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A critical analysis of the legislative and policy response to protect transgender children in South African schools.

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This mini dissertation is submitted in partial fulfilment of the requirements for the degree of Master of Laws in Constitutional Litigation and Theory.

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I, Tremelle Govender, declare that:

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List of Abbreviations

CRPD	Convention on the Rights of Persons with Disabilities
LGBT	Lesbian, Gay, Bisexual, Transgender
LGBT+	Lesbian, Gay, Bisexual, Transgender with acknowledgment of those who do not identify in these categories but do not fit the heterosexual, binary norm.
LGBTQI+	Lesbian, Gay, Bisexual, Transgender, queer, intersex with acknowledgment of those who do not identify in these categories but do not fit the heterosexual, binary norm.
NISHTHA	National Initiative for School Heads' and Teachers' Holistic Advancement
LGBTQQIP2SAA	Lesbian, Gay, Bisexual, Transgender, Queer, Questioning, Intersex, Pansexual, Two-Spirit (a term used by some Indigenous cultures to describe a person embodying both masculine and feminine qualities), Asexual, Ally.
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SADTU	The South African Democratic Teachers Union
SAHRC	South African Human Rights Commission
UK	United Kingdom
UNCRC	United Nations Convention on the Rights of the Child -
US	United States
WHO	The World Health Organisation

Abstract

The transgender community's visibility has seen a global increase in the last few years. South Africa's Constitution is praised for its progressive nature with the theme of inclusivity and equality echoed through its clauses. As institutions embodying the values of the Constitution, South African schools become pivotal spaces for fostering inclusivity and safeguarding the rights of transgender students. The study delves into the existing legal and policy landscape, evