

To cite: KP Magashula & C Ngwena 'Beyond symmetrical binaries: The emergence of the constitutional recognition of transgender persons in Zimbabwe with reference to *Nathanson v*

Mteliso & Others' (2023) 23

African Human Rights Law Journal 386-409

<http://dx.doi.org/10.17159/1996-2096/2023/v23n2a7>

Beyond symmetrical binaries: The emergence of the constitutional recognition of transgender persons in Zimbabwe with reference to *Nathanson v Mteliso & Others*

*Kutlwano Pearl Magashula**

The Other Foundation, South Africa

<http://orcid.org/0000-0003-3266-9852>

*Charles Ngwena***

Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa

<https://orcid.org/0000-0002-4482-6707>

Summary: *In this case discussion we explore the constitutional and human rights implications of a decision of a High Court of Zimbabwe in Nathanson v Mteliso & Others for the recognition of transgender identity. The Court found that the arrest and detention of a transgender woman on the claim that she was a man who had entered a women's toilet were unlawful. It is argued that while the decision stops well short of a comprehensive engagement with the intersection between gender diversity and fundamental rights, it nonetheless is progressive. The decision should be understood as standing for the proposition that transgender persons are entitled to rights guaranteed in the Constitution and international human rights law.*

* LLB (Swaziland) LLM (Pretoria); kmagashula@theotherfoundation.org

** LLB LLM (Wales) LLD (Free State); charles.ngwena@up.ac.za

Key words: *transgender; constitutional rights; human rights; equality; non-discrimination; human dignity*

1 Introduction

Transgender citizens are part of Zimbabwean society. Their rights ought to be recognised like those of other citizens. Our constitution does not provide for their discrimination. It is nothing but delusional thinking to wish away the rights of transgenders.¹

In this article we analyse the constitutional and human rights significance of a decision of the High Court of Zimbabwe in *Nathanson v Mteliso & Others* for the recognition of the constitutional rights of transgender persons.² The Court found that the arrest and detention of a transgender woman on the claim that she was a man who had entered a women's toilet were unlawful and contrary to section 25 of the Criminal Procedure and Evidence Act that regulates arrest without a warrant. It also found that the arrest and detention were contrary to sections 50, 51 and 53 of the Constitution of Zimbabwe of 2013. Section 50 guarantees the rights of arrested and detained persons. Sections 51 and 53 respectively guarantee the rights to human dignity and freedom from cruel, inhuman or degrading treatment. The Court ordered damages for unlawful arrest, malicious prosecution, emotional distress and *contumelia*.

The *Nathanson* case is Zimbabwe's first domestic juridical pronouncement on the constitutional status of transgender identity. While the decision did not deliberate comprehensively on the fundamental rights of transgender and gender diverse persons, it struck an unequivocally progressive note. The Court stressed that transgender persons were entitled to equal enjoyment of fundamental rights, including the rights to human dignity, equality and privacy.

We begin by summarising the facts, the issues and the decision.

2 Facts

This was an application brought before a High Court of Zimbabwe sitting in Bulawayo challenging the arrest and prosecution of Ricky Nathanson (plaintiff), a transgender woman, who was arrested on the claim that she was a man who had entered a women's toilet. She

1 *Nathanson v Mteliso & Others* (HB 176/19, HC 1873/14) [2019] ZWBHC 135 (14 November 2019) per Bere J para 131.

2 *Nathanson* (n 1).

had gone to meet a client at a hotel. At the hotel she was forcefully detained for approximately 45 minutes by two men after having refused to buy them a bottle of whisky. Essentially, Ricky refused to be blackmailed on account of her transgender identity.³ One of the men instigated an arrest by summoning the police, alleging that 'there was a man walking around in a dress who needed to be fixed'.⁴ Six police officers, who had no warrant, came to arrest her. She was bundled into an open police vehicle and taken to a police station.

Ricky was ordered to remove her shoes and sit on the floor at the police station.⁵ Ricky's arrest had attracted publicity. At the police station she was paraded before a crowd. Later, five male officers took her to a room to interrogate her about her gender and, specifically, whether she was a man or a woman. Ricky was ordered to lower her pants for them to verify whether she was a man or a woman. On seeing her genitalia, the officers laughed and jeered.⁶ Later that same evening, Ricky was taken to a hospital for a 'gender verification' examination. The doctor who examined her recommended further examination at another hospital by a gynaecologist. The finding of the gynaecologist was that Ricky was a transgender woman even if she was biologically male.⁷ At no point was her consent sought for the examinations and Ricky offered no objection as she understandably was frightened of the police officers, this being her first arrest.⁸ During the trial, the police made an admission that they would have forced Ricky to undergo the examination even in the face of any objection from her.⁹

Ricky was further detained in police custody in a dark cell that reeked of human waste. She signed a cautioned statement confirming that while she was male by biology, she had hormones that caused her to live as a woman.¹⁰ She admitted without informed understanding that she had committed the offence of criminal nuisance under section 46 of the Criminal Codification and Reform Act of Zimbabwe.¹¹ The alleged offence was based on the insistence that she was a man who had entered a women's toilet.

The next day Ricky was taken to court and charged with committing a criminal nuisance. The charge was based on the allegation that

3 *Nathanson* para 7.

4 *Nathanson* para 8.

5 *Nathanson* paras 8-10.

6 *Nathanson* paras 10-12.

7 *Nathanson* paras 13-15.

8 *Nathanson* para 43.

9 *Nathanson* para 62.

10 *Nathanson* para 16.

11 Criminal Codification and Reform Act [Chapter 9:23].

Ricky was a man who had entered a women's toilet.¹² Although she was eventually granted bail, she was forced to go into hiding after being subjected to threats by one of the men who had instigated her arrest.¹³ For the three days she was detained in police custody, Ricky reported that she was subjected to taunting and paraded outside her cell. The publicity around her court appearance adversely impacted on her modelling business, causing her to abandon it. Several media articles were written attacking her personally and degrading her mainly because of her transgender identity.¹⁴

Almost two years later, the charges against Ricky were withdrawn because no clear-cut offence was disclosed on the facts. The charges have never been reinstated.¹⁵ Ricky sought psychological support from a clinical psychologist who confirmed that the arrest, the invasive examinations and the attendant publicity of the case had taken their toll and that Ricky had been diagnosed with post-traumatic stress disorder (PTSD).¹⁶ Ricky then instituted action seeking damages.

At the trial the arresting officers insisted that they had acted lawfully and that a suspicion based on reasonable grounds that a man had entered a women's toilet justified Ricky's arrest.¹⁷

3 Issues

Before the High Court, Bere J, the trial judge, had to determine the following main issues:

- (1) whether Ricky was arrested unlawfully and prosecuted maliciously;
- (2) whether Ricky was subjected to inhuman or degrading treatment;
- (3) whether Ricky suffered damages as a result of the defendants' conduct;
- (4) whether Ricky was entitled to damages for unlawful arrest, unlawful detention, emotional distress and *contumelia*, as well as to exemplary damages; and
- (5) the quantum of damages in the event of finding the defendants liable.

12 *Nathanson* para 17.

13 *Nathanson* para 18.

14 *Nathanson* paras 36-39.

15 *Nathanson* para 19.

16 *Nathanson* paras 45-54.

17 *Nathanson* para 62.

4 Decision

The Court found that Ricky's arrest was contrary to section 25 of the Criminal Procedure and Evidence Act,¹⁸ which regulates arrest without a warrant. The Court stated that the Criminal Procedure and Evidence Act does not criminalise the entering of a toilet by a person not belonging to the gender to which it is assigned.¹⁹ The Court reiterated that there was no such offence under Zimbabwean law.²⁰ The Court was of the view that it was a serious breach of the law for the police to arrest and detain Ricky merely on the basis of an allegation. It found that the arrest was prompted by malice and that the involvement of the six riot police officers to effect the arrest was an aggravating factor.²¹ The Court remarked at the overly high-handed manner in which the police conducted the arrest.²² The Court concluded that there could never be any justification for how the police conducted themselves. It found that Ricky had not violated any law and that her alleged admission to a non-existent crime under section 46 of the Criminal Codification and Reform Act was immaterial.²³ According to the Court, the case might have been different if Ricky had entered the toilet and encountered another person in a way that causes that person to feel that their dignity has been compromised.²⁴ Even then, it noted, this would have required a complainant to first allege criminal conduct against Ricky.²⁵

While it is not clear from the facts whether Ricky had specifically relied on her constitutional rights to frame her arguments, the Court applied the Constitution. It found that Ricky had not been informed of the reasons for her arrest and that her humiliating treatment in police custody was unlawful. Therefore, this conduct also constituted violations of sections 50, 51 and 53 of the Constitution being inhuman and degrading treatment.²⁶ Section 50 guarantees a person who is arrested and detained to be informed of the reasons for the arrest and to be treated humanely and have their dignity respected. Section 51 guarantees every person a right to dignity in their private and public life, while section 53 guarantees freedom from inhuman and degrading treatment.

18 Criminal Procedure and Evidence Act of Zimbabwe [Chapter 9:07].

19 *Nathanson* para 72.

20 *As above*.

21 *Nathanson* para 73.

22 *Nathanson* para 79.

23 *Nathanson* para 81.

24 *Nathanson* para 82.

25 *As above*.

26 Constitution of Zimbabwe Amendment Act 20 of 2013.

Regarding damages, it was the opinion of the Court that Ricky had suffered substantial emotional distress and loss of dignity on account of the unlawful arrest and treatment in detention.²⁷ The Court found that the procedures to verify her gender were invasive to the point of undermining the very foundation of her dignity. Along with the adverse publicity engendered by her court appearance, Ricky was left emotionally extremely harmed.²⁸ The Court ordered damages for unlawful arrest, malicious prosecution, emotional distress and *contumelia* in the total amount of Z\$400 000 including interest, but declined the claim for exemplary damages. According to the Court, damages should seek to compensate for the injuries suffered but not enrich the victim.

Although identifying as transgender woman was not a contested issue before the Court, it was clear to the Court that it was at the root of the reason why Ricky had been subjected to violations of her constitutional rights. The Court took it upon itself to pronounce on the constitutional standing of transgender persons. In the absence of a domestic precedent, it looked to foreign jurisprudence for interpretive guidance, and specifically to the Supreme Court of India. When interpreting provisions of the Constitution, Zimbabwean courts may consider foreign law.²⁹

In the *Nathanson* case the Court followed with approval the pronouncements on the constitutional standing of transgender persons in *Navtej Singh Johar & Others v Union of India Ministry of Law & Justice*, a decision of the Supreme Court of India.³⁰ The main issue in this case was whether a statute that criminalised consensual sexual intercourse between persons of the same sex was unconstitutional and should be struck down. The statute criminalising same-sex intercourse was a colonial outgrowth, having been introduced to India when it was a British colony and inherited at independence. In answering the question affirmatively, the Supreme Court of India broadened its judicial gaze beyond non-conforming sexualities to also pronounce more generally on the constitutional status of sexual and gender minorities. At the same time as affirming the constitutional recognition of people who are attracted to the same sex and striking down the statute as discriminatory and an erosion of liberty, human dignity and privacy, it also affirmed transgender people as constitutionally protected for analogous reasons.

27 *Nathanson* para 125.

28 *Nathanson* para 125.

29 Sec 46(1)(e) Constitution of Zimbabwe (n 26).

30 AIR 2018 SC 4321.

Bere J drew inspiration from the *Navtej Singh Johar* case, treating the Constitution of India as comparable to that of Zimbabwe and the transgender recognition-related judicial pronouncements in the case as instructive.³¹ He quoted with approval the following enunciation by Dipak Misra CJ affirming non-conforming gender identity:³²

The emphasis on the unique being of an individual is the salt of his/her life. Denial of self-expression is inviting death. Irreplaceability of individuality and identity is grant of respect to self. This realisation is one's signature and self-determined design. One defines oneself. That is the glorious form of individuality.

The *Nathanson* decision relied on the *Navtej Singh Johar* case to construct gender identity as an intrinsic part of an individual's personhood and to unequivocally affirm that transgender persons were entitled to the full measure of fundamental rights guaranteed by the Constitution of Zimbabwe. Bere J concluded:³³

Transgender citizens are part of the Zimbabwean society. Their rights ought to be recognised like those of other citizens. Our constitution does not provide for their discrimination. It is nothing but delusional thinking to wish away the rights of transgenders.

