and serves to erase variant gender identities and expressions. The social critique theories employed demonstrate how systemic forms of oppression result in exclusionary and hierarchical norms that further marginalise non-binary transgender persons and create barriers to recognition.

The chapter begins with a theoretical analysis of the *Gender marker* case and highlights the issues inherent in the approach adopted by the Court. The case is evaluated using identity-based critiques of dominant cultural practices to show how the approach has resulted in exclusionary norms. Thereafter, the chapter looks at various comparative approaches to legal gender registration with the aim of identifying exemplary practices for Botswana. The chapter considers how various jurisdictions have dealt with and continue to deal with, applications for legal gender recognition, highlighting approaches worthy of replication and critiquing the more restrictive approaches. It demonstrates how the challenges identified in the Court's approach can be remedied to make the process of gender registration more accessible and responsive to the needs of transgender persons in Botswana. It proposes approaches that are simplistic and cognisant of gender plurality and that are not unnecessarily restrictive. Some of the considerations made include the implications and benefits of doing away with gender registration or removing sex descriptors from identity documents. The chapter further explores the possibility of a third gender as a recognisable category for legal gender recognition as an emerging model for removing existing barriers to legal gender recognition.

4.2 Theoretical analysis of the *Gender marker* case

A critical interrogation of the *Gender marker* decision exposes some inherent biases and stereotypical considerations which not only disregarded the diversity of transgender persons in Botswana, but which create additional barriers to legal gender recognition, especially for transgender persons whose experiences are different from the applicant in the case. The principal critique of the case is that it reinforces notions of gender binaries and cis-normative biases. The approach of the Court privileges transgender persons who seek to fit into dominant ideas of what it means to be male or female and ignores those who do not or challenge normative understandings of gender and its expression. By so doing, the Court created categories of inclusion which privileges transgender persons who already enjoy class and passing privileges whilst ignoring those who cannot afford gender affirming surgeries and treatments or who choose not to undergo any procedures. This was not only restrictive and limiting but it also failed to take it account the fact that gender identity is a complex concept than cannot merely be considered using only hormonal or biological features. In addition, the criteria developed by the Court for legal gender recognition is pathologising and reinforces the idea that there is something wrong with being

transgender and that it signals a mental condition that must be cured by hormonal and surgical treatment. This takes away from gender diversity as a form of healthy human expression. This is not only stigmatising but is symbolic of a society that is repressive of difference and that punishes non-conformity.

4.2.1 Theoretical framings

Several theories emerge as rationale for the Court's approach and as an aid to analysis two theories advanced by prominent African sexuality scholars will be discussed.

The first theory is advanced by Nyanzi²⁰⁴ who in interrogating the various theoretical approaches to governing sexuality makes reference to the model of the 'charmed circle,' a sexual hierarchy concept developed by the anthropologist and feminist scholar Gayle Rubin.²⁰⁵ This is a metaphorical tool through which sex acts are appraised according to a hierarchical system of sexual value influenced by religion, psychiatry, popular culture and politics.²⁰⁶ The position in the value metrics determines which sexual practices are rewarded with social approval and which ones are denigrated as vice.²⁰⁷ The 'charmed circle' comprises of 'good,' 'normal' and 'natural' sexualities and the 'outer limits' include 'bad,' 'abnormal' and 'unnatural' sexualities.²⁰⁸ Individuals whose behaviour ranks higher in the hierarchy, such as married heterosexual reproductive couples, are rewarded with certified mental health, respectability, legality and institutional support.²⁰⁹ Individuals whose sexual behaviour places them lower on the scale such as transgender persons, are subjected to a presumption of mental illness, criminality, restricted social and physical mobility and loss of institutional support.²¹⁰ According to Rubin, the categories of sexual misconduct have been multiplied by medicine and psychiatry.²¹¹ She cites the DSM as a map of the current moral hierarchy of sexual activities.²¹² Rubin argues that the hierarchies of sexual value function in much the same way as ideological systems of racism, ethnocentrism and religious chauvinism.²¹³ Although the theory of the charmed circle has been critiqued by various scholars, Nyanzi argues that it is important because it aids the analysis of how dominant ideologies construct, control and constrain sexualities.²¹⁴ She contends that the concept of the sex hierarchy is a useful tool for scholars of African sexualities involved in the examination of the hegemonic control of diverse sexualities by different social powers such as religious, biomedical, heteronormative or patriarchal influences. The theory of the 'charmed circle' comports with the notion of a protected category of transgender persons who embody the

²⁰⁴ Nyanzi (n 94) at 447.

²⁰⁵ G Rubin 'Thinking sex: Notes for a radical theory of the politics of sexuality' in P Aggleton & R Parker (eds) *Culture, society and sexuality* (2006) 143-178.

²⁰⁶ Nyanzi (n 94) at 483.

²⁰⁷ As above.

²⁰⁸ As above, 484.

²⁰⁹ Rubin (n 205) at 151.

²¹⁰ As above.

²¹¹ As above.

²¹² As above.

²¹³ As above, 152.

²¹⁴ Nyanzi (n 94) at 484.

physical appearances of the gender they identify as and who qualify for legal gender recognition whereas the 'outer limits' in this context may be used to examine the treatment of transgender persons who do not fit the mold of dominant ideas of male and female and are therefore seemingly not deserving of legal gender recognition.

Similar to Rubin's contention that development of pluralistic societies begins with the concept of benign sexual variation,²¹⁵ Charles Ngwena²¹⁶ finds that any attempts to develop an inclusive approach to African sexualities must contend with dominant political and cultural narratives on sexuality.²¹⁷ He states that the absence of plurality must be contested in order to uncover the practice of political power which uses 'natural categories' to legitimise the exclusion of non-heteronormative sexualities.²¹⁸ Ngwena states that in order to respond to the requirement of an inclusive hermeneutics of sexuality, it is important to pry open naturalised and institutionally privileged sexualities.²¹⁹ He goes on to say that for an inclusive approach to articulating African sexualities, it is important to move from oppressive generalisations and accept the importance of capturing the sexualities of the peoples of Africa in their diverse social groupings as well as their individual subjectivities.²²⁰ The overriding goal, according to Ngwena, is over-coming social or status subordination arising from sexual hierarchy-related exclusionary laws and practices.²²¹ Status subordination in this context is viewed as a methodological tool for guarding against imposing a single or over-simplified group identity that ignores particularities and assumes a conformity of interests.²²² Ngwena views the failure to see a multiplicity of identities or to accommodate intersectionality and struggles within social groups seeking affirmation as paradoxically rendering equality oppressive.²²³ He reiterates that sexuality should be understood not as sameness but as relational and non-hierarchical difference and that plurality dictates that people must be able to articulate different needs without being required to assimilate to a normative standard.²²⁴ A status-subordination approach in this context allows for the analysis of the implications of validating some transgender identities and misrecognising others. It is also instrumental for facilitating thought processes about working plurality into the legal framework as far as transgender identities are concerned.

4.2.2 Application of theoretical analysis to the *Gender marker* case

Botswana, as demonstrated by the *Gender marker* case, operates within a binary gender system. It recognises only male and female genders and is apathetic to gender identities that fall outside of these set categories. Borrowing from Rubin's theory of the charmed circle, this means that cis-heteronormative identities occupy the deepest echelons of the circle of recognition with non-normative sexual and gender identities

²¹⁵ Rubin (n 205) at 153.

²¹⁶ Ngwena (n 35).

²¹⁷ As above, 198.

²¹⁸ As above.

²¹⁹ As above.

²²⁰ As above, 205.

²²¹ As above, 207.

²²² As above, 208.

²²³ As above.

²²⁴ As above.

occupying the outer limits. The failure of the Court to recognise a multiplicity of gender identities necessarily dictates that those who seek inclusion must assimilate to normative standards of gender expression. For this reason, performative gender norms, such as dress, mannerisms and ability to pass for the other gender, are used to determine who will be given recognition. One must comply with these norms to be legally recognised. Hence the requirements for medical transition and qualification of gender identity by a medical practitioner. This is a form of status subordination as postulated by Ngwena and as suggested by the author, this absence of plurality must be contested as it legitimises the institutional exclusion of non-heteronormative gender identities.²²⁵

4.3 Comparative case law

Comparative case law provides avenues for responding to the challenges identified with the Court's approach in the *Gender marker* case. The different approaches to legal gender recognition used in various jurisdictions provide guidance on the development of more inclusive approaches. This portion of the discussion examines comparative case law from Australia, India and Germany. The first case discussed is an Australian case dealing with legal gender recognition in a context with established legislation for gender registration. The second case, an Indian case, considers it in a context that had no framework for legal gender recognition. The final case considers the third marker option in relation to intersex identities in Germany.

4.3.1 *AB & AH v Western Australia*

The appellants in this case were two transgender men who had undergone gender affirming procedures in the form of bilateral mastectomies and hormonal therapy.²²⁶ This was in compliance with the Gender Reassignment Act of Western Australia (the Act) which mandates a medical or surgical procedure (or a combination of both) for legal gender recognition.²²⁷ The appellants applied for recognition certificates in terms of the Act and were denied registration by the Gender Reassignment Board (the Board).²²⁸ The refusal was based on the fact that they had retained their female reproductive systems and according to the Board, 'having a female reproductive system is inconsistent with being male.'²²⁹ The State Administrative Tribunal reviewed the Board's decision and set it aside. It further granted the appellants' application for recognition certificates. The Board appealed the decision before the Court of Appeal of the Supreme Court of Western Australia. The Court confirmed that gender cannot be regarded 'merely as a matter of chromosomes, but partly a psychological question, one of self-perception and partly a social question, how the society perceives the individual's gender to be.'²³⁰ The Court found that whether a person is identified as male or female is dependent on their physical appearance and behaviour in the

²²⁵ Ngwena (n 35) at 207.

²²⁶ *AB & AH v Western Australia* 244 CLR 390 (2011) ALJR 42, para 11.

²²⁷ Western Australia Gender Reassignment Act 2000, section 14(1).

²²⁸ As above, section 17.

²²⁹ *AB & AH v Western Australia* (n 200) para 12.

²³⁰ As above, para 34.

conduct of their life, not necessarily how much of their body remains male or female.²³¹ The Supreme Court set aside the appeal and reinstated the orders of the Tribunal. The test for legal gender recognition established by this case is threefold, firstly, the person must identify as a different gender,²³² secondly, they must have undergone hormonal therapy or surgical treatment and finally they must have the gender characteristics typically associated with the gender they have been reassigned to and the society must perceive them as that gender. Translated, this last requirement speaks to the issue of 'passing.' In addition, to affirming the challenges already identified with medical approaches to gender diversity, this case introduces a new element, that of societal perceptions of gender identity. The requirement for physical changes so that the society may perceive you as a particular gender is unnecessarily burdensome and reinforces stereotypical notions of what it means to be a man or woman. Furthermore, it violates bodily and mental integrity, autonomy and self-determination. That said, the Court's liberal interpretation of the Act in this case allowed for a challenge to surgical requirements for gender recognition, allowing for more transgender persons (including those who are pre-operative) to benefit from legislative protection. As a question of best practices, this is the only part of the judgment that speaks to the removal of barriers to legal gender recognition.

4.3.2 National Legal Services Authority v Union of India

The Indian Supreme Court in this case was confronted with a number of transgender identities, including *Hijras*, biological males who reject their 'masculine' identity and identify as women or 'not men,' or 'in between man and woman,' or 'neither man nor woman.'²³³ Other identities include *Aravanis* and *Thirunangi*, said to be biological males who self-identify as women trapped in male bodies²³⁴ and *Jogtas/Jogappas*, who are male to female transgender persons dedicated to, and who serve as servants of, goddess *Renukha Devi (Yellamma)*.²³⁵ The Court in this case found that self-determination of gender is an integral part of self-autonomy and self-expression and falls within the realm of personal liberty as guaranteed by the Constitution.²³⁶ It further found that self-identified gender can be either male or female or a third gender.²³⁷ This was based on the consideration that *Hijras* for example, do not identify as male or female and this distinction makes them separate from both female and male genders and therefore have to be considered as a 'third gender' over and above binary genders.²³⁸ Although the Court did not set out a rigid criteria for the third-gender category, what is useful for the current consideration is that its primary criterion for

²³¹ As above, para 35.

²³² In terms of section 15(1)(b) this means the person must (i) believe that his or her true gender is the gender to which the person has been reassigned, (ii) have adopted the lifestyle and have the gender characteristics of a person of the gender to which the person has been reassigned and (iii) have received proper counselling in relation to his or her gender identity.

²³³ *National Legal Services Authority v Union of India & Others* (n 40) para 34.

²³⁴ As above.

²³⁵ As above.

²³⁶ As above, para 69.

²³⁷ As above, para 70.

²³⁸ As above.

legal gender recognition is self-identification. It further found that in examining the rights of transgender persons who have undergone sex reassignment surgery, the test to be applied is not the 'biological test,' but the 'psychological test,' because psychological factors as well as the thinking of the transgender person have to be given primacy rather than binary notions of the gender of the person.²³⁹ The Court found that the rights of transgender persons have to be protected irrespective of chromosomal sex, genitals, assigned birth sex or implied gender roles.²⁴⁰ The self-determination approach employed by the Court in this case demonstrates that legal gender recognition can be granted outside of restrictive medical requirements. The approach is cognisant of the fact that gender identity is a spectrum and cannot merely be reduced to binary considerations. This approach is inclusive and makes legal gender recognition simple and accessible regardless of how a person presents.

4.3.3 1 B v R

The German Federal Constitutional Court in this case dealt with an application by a non-binary intersex person.²⁴¹ The complainant had been born with atypical chromosomes but had been assigned the female gender and registered as a girl in the birth register.²⁴² They however, identified as neither female nor male and consequently applied to have their gender marker amended from 'female' to 'inter/diverse' or 'diverse.'²⁴³ The request was denied on the basis that the law did not provide for a third gender even though it had been amended to allow for gender to be left unspecified.²⁴⁴ The Court held that the requirement in the Civil Status Act of Germany,²⁴⁵ for every person's sex to be entered on the birth register, outside of the availability of a third option for intersex persons, was unconstitutional and amounted to discrimination based on sex.²⁴⁶ It further found that the requirement for every person to be registered as either male or female deprived those who fall outside of the binary, the opportunity to be identified in their innate gender.²⁴⁷ The judgment has been welcomed as a milestone in the protection of the rights of intersex persons, for providing for a third gender option, a radical challenge to dominant ideas of sex and gender.²⁴⁸

The principal difference between the three cases is that the Australian case follows an essentialist conception of gender whilst the latter two cases reject binary understandings of sex and gender. This demonstrates an awareness of the unpredictability of sex and gender and a recognition that transgender persons (including intersex persons) are characterised by differences in gender expression and

²³⁹ *National Legal Services Authority v Union of India & Others* (n 40) para 34.

²⁴⁰ As above.

²⁴¹ *1 B v R* 2019/16 Federal Constitutional Court of Germany (2017).

²⁴² As above, para 1.

²⁴³ As above.

²⁴⁴ As above.

²⁴⁵ Civil Status Act of Germany, 2007.

²⁴⁶ *1 B v R* 2019/16 (n 241).

²⁴⁷ As above.

²⁴⁸ H Botha 'Beyond sexual binaries? The German Federal Constitutional Court and the rights of intersex people' (2018) 21 *Potchefstroom Electronic Law Journal* 1-26.

that not all persons fit neatly into binary gender categories. An openness to gender diversity beyond traditional understandings of man and woman is critical for ensuring inclusivity and plurality. The two latter cases demonstrate the importance of removing restrictive medical requirements for legal gender recognition to ensure the protection of the rights of gender diverse persons. Whilst medical evidence of gender identity can provide a pathway for legal gender recognition, sole reliance on medical interventions can act as a major obstacle for recognition of transgender persons who have not transitioned medically. It creates a burdensome dependence on diagnosis with gender dysphoria and medical transition as prerequisites for the realisation of rights and places doctors as gatekeepers of transgender identities. These burdensome requirements have been recognised by various human rights bodies as equivalent to cruel, inhuman and degrading treatment. Furthermore, they may result in the violation of rights to privacy, autonomy, bodily integrity and freedom from discrimination. Not only does international human rights law call for the depathologisation of transgender identities, it calls for the repeal of discriminatory practices that hinder access to legal gender recognition. This means that gender affirming procedures must be freely chosen and not imposed as a requirement for legal gender recognition. Requirements for medical interventions as a prerequisite for legal gender recognition do not respect agency and the freedom to control one's body.

4.4 Comparative model legislation

Like case law, different countries employ differing approaches to legislation on legal gender recognition. While the medical approach remains prevalent, many countries have made a move towards the depathologisation of gender diversity. Notably, Argentina and Malta. Both countries have model laws on legal gender recognition that may be adopted in Botswana.

The Human Rights Committee has lauded the Gender Identity Act of Argentina²⁴⁹ as a best practice for legal gender recognition.²⁵⁰ The law was celebrated for its simple administrative processes for modification of sex markers without any abusive requirements of medical diagnosis and medical treatment.²⁵¹ However, the Act does allow for access to gender affirming surgical interventions and hormonal treatments for those who are desirous of transitioning medically. It further obligates the state to either provide or ensure access to gender affirming health care. The Gender Identity Act is comprehensive in the sense that it requires neither judicial interventions, nor a diagnosis with gender dysphoria or any other diagnosis. The Gender Identity Act of Argentina is demonstrative of the fact that transgender identities can be de-pathologised without hampering access to gender affirming healthcare. Similarly, in 2015 Malta passed its Gender Identity, Gender Expression Sex Characteristics Act (GIGESC Act) which encompasses both legal recognition and protection against discrimination for transgender and intersex persons.²⁵² This radical combination sets Malta apart from other gender identity laws. The GIGESC recognises the right to bodily

²⁴⁹ Gender Identity Act of Argentina Act of 2012.

²⁵⁰ International Covenant on Civil and Political Rights Human Rights Committee Concluding Observations on Argentina CCPR/C/ARG/CO/5 (2016), para 3(b).

²⁵¹ As above.

²⁵² Gender Identity, Gender Expression and Sex Characteristics Act of Malta, 2015.

integrity and physical autonomy as an immutable part of the right to gender identity.²⁵³ It recognises the right of all persons to gender identity and the right to be treated according to one's gender identity, particularly the right to be identified in that way in documents providing identity. Like the Argentinian Act, the Act does not require proof of medical procedures. This protection is extended to persons who have been granted international protection under the Refugees Act of Malta.²⁵⁴ The Act also recognises foreign decisions about a person's gender identity including gender markers other than male or female or no gender marker at all.²⁵⁵ The Act imposes fines on persons who knowingly expose persons who have changed their gender markers and who knowingly violate provisions of the GIGESC Act.²⁵⁶ Most critical for this discussion, the GIGESC Act explicitly denounces the pathologisation of any form of sexual orientation, gender identity or gender expression.²⁵⁷ It goes on to state that the nullification of classification under the ICD or any other similar internationally recognised classification shall not impact the provision of any healthcare service related to sex or gender negatively.²⁵⁸ Such care should be given expert sensitivity and be individually tailored and should extend from the date of diagnosis or self-referral for as long as necessary.²⁵⁹

Other non-pathologising gender recognition laws can be found in Colombia, Denmark, Ireland and Norway. These prove that a legal and administrative framework can be established to facilitate legal gender recognition without restrictive and abusive conditions. Borrowing from this progressive comparative legislation Botswana can develop a framework for legal gender recognition that not only ensures that transgender identities are de-pathologised but expressly makes provision for self-determined gender, effectively removing existing barriers to legal gender recognition.

4.5 Emerging models of gender recognition

Beyond the self-identification model of gender recognition, which is inextricably linked with depathologisation, there are other emerging models of gender recognition that can help remove the identified and existing barriers to legal gender recognition.

4.5.1 Ending gender registration

Principle 31 of the YP+10 calls for the abolition of gender markers on official identity documents and the curtailment of collection of gender and sex information where possible, considering issues of national security and other legitimate concerns. Where this is not possible, the Principle calls for any easy, transparent and accessible process for amendment without restrictive requirements. While acknowledging that data on gender and sex may be necessary for national development initiatives such as ensuring gender equity, such information can be collected without the need to include it on official identity documents. This is because the recording and visible

²⁵³ Section 3(d) of Act.

²⁵⁴ Section 4(8) of Act.

²⁵⁵ Section 9 of Act.

²⁵⁶ Section 11 of Act.

²⁵⁷ Section 15 of Act.

²⁵⁸ Section 15(2) of Act.

²⁵⁹ Section 15(1).

display of a gender marker in an identity document can infringe rights to privacy and the freedom from discrimination as demonstrated by the experiences of the applicant in the *Gender marker* case. Furthermore, in the face of technological advancements and the use of bio-metric data, the use of gender markers has grown increasingly obsolete and unnecessarily invasive. There are other means of identity verification and this is a consideration Botswana should be making to ensure the effective protection of the rights of its citizens in their diversity. For example, the unique identification number in *omang* cards ensures robustness of the national identity system and can ensure capturing of gendered data without express registration.²⁶⁰ That said, in the event that it can be successfully argued that Botswana does not have the systems and structures to end gender registration, then it is important to reiterate that there should be an easy process for amendment of gender markers. Ending gender registration in compliance with Principle 31, would be an important step towards building a society that accepts gender as personal.

4.5.2 Recognition of gender plurality

Having demonstrated the harmful and exclusionary effects of hierarchical and essentialist conceptions of gender, another important consideration for removing barriers to legal gender recognition is the recognition of gender plurality. Recognition of gender plurality in the form of adopting a third gender or 'x' as a viable gender marker, ensures social and cultural participation for those who do not conform to normative conceptions of gender or who fall outside of those gender constructs. Flowing from the understanding that personal autonomy and self-determination are core to individual conceptions of gender, it follows that non-binary persons or gender non-conforming persons should be allowed to use gender markers that are representative of their gender identities and experiences. The recognition of gender plurality will of course necessitate a dismantling of conformist considerations of gender and a deliberate effort in building understanding of plurality and acceptance of difference. This is important for ensuring equality before the law as well as equal protection of the law. Jurisprudential comparisons, such as the cases discussed above, provide an evidential basis for this assertion. In particular, the views of Justice Sikri agreeing with Justice Radhakrishnan in *National Legal Services Authority v Union of India & others* that equality is anchored on two complementary principles, non-discrimination and reasonable differentiation, are particularly instructive. The Judge stated that equality is not just about preventing discrimination, but about ending systematic discrimination.²⁶¹ He emphasised that reasonable differentiation speaks to creating a gender classification that would reasonably accommodate non-binary gender experiences. This, he observed, 'will not only ensure the legal protection of this marginalised group but will ensure that other socio-economic benefits enjoyed by traditional male and female genders are also extended to them'.²⁶² Adoption of a third gender or 'x' marker would serve to protect the right to recognition of non-binary and gender non-conforming persons and bring them within the fold of rights as recognised in respect to other classes of transgender persons. While acknowledging the

²⁶⁰World Bank *Group Identification for development (ID4D) country diagnostic: Botswana* (2016) at 17.