5 Analysis

In our analysis, we focus mainly on the following aspects: the naming of 'transgender' identity; the social and legal privileging of a symmetrical two-gender system; the pathologisation of transgender identity; the recognition of the constitutional and human rights of transgender persons; and access to bathrooms.

5.1 'Transgender' and the naming of transgressive genders

When using 'transgender' to describe non-conforming identities in an African context, the Euro-American origins of the term must be borne in mind to ensure that Africans are substantively included rather than normatively constituted or erased. In its popularised identitarian form, the term 'transgender' may be colonising. It entered transnational constitutional and human rights jurisprudence from its specific origins in the Global North. The term gained popularity in the late 1980s as self-naming and identity politics in a social and political context where gender-affirming hormonal therapies and gender surgeries had been validated by the medical profession and

31 *Nathanson* para 2.

32 *Nathanson* para 130, citing *Navtej Singh Johar* (n 30) para 1.

33 *Nathanson* para 131.

were becoming increasingly accessible to populations in the Global North.³⁴ This is not an argument for abandoning a term that has acquired valence and global popularity in advocacy for challenging discriminatory regimes, including in the African region. Indeed, identities may be the outcome of enculturation in which Africans identify with naming whose origins lie outside their locale, as has generally occurred with the appropriation of the LGBTQIA+ acronym and the term 'queer'.³⁵ Rather, it is to acknowledge that naming is always culturally invested. When naming is culturally transplanted, it carries the risk of cultural imperialism and misrecognition.

The predominant Euro-American usage of 'transgender' implies a binary transitioning – a crossing over – from one identifiable gender to another that is often accompanied by gender affirming therapies and/or surgeries.³⁶ It is built around a 'wrong body' narrative that privileges Western identities while alienating persons from other cultures of which the gender identity may be non-binary or have no access to or do not desire gender-affirming therapies.³⁷ Equally, for persons who derive gender non-conforming identities from indigenous life worlds and spiritualities, the Euro-American use of 'transgender' is colonising.³⁸ Even allowing for enculturation, naming should be appropriated in ways that are conscious of the name's epistemic limits and potential for cultural imperialism. A transplanted identity category may have the effect of universalising only the experience of the Global North. While serving to articulate a cause and mobilise against discrimination, it can also serve to marginalise African experiences that are outside Western gender paradigms. When the social experiences of a historically-marginalised group are not fully integrated into the collective understanding of the social world, the outcome is epistemic injustice and the persistence of coloniality.³⁹

Cognisant of the epistemic limits of the term 'transgender', we use it in this commentary as an umbrella term to denote the widest possible range of persons whose gender identity, that is, a deeply-felt psychological identification with their gender, is not congruent

34 R Pearce and others 'The introduction: The emergence of trans' (2019) 21 *Sexualities* 4-5.

35 C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018) 214.

36 S Duffy 'Contested subjects of human rights: Trans and gender-variant subjects of international human rights law' (2021) 84 *Modern Law Review* 1041.

37 As above.

38 As above.

39 J Ogone 'Epistemic injustice: African knowledge and scholarship in the global context' in A Bartels and others (eds) *Postcolonial justice* (2017) 17.

to the sex assigned at birth.⁴⁰ To maintain the inclusiveness of the category of 'transgender', there should be no qualifiers placed on the term based on aspects such as bodily alterations arising from hormonal or surgical treatment, the way in which one chooses to express themselves, construct their appearance or behave, or genital characteristics. Any such qualifiers would only serve to erase the heterogeneity of the transgender community.⁴¹ We, therefore, align with the inclusive approach of the Yogyakarta Principles, which conceptualises gender identity as

each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.⁴²

In defining transgender identity in the *Nathanson* case, Bere J was implicitly guided by the Yogyakarta Principles. He followed the approach of the Supreme Court of India in the *Navtej Singh Johar* case in endorsing a definition of gender identity that was taken from the Yogyakarta Principles.⁴³ In *Navtej Singh Johar*⁴⁴ the Indian Supreme Court was in turn following its own decision in *National Legal Services Authority v Union of India (NALSA)*.⁴⁵ The *NALSA* case recognised transgender identity as entitled to constitutional protection. It adopted the Yogyakarta Principles in defining gender identity.⁴⁶

Implicit in this expansive judicial construction of gender identity is an awareness that some transgender persons may identify with a binarised gender identity, identifying as either male or female, but others may not. As noted by the Supreme Court of India, the Hijras of India, for example, provide a historical archive of a gender that is neither male nor female.⁴⁷ Transgender identity should not depend on first undergoing gender-affirming therapy. To render the legal recognition of transgender identity contingent upon gender-affirming therapies would be to medicalise or even pathologise

40 S Stryker & S Whittle *The transgender studies reader* (2006) 666.

41 KP Magashula 'A case for removing barriers to the legal recognition of transgender persons in Botswana' in E Durojaye and others (eds) *Advancing sexual and reproductive health and rights: Constraints and opportunities* (2021) 153.

42 Conference of International Legal Scholars *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007) 6.

43 *Nathanson* para 2, citing *Navtej Singh Johar* (n 30) para 5.

44 *Navtej Singh Johar* (n 30) para 5.

45 (2014) 5 SCC 438.

46 *National Legal Services Authority* (n 45) para 19.

47 *National Legal Services Authority* (n 45) para 11.

an individual's self-sense of their gender. Transgender eschews identitarian homogeneity since there is a multiplicity of transgender subjectivities. What unites transgender identity is not somatic or cultural sameness or, much less, medical validation. Instead, it is the experience of being stigmatised because of non-conforming gender status that is seen as socially transgressive and threatening to a dominant cultural norm.

When transposed to gender, Hall's work on rethinking cultural identities cautions us against inclining towards naturalising the category of transgender and using only a biological construct.⁴⁸ Transgender identities are produced in a social, cultural and historical setting. Consequently, we should guard against the notion of essential or authentic transgender identity. Rather than treat gender identities as pre-discursive, we are better served by an approach that interrogates the ways in which gender is subjectively constructed in a given historical and cultural setting. Hall underscores the provisional nature of any identity as a temporal as well as temporary, rather than fixed, attachment to mark 'becoming and being' in ways that are always subject to transformation through the play of history.⁴⁹

Transgender identities, therefore, should not be prescribed identities but 'specific enunciations' that are situated in historical contingency.⁵⁰ They are diverse, fluid identifications located in time and place but with no essential transgender home. Their subjectivities reflect a multiplicity of gendered experiences mediated by 'race', ethnicity, culture, religion, class, access to health services, geographical location and other intersectionalities. Above all, we argue that 'transgender' should be used contextually and remain under the constant gaze of intersectionalities. Transgender identity should centre the locale and not imply singularity or a Western-spawned universalism that ignores differences, including culture, ethnicity, race, socio-economic status and coloniality.⁵¹

Though awareness about the existence of African transgender identities is coming to the fore, there is a need to raise the bar of continental awareness. Outside of transgender rights advocacy and activism, which in any case is unevenly spread across the continent, there is no comprehensive transgender archive that is historically and culturally specific to Africa. Without such an archive, there is

48 S Hall 'Cultural identity and diaspora' in J Rutherford (ed) *Identity: Community, culture, difference* (1990); S Hall 'Who needs "identity"?' in P du Gay, J Evans & P Redman (eds) *Identity: A reader* (2000) 15.

49 Hall (1990) (n 48) 225.

50 Hall (2000) (n 48) 17.

51 Ngwena (n 35) 214.

a real risk of unproductive mimicry and essentialisation in African transgender discourses through an overreliance on transgender archives produced in the Global North.⁵² More scholarly and activist efforts must be expended to excavate and articulate an epistemology of transgender, including its naming, that speaks to the specificities of the African region without abandoning the importance of building cross-cultural alliances and global solidarity.

5.2 The social and legal privileging of symmetrical gender binaries

The *Nathanson* case and, more specifically, Ricky's experience of a contrived and violent arrest, a humiliating stay in police custody, harassment following release from detention and the loss of her modelling business on account of adverse media publicity, are a sharp reminder that genders that 'transgress' experience hybrid modes of injustice.⁵³ Transgressive genders do not simply become targets of demeaning misrepresentations and spoiled identity, but also experience socio-economic exclusion, repression, hate and violence.⁵⁴ The agency, equality and human dignity of transgender persons are constrained not only by invidious or attitudinal discrimination based on unfounded, derogatory stereotypes, but more so by systemic or structural inequality and violence.

Because of her gender identity, Ricky was cast at the receiving end of socially-produced transphobia in the form of individual, institutional and societal discrimination accompanied by hate and violence. A wide spectrum of society was implicated: the civilian who instigated the arrest by summoning the police simply because Ricky resisted blackmail; the police who arrested and detained her, subjecting her to violence and humiliating invasions of privacy on a contrived charge; the doctors who conducted 'gender verification tests' without her consent; the public that jeered at Ricky while in police custody; and the media that wrote negatively and salaciously about her gender identity and supposed sexuality. The police, in particular, served as a veritable vector of institutional transphobic violence.

The fabricated nature of Ricky's arrest illustrates that when gender identity status is claimed outside its presumed moorings to a binarised

52 S Tamale 'Researching and theorising African sexualities' in S Tamale (ed) *African sexualities: A reader* (2011) 10-12.

53 N Fraser *Justice interruptus: Critical reflections on the 'post-socialist' condition* (1997) 16-23.

54 E Goffman *Notes on the management of spoiled identity* (1963).

male or female sex category assigned at birth, it poses an iconoclastic demand precisely on account of the historical pervasiveness of patriarchy. There is universal evidence that transgender is the object of intense discrimination and status subordination across jurisdictions.⁵⁵ Transgender persons overwhelmingly experience 'precarity', encountering discriminatory practices to the point of becoming targets of hatred, extreme forms of violence and even killings.⁵⁶ The institutionalised exclusion of transgender persons from citizenship is evident not so much in explicit proclamations or proscriptions, but in the hegemonic silences of formal laws, practices and social norms that assume only congruent gender binarism as the basis upon which citizens engage with institutions of society from the cradle to the grave.

In social and political systems where dominant cultural discourses are in thrall to patriarchy – which is the better part of the world's systems – a principle of binarised symmetry or consistency is used to normatively construct the connections between sex, gender and sexuality. This is a consequence of heteropatriarchy, that is, an ideology that valorises masculinity and heterosexuality. The principle of binarised symmetry informs law, policy and dominant social practices. It explains, for example, the use of gender markers in birth, marriage, death and education certificates, driver's licences, national identity documents and passports. The heteronormative bias in the regulation of how sexuality and gender are expressed, marriage and the provision of male and female public restrooms is a manifestation of a socially-embedded symmetrical gender binary.⁵⁷ The pervasiveness of the societal exclusion of transgender persons is an institutionalised misrecognition that functions as a form of civil death.

5.3 Pathologisation

Societal pathologisation of transgender identity explains why Ricky was treated inhumanely in detention, including being subjected to humiliating gender-verification tests. Pathologisation of transgender identity is rooted in the ideology of heteropatriarchy that legitimises

55 BM Dickens 'Transsexuality: Legal and ethical challenges' (2020) 151 *International Journal of Obstetrics and Gynecology* 165.

56 Accountability International 'Southern Africa trans diverse situational analysis: Accountability to reduce barriers to accessing health care' (nd), <https://accountability.international/projects/trans-diverse-africans-situational-analysis-2016-2019/> (accessed 5 July 2022).