²⁶¹ *National Legal Services Authority v Union of India & others* (n 40) para 88.

²⁶² As above.

administrative difficulties and uncertainties that may come with implementation of a third gender category, the jurisprudential comparisons provide an in-depth evidential basis for learning and improving.²⁶³ Besides, administrative challenges cannot suffice as justification for limiting the enjoyment of rights. As observed by the European Court of Human Rights in *Christine Goodwin v United Kingdom*, 'in the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved.'²⁶⁴

In addition to these models, there are other gender-inclusive models for gender recognition that can be considered as a way to removing barriers to legal recognition. These include the opt-in model where the gender of all new born babies on birth certificates is indicated with an 'x' and upon attaining the age of 16, they can choose their sex descriptor.²⁶⁵ This model, which comports with the self-identification approach, is premised on the understanding that every form of gender identity expression is legitimate and therefore should be recognised.²⁶⁶ Such a model would necessitate the removal of medical and surgery requirements in order to qualify for recognition.²⁶⁷

4.6 Conclusion

Restrictive and burdensome requirements for legal gender recognition predicated upon essentialist conceptions of gender, have been recognised as a violation of international human rights. International human rights law calls for the repeal of discriminatory practices that hinder access to legal gender recognition and that stem from the pathologisation of non-normative gender identities. Gender affirming procedures are important for easing gender dysphoria, however, they must not be mandated as a prerequisite for legal gender recognition. These must be freely chosen and not imposed. Comparative jurisprudence and comparative legislation demonstrate the benefits of the self-determination and gender plurality models and how they can affirm and protect rights to legal recognition without the need for medical interventions. Alternative and emerging approaches such as ending gender registration also provide avenues for removing existing barriers to legal gender recognition, especially for non-binary and gender non-conforming persons. Ending gender registration in official identity documents can, for example, ensure that only personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose is included in identity documents. Undoubtedly, this would resolve some of the challenges faced by transgender persons, even in the absence of medical interventions.

²⁶³ Deyi (n 44) at 137.

²⁶⁴ *Christine Goodwin v United Kingdom* Application No 28957/95 ECHR (11 July 2002).

²⁶⁵ Deyi (n 44) at 140.

²⁶⁶ As above.

²⁶⁷ As above.

CHAPTER 5: CONCLUSION

5.1 Introduction

The *Gender marker* case was a ground-breaking case that will go down in human rights history as a milestone in the protection of the rights of transgender persons. It affirmed that transgender persons form part of the diversity of the nation of Botswana and acknowledged that the ability to access proper identification, that is representative of one's self-determined gender identity, is at the core of humanity and dignity. Although not establishing a framework for dealing with administrative requests for changes in gender markers, it helped clarify that this was a constitutionally enforceable right and began the conversation on comprehensive approaches to legal gender recognition. That said, the approach adopted by the Court in the case has created additional barriers to legal gender recognition for transgender persons whose experiences fall outside normative understandings of what it means to be a man or woman. International human rights law, comparative case law and comparative jurisprudence provide guidance for developing more inclusive and less restrictive approaches to legal gender recognition that may be replicated in Botswana.