57 F Valdes 'Unpacking hetero-patriarchy: Tracing the conflation of sex, gender and sexual orientation to its origins' (1996) 8 *Yale Journal of Law and the Humanities* 161.

the social, political and economic dominance of heterosexual males in society.⁵⁸ Heteropatriarchy naturalises the connections between sex, gender and sexuality so that there is normative heterosexual congruence within the confines of a male/female binary.⁵⁹ This ideology legitimises cisgenders, that is, genders that conform to symmetrical gender binaries of male and female.⁶⁰ The effect is to valorise as 'proper' gender identities and expressions that align with heterosexual congruence, and to denigrate as 'improper' genders that are not in alignment.⁶¹ This differentiation is propped up by religious, medical, cultural and political discourses that reward cisgenderism and heteronormativity with unquestioned mental health, respectability, legality and institutional support.⁶² Non-conformity, on the other hand, is equated with mental illness and criminal conduct. This assumption is used to justify constraining the social and physical mobility of non-conforming persons and denying them institutional support.⁶³

Medical discourses have played a prominent role in pathologising transgender identity as well as validating it. The emergence of transgender as an identitarian category in contemporary times has been preceded by a universalised medical discourse that began with constructing transgender as a pathology. As in the case of homosexuality, the articulation of gender diversity and variance first gained a semblance of public validity and legitimacy once it was given a scientific imprimatur by medicine.⁶⁴ The medical study of transgender identities and gender incongruence began in earnest in the nineteenth century.⁶⁵ At first, the medical approach was to treat transgender identity as a clinical 'disorder', a form of delusion requiring reality testing and psychotherapy.⁶⁶ These negative framings have shifted over the years as the understanding of transgender identities grows. However, influences of oppositional sexism and heteropatriarchy persist in medical discourses about gender identity.⁶⁷

58 As above.

59 As above.

60 E Lennon & BJ Mistler 'Cisgenderism' (2014) 1 *Transgender Studies Quarterly* 63.

61 As above.

62 G Rubin 'Thinking sex: Notes for a radical theory of the politics of sexuality' in P Aggleton & R Parker (eds) *Culture, society and sexuality: A reader* (2006) 150.

63 Rubin (n 62) 151.

64 S Long 'When doctors torture: The anus and the state in Egypt and beyond' (2008) 7 *Health Human Rights* 116.

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

66 As above.

67 G Ansara 'Cisgenderism in medical settings: Challenging structural violence through collaborative partnerships' in I Rivers & R Wards (eds) *Out of the ordinary: LGBT lives* (2012) 102.

On a global scale, the World Health Organisation (WHO) took a lead in officially pathologising transgender identity using the International Statistical Classification of Diseases and Related Health Problems Manual (ICD-9) of 1975.⁶⁸ Across the world, including in the African region, doctors use WHO's ICD in conjunction with the Diagnostic and Statistical Manual of Mental Disorders (DSM) of the American Psychiatric Association to classify and diagnose mental health conditions.⁶⁹ 'Transgenderism' has been classified by ICD and DSM as a psychiatric 'disorder' because of incongruence between the sex that was assigned and the psychological sex or gender identity.⁷⁰ Once diagnosed as a psychiatric disorder, transgender identity becomes a mental illness that can or ought to be treated medically such as by counselling, administration of hormones and gender-reassignment surgery.

The ICD and DSM manuals have since been revised to move away from pathologising transgender identities and reflect new understandings of health and advances in medical science. In 2019 the eleventh revision of ICD (ICD-11) was revised to include a new chapter titled 'Conditions related to sexual health'. The revision served to reclassify transgender identities as 'gender incongruence' and no longer mental disorders. The reclassification emanated from the recommendations of a working group on sexual disorders and behaviours set up by WHO. The recommendations were influenced by submissions from multi-sectors, including civil society and activists, critical of the pathologisation of transgender people and the stigma that accompanies equating transgender identity with mental illness.⁷¹ The working group acknowledged that pathologising transgender identity deprives transgender persons of legal recognition, undermines human rights protections and creates barriers to accessing health care.⁷² The working group recommended the removal of transgender identities as a mental disorder to reduce the stigma, but retained the classification of gender incongruence to safeguard access to health care.⁷³

68 Magashula (n 41) 154.

69 American Psychiatric Association *The diagnostic and statistical manual of mental disorders, Fifth edition, text revision (DSM-5-TR)* (2022).

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

71 GM Reed and 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.

72 As above.

73 As above.

This 2019 revision followed an earlier revision to the DSM (2013) that removed the term 'gender identity disorder' as a psychiatric diagnosis and reclassified it as 'gender incongruence' to signal that identifying as transgender is not a mental disorder. The psychological distress that results from gender incongruence was also re-categorised as 'gender dysphoria' to more accurately reflect individual experiences and reduce stigma against transgender people while ensuring clinical care to transgender persons.⁷⁴ A working group on sexual and gender identity disorders met to deliberate on whether to completely remove the experiences of transgender people from the DSM-V but decided against it in order to protect access to health care for transgender people.⁷⁵ Significantly, as part of depathologising transgender identity, the working group recommended transitioning from binary terminology when framing gender incongruence by substituting terms such as 'opposite sex' and 'anatomic sex' with non-binary terminology such as 'experienced gender' and 'assigned gender'.⁷⁶

Because Ricky claimed an identity outside the limitations of a socially as well as medically-binarised understanding of male and female, law enforcement officers felt emboldened to subject her to 'gender-verification tests' with the unquestioning support of the medical profession. The doctors who examined her treated her gender as a pathology, adding to the violence inflicted upon her by the police. Despite Ricky's own determination of her gender identity, without her consent, they proceeded to conduct medically-unsubstantiated examinations, invalidating her agency and violating her right to dignity and privacy. Ricky's experiences are a case study in pathologisation and how medicalised constructions of transgender identities continue to perpetuate institutionalised transphobic violence and embed symmetrical gender binaries.

5.4 Affirming the constitutional and human rights of transgender persons

The struggle for the recognition of transgender identities is more than a quest for a mutual identitarian recognition that can be met within a paradigm of formal equality.⁷⁷ Ultimately, it is a struggle for lived equality. It is a demand for inclusive equality to overcome

74 American Psychiatric Association 'DSM-V Fact Sheet on gender dysphoria' (2013).

75 Reed and others (n 71).

76 As above.

77 N Fraser 'Rethinking recognition' (2000) 123 *New Left Review* 109-110; GWF Hegel *Phenomenology of spirit* (1977) 104-109.

status subordination and achieve status recognition so that there is parity in societal participation for all.⁷⁸ With a few exceptions, the 'post-colonial' African state is a conservative variant of its colonial counterpart, having inherited and reinforced a heteropatriarchal state.

The *Nathanson* case illustrates that normative gender binarism is not an unchallenged master dichotomy. Alternative discourses, which have been silenced historically, are surfacing across the globe not just in activism and scholarship, but also in litigation and legal reform. Albeit in their beginnings, insurgent African voices to transform cisgender binarism and recognise alternative gender identities – among others, through litigation to vindicate fundamental rights – are making themselves heard.⁷⁹ The *Nathanson* case is one such voice.

Especially for a country such as Zimbabwe – where the state has been highly instrumental in promoting a discourse of homophobia, including hate speech, in ways that are transposable to transphobia – the *Nathanson* case represents a landmark decision.⁸⁰ Homophobia and transphobia correlate, uniting in their strong antipathy towards non-heteronormative sexualities and genders.⁸¹

The *Nathanson* case lends its voice to a small but growing body of case law emanating from the region that recognises sexual and gender diversity and calls for plurality and legal inclusion. Botswana,⁸² Kenya⁸³ and South Africa⁸⁴ are the other jurisdictions where there has been constitutional recognition of transgender identities in Africa.

78 We align with the concept of inclusive equality articulated by the Committee on the Rights of Persons with Disabilities in General Comment 6 on equality and discrimination CRPD/C/GC/6 (2018) para 11.

79 A Mbugua 'Gender dynamics: A transsexual overview' in Tamale (n 52) 238; 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; B Camminga *Transgender refugees and the imagined South Africa: Bodies over borders and borders over bodies* (2019); Magashula (n 41).

80 N Muparamoto 'LGBT individuals and the struggle against Robert Mugabe's extirpation in Zimbabwe' (2021) 3 *Africa Review* 51.

81 JL Nagoshi 'Gender differences in correlates of homophobia and transphobia' (2008) 59 *Sex Roles* 521.

82 *ND v Attorney General & the Registrar of National Registration* (2017) Botswana High Court Case MAHGB-000449-15.

83 *Republic v Kenya National Examinations Council & Another Ex-Parte Audrey Mbugua Ithibu* Judicial Review Case 147 of 2013 (2014) Kenya Law Reports 6.

84 *Lallu v Van Staden* Roodepoort Equality Court, Case 3 of 2011; *KOS & Others v Minister of Home Affairs & Others* 2017 (6) SA 588 (WCC); *September v Subramoney NO & Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC). South Africa also has legislation: The Alteration of Sex Description and Sex Status Act 49 of 2003 enables transgender and intersex persons undergoing gender affirming treatment to change their names and the gender markers in their identity documents.

The *Nathanson* judgment lays a foundation that is conducive for African transgender activism as well as for domestic legal reforms. While the judgment falls short of a comprehensive engagement with the intersection between transgender identities and fundamental rights, we argue that it did not detract from the constitutional imperatives. Implicitly, it supports the rights of transgender persons to constitutional equality, human dignity and privacy under the Zimbabwean Constitution of 2013.

5.4.1 *Relevance of international human rights law to interpreting the Constitution of Zimbabwe*

Zimbabwean courts are required to give ‘full effect’ to the fundamental rights guaranteed by the Constitution.⁸⁵ The canons of interpretation that are prescribed by the Constitution provide guidance. Courts have a duty to promote the foundational values and principles that underpin a ‘democratic society based on openness, justice, human dignity, equality and freedom’.⁸⁶ It is not only domestically-grown law that matters but also international law. Courts are enjoined to take into cognisance norms arising from treaties and conventions that Zimbabwe has signed.⁸⁷ Where there is more than one possible interpretation or conflicting interpretations, an interpretation that is in consonance with international law must be preferred.⁸⁸ Cumulatively, the provisions of the Zimbabwean Constitution evidence a clear intention to protect constitutional rights consistent with international human rights.

Zimbabwe has ratified, without reservations, treaties that have been used by United Nations (UN) treaty-monitoring bodies or special mechanisms to recognise transgender identity. Examples are the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁸⁹ The UN Independent Expert on Sexual Orientation and Gender Identity has recognised transgender identity as a ‘cornerstone of the person’s identity’ which is manifested by the way in which the person makes free and voluntary choices, feels, expresses themselves or behaves.⁹⁰ The Yogyakarta

85 Sec 46(1)(a) Constitution of Zimbabwe.

86 Sec 46(1)(b) Constitution of Zimbabwe.

87 Sec 46(1)(c) Constitution of Zimbabwe.

88 Sec 327(6) Constitution of Zimbabwe.

89 Duffy (n 36).

90 UN Independent Expert on Sexual Orientation and Gender Identity ‘Report of the Independent Expert on Protection against Violence and Discrimination

Principles, which were adopted in 2007 at a meeting of international human groups, are also an important source of international law.⁹¹ The Principles have been influential in promoting the recognition of transgender persons as rights holders in international, regional and domestic law. The Principles, which constitute soft law, are the most comprehensive set of norms and standards for recognising and affirming the human rights of sexual and gender minorities.

Regional instruments are another source of international law supportive of the human rights of transgender people. Zimbabwe has ratified African Charter-based human rights instruments that, in our view, support the rights to human rights of transgender persons even if there is no express affirmation. Article 2, the non-discrimination clause of the African Charter on Human and Peoples' Rights (African Charter), which Zimbabwe has ratified, is supportive of this argument.⁹² While transgender status is not mentioned as a protected ground, article 2 is not exhaustive. It includes analogous grounds as it protects 'other status' against discrimination. It can, therefore, be extended to gender minorities.⁹³ This argument, likewise, may be extended to article 3 which guarantees equality to social groups protected by article 2 of the African Charter. Zimbabwe has ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). The Protocol protects the rights of women. Article 2 guarantees women protection against unfair discrimination. Under the Protocol 'women' means persons of the 'female gender'.⁹⁴ By using 'gender' rather than 'sex' to define women, it may be inferred that the protected category are any women regardless of their gender identity.⁹⁵

At the regional level, the role of the African Commission on Human and Peoples' Rights (African Commission) has also been significant. The African Commission has weighed in to protect sexual and gender minorities against violence and human rights violations.