5.2 Recommendations

Below are some recommendations for a comprehensive and all-encompassing approach to legal gender recognition that would be helpful for safeguarding the rights of transgender persons in Botswana. To effectively protect the rights of transgender persons to legal gender recognition and remove existing barriers to recognition, conscientious and concerted steps need to be taken to dismantle the arbitrary and discriminatory criteria unwittingly established by the Court in the *Gender marker* case as well as through administrative practice prior to the case. It is critically important to challenge the dominant ideologies that construct transgender identities, control who is given recognition and constrain non-binary or gender non-conforming persons. This is important for developing an inclusive approach to legal gender recognition that embraces plurality and inclusivity. It will be important to develop an easy and accessible procedure for legal gender recognition devoid of any cumbersome preconditions. International human rights law, comparative law as well as comparative jurisprudence provide the necessary guidance and building blocks for developing a comprehensive legal and policy framework for legal gender recognition. Participatory processes involving transgender persons in their diversity, activists in the area of transgender rights, medical practitioners and law makers will be necessary for ensuring that all necessary factors are taken into consideration in building this framework. This framework must aspire to build an inclusive society that embraces difference and accommodates diverse experiences across the gender spectrum. In this spirit, the process for legal gender recognition should be based on self-identification, allow for recognition of gender plurality be an uncomplicated administrative process and not require applicants to present medical evidence, undergo surgery or any hormonal replacement therapy.

It is important to highlight that the suggestion for the removal of medical requirements for legal gender recognition is not to dismiss the importance of ensuring access to gender affirming services for those who are desirous of transitioning medically. This is

critical for alleviating experiences of gender dysphoria and ensuring access to the highest attainable standard of health. Access to gender affirming healthcare services must be facilitated for transgender persons who wish to transition medically. Such care should be given expert sensitivity and tailored to the needs of every patient. To ensure accessibility, such care should be provided by the public health system or if not so provided, its costs should be covered or reimbursable under private and public medical aid schemes.

5.3 Overall conclusion

In conclusion, it is important to recall the research questions and provide an overview of responses.

5.3.1 Implications of the *Gender marker* case on the actual lives of transgender persons in Botswana

The *Gender marker* case gave legal gender recognition to transgender persons notwithstanding the absence of a legal and policy framework on gender identity in Botswana. The Court in this case applied a liberal interpretation of the National Registration Act, allowing for the recognition of self-determined gender, albeit with the support of medical evidence. In arriving at its decision, the High Court considered the prevalent experiences of discrimination, stigma and harassment that transgender persons face as a result of being denied legal recognition. However, the approach of the Court to understandings of transgender identities not only pathologized transgender persons but exposed dominant cis-normative biases and essentialist construction of gender. The approach of the Court privileges transgender persons who fit into dominant ideas of what it means to be male or female and ignores those with non-normative gender expressions. This approach is not only discriminatory but creates barriers to legal gender recognition for non-binary and gender non-conforming persons, as well as other transgender persons who cannot afford to transition medically.

5.3.2 The international and national legal position in respect of the right to legal gender recognition

The international human rights framework recognises the right to legal gender recognition. It calls for procedures to legal gender recognition that are easy, transparent and accessible. Requirements for surgical and hormonal treatments as prerequisites for legal gender recognition violate international law. These requirements, which treat transgender persons as mental or psychiatric patients, violate rights to sexual and reproductive health as well as their rights to dignity. International human rights law calls for the destigmatisation and depathologisation of transgender identities to ensure respect for the rights of transgender persons. States are obligated to respect the physical and psychological identity of transgender persons by legally recognising self-identified gender without additional requirements.

5.3.3 Best approaches for removing barriers to legal gender recognition in Botswana

Comparative international law demonstrates that procedures for legal gender recognition that are not restrictive, and which do not require medical transition, are important for removing barriers to legal gender recognition. Furthermore, the recognition of gender plurality is an important approach for ensuring recognition of non-binary and gender non-conforming persons. These approaches necessitate a dismantling of traditional understandings of gender and an acceptance of plurality. Another approach that is demonstratively effective for facilitating legal gender recognition is the abolition of gender registration. The curtailment of collection of gender and sex information and its display on identity documents, as far as possible, is important for the protection of privacy and the right to dignity.

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