Based on Sexual Orientation and Gender Identity' (UN General Assembly 2018) A/73/152 para 21.

91 Conference of International Legal Scholars (n 42); International Commission of Jurists (ICJ) *The Yogyakarta Principles Plus 10 – Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (2017).

92 F Viljoen & R Murray 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86.

93 As above.

94 Art 1(k) African Women's Protocol.

95 Magashula (n 41) 163.

In 2014 it adopted Resolution 275.⁹⁶ The Resolution, which explicitly draws on article 2, the non-discrimination clause of the African Charter, calls upon African states to ensure that sexual and gender minorities are protected from violence and that victims of violence have access to adequate remedies. The Commission has since been building on Resolution 275 to enhance the protection of sexual and gender minorities. At its sixtieth ordinary session the Commission underscored the importance of protections against human rights violations connected to sexual orientation, gender identity and sex characteristics, protections for human rights defenders and training for law enforcement officers.⁹⁷ In 2018, as a follow-up to a dialogue held in 2015,⁹⁸ the Commission was part of a meeting with the Inter-American Commission on Human Rights and the UN human rights mechanisms to discuss human rights protections for sexual and gender minorities.⁹⁹ The African Commission's initiatives augur well for the development of a conducive environment for protecting the human rights of trans communities in the African region.

In one important respect, however, the Zimbabwean Constitution implicitly detracts from affirming the rights of transgender persons. It proscribes same-sex marriage in section 78(3). This provision was adopted at the insistence of the ruling ZANU Patriotic Front. Its history lies in assuaging homophobic discourses that were promoted during the presidency of Robert Mugabe.¹⁰⁰ While the proscription of same-sex marriage should not be conflated with proscribing transgender identity, the intersections between same-sex sex and transgender identity may be tantamount to proscribing both. We argue that section 78(3) should be interpreted restrictively so that it only limits the rights of transgender persons as they apply to the institution of marriage between persons identifying as having the same sex. Thus, it should not apply, for example, to transgender persons whose partners do not identify as the same sex or who do not desire marriage. In any event, the provision should be interpreted in ways that separate 'sex' from gender.

96 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).

97 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 30 June 2022).

98 Centre for Human Rights 'Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations' (2016).

99 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).

100 Muparamoto (n 80).

5.4.2 *Affirming equality and non-discrimination*

While the Court in the *Nathanson* case did not consider the relevance of the equality and non-discrimination clause of the Zimbabwean Constitution, the treatment to which Ricky was subjected, including gender-verification tests, suggests that she was denied equality and suffered unfair discrimination because of her gender identity. We argue that the Constitution of Zimbabwe of 2013 is a transformative document. Unlike its predecessor, the Constitution of 1980, which was more or less imposed on Zimbabwe by the United Kingdom, the departing colonising power, the Constitution of 2013 represents a ‘people-driven’ autochthonous supreme law.¹⁰¹ It signals a desire to make a fresh start through, among others, constitutional reforms aimed at fostering broad-based national ownership of a constitution, revitalising membership of the national constitutional community, domesticating international human rights norms, and recognising equal citizenship. The 2013 Constitution resembles that of Kenya and South Africa¹⁰² in having the architectural hallmarks of a constitution committed to the achievement of substantive equality, including the recognition of transgender identity given executive, legislative and judicial commitment.

The foundational values of the Constitution of Zimbabwe include equality, gender, fundamental human rights and freedoms, and human dignity.¹⁰³ Unfair discrimination is incompatible with the equality and non-discrimination protections in the Bill of Rights. Section 56(1) states that ‘all persons are equal before the law and have the right to equal protection and benefit of the law’. When read together with the foundational values of the Constitution and the interpretative guidance, we can infer that transgender persons have a right to substantive equality under the 2013 Constitution.

5.4.3 *Affirming human dignity*

The idea of a fundamental right to human dignity speaks to the imperative of recognising that every person has a right to unqualified inherent self-worth by virtue of being a human being and that that they should be treated with respect as well as concern by others.¹⁰⁴ Human dignity is a foundational value under the Constitution of

101 GA Dzinesa *Zimbabwe’s constitutional reform process: Challenges and prospects* (2012) 2-6.

102 Constitution of Kenya of 2010 and Constitution of the Republic of South Africa, 1996, respectively.

103 Sec 3 Constitution of Zimbabwe.

104 Art 1 Universal Declaration on Human Rights (1948).

Zimbabwe.¹⁰⁵ It is also a canon of constitutional interpretation.¹⁰⁶ Above all, it is a fundamental right in more than one provision. In the *Nathanson* case the Court specifically applied it drawing on section 50 that guarantees a person who is arrested and detained to be informed of the reasons for the arrest and to be treated humanely and have their dignity respected. Section 51 guarantees every person a right to dignity in their private and public life and section 53 guarantees freedom from inhuman and degrading treatment. In finding violation of human dignity, Bere J stated:¹⁰⁷

I imagine how uneasy one feels if they have to go to a medical doctor of their choice (someone who is specifically trained on issues of confidentiality), and expose their genitalia, if a medical need arose. Imagine five male strangers demanding and ordering one to display their genitalia for them to examine it. It is better left to imagination how the plaintiff must have felt after this invasive conduct by these five police officers. It must naturally have gotten worse for the plaintiff when the officers started fidgeting and making fun of her after this inconclusive examination.

The conduct that Bere J is describing is concomitantly evidence of egregious violations of the right to privacy. Apart from being an integral part of the right to dignity, the right to privacy is also guaranteed by section 57 of the Constitution. Not everyone under arrest is required to verify their gender, and it remains unclear, even from the medical examination, exactly how a person's gender is effectively verified. This is reminiscent of the practice of forced anal examinations that are used to provide evidence when consenting males are prosecuted under sodomy laws.¹⁰⁸ This practice has no sound medical basis and is a serious violation of medical ethics as well as human rights.¹⁰⁹

The *Nathanson* decision demonstrates not only an affirmation of respect for the human dignity of transgender persons, but also a remarkable allyship in its deliberate use of feminine pronouns to refer to Ricky. This not only served to validate her gender identity but revealed a growing judicial openness to diversity. In *September v Subramoney*¹¹⁰ the Equality Court of South Africa put a spotlight on the intersection between the recognition of transgender identity and human dignity. The Court explained that at the core of human

105 Sec 3(1)(e) Constitution of Zimbabwe.

106 Secs 46(1)(b), 56(5) & 86 Constitution of Zimbabwe.

107 *Nathanson* para 92.

108 C Cichowitz and others 'Forced anal examinations to ascertain sexual orientation and sexual behaviour: An abusive and medically unsound practice' (2018) 15 *PLoS Medicine* e1002536.

109 As above.

110 *September v Subramoney* (n 84).

dignity is the imperative of unqualified recognition of the self-worth of a person so that they are treated with respect as well as concern by others. The fundamental right to dignity is impaired where the state castigates an attribute or conduct that is an integral part of being human.¹¹¹ The *September* case concerns a transgender woman who was serving a prison sentence. She had not undergone the medical or surgical procedures prescribed under the Alterations of Sex Description and Sex Status Act¹¹² as legal requirements for changing previously-registered gender.¹¹³ She contended that expressing herself as a woman was the only way in which she could assert her gender identity but that prison authorities denied her this right.¹¹⁴ Prison authorities did not permit her to keep long hair and style it in a feminine way, wear make-up or women's underwear. She was not addressed as a female person as the authorities insisted on using a male pronoun because she had not formally changed her gender marker under Alterations of Sex Description and Sex Status Act. She had also been punished for expressing herself as a woman.¹¹⁵ She argued that her treatment constituted unfair discrimination under the Promotion of Equality and Prevention of Unfair Discrimination Act.¹¹⁶ Fortuin J held that the failure to accommodate transgender inmates by allowing them to express their gender identity was discriminatory and extremely burdensome on transgender persons.¹¹⁷ The judge affirmed that gender identity was at the core of human dignity and that it was entitled to recognition.¹¹⁸ Significantly, the Equality Court highlighted the unqualified nature of human dignity. It did not treat the formal requirements for changing a gender marker on identity documents under the Alterations of Sex Description and Sex Status Act as a precondition for respecting the human dignity of transgender persons and recognising their gender identity.

5.4.4 Access to bathrooms

The *Nathanson* case also concerns a hidden site of contestation – bathroom access for transgender people. Although easily dismissible as a minor inconvenience and even a frivolous issue for those privileged enough to have an identity that is rewarded with social approval and institutional support, bathroom access is a critical issue for the transgender community. Any discussion on the recognition,

111 *September v Subramoney* (n 84) para 117.

112 Act 49 of 2002.

113 *September v Subramoney* (n 84) para 15.

114 *September v Subramoney* (n 84) para 31.

115 As above.

116 Act 4 of 2000 (PEPUDA or Equality Act).

117 *September v Subramoney* (n 84) para 156.

118 *September v Subramoney* (n 84) para 121.

equality and dignity of transgender people is incomplete without considering the issue of their access to public toilets. Safe access to public toilets is necessary for participation in social and economic life such as in the workplace, educational sector, recreational facilities and in public spaces generally.¹¹⁹ For transgender people, it can be a cause for harassment, exclusion, trauma and even violence, as evidenced by Ricky's experience. Public toilet access, in particular, and spatial segregation on the basis of gender, more broadly, are only some of the ways in which heteropatriarchy is enforced. Gender-segregated toilets solidify and make visible the binary conception of gender.

Unfortunately, this conception of gender is not an issue the merit of which Bere J delved into adequately, missing an opportunity to examine the micro-aggressions that communicate hostility towards transgender people in everyday life. It is true that the Court was quick to cast doubt on any belief that the police genuinely thought Ricky had committed a criminal offence by entering the women's toilet when she was biologically a man.¹²⁰ However, the Court did not properly ventilate this issue, only mentioning it in passing. Before proceeding to give its orders, the Court stated that 'to avoid the recurrence of what happened to the plaintiff ... it might be prudent to construct unisex toilets as an addition to the resting rooms in public spaces'.¹²¹ We argue that this proposal clearly is not the solution. The Court failed to realise how the construction of a different set of toilets is stigmatising. It would only serve to further segregate and 'other' transgender people instead of granting them equal access.

Although well intentioned, the proposal for a unisex toilet itself belies the understanding of equality as including transgender persons. A unisex toilet, additional to other 'normal' gender-assigned toilets, would offer a sharp example of what the 'other' is. Requiring transgender people to use unisex or gender-neutral toilets singles them out as extra-societal, communicating clearly that they do not fit in. The Court wasted an opportunity to provide a clearer statement of law to ensure that the right of transgender people to access public toilets free from hostility is protected. This was an opportune moment to develop the concept of inclusive equality and the accommodation of difference through a transformative process of institutional change that addresses the hidden interstices of dominant norms. There are ways of preserving privacy while permitting equitable access. There

119 BP Bagagli and others 'Trans women and public restrooms: The legal discourse and its violence' (2021) 6 *Frontiers in Sociology* 1.

120 *Nathanson* para 79.

121 *Nathanson* para 132.

is nothing to suggest that the presence of trans people in bathrooms that correlate with their gender identity heightens the risk of any invasion of privacy.

6 Conclusion

In the *Nathanson* case the High Court of Zimbabwe affirmed gender identity as a constitutionally-protected right. It pronounced unequivocally that ‘transgender citizens’ enjoy equal rights under the country’s Constitution.¹²² While the fundamental rights of transgender persons were not directly in issue in the *Nathanson* case, the Court took it upon itself to uncover that transphobia was at the root of the unlawful arrest and detention of Ricky. Although the Court did not explore the rights of transgender persons comprehensively, it affirmed that transgender persons enjoy equal rights under the Constitution. By deriving a persuasive precedent from the Supreme of Court of India and its robust recognition of the human dignity and equality of transgender persons,¹²³ the Court implicitly signalled its willingness to align with progressive jurisprudence. The *Nathanson* case provides civil society with a springboard from which to advocate a legal reform to accommodate the recognition of transgender identities in all social and economic life, including access to administrative procedures for changing gender markers on identity documents and gender-affirming care.

¹²² *Nathanson* para 131.

¹²³ *Navtej Singh Johar* (n 30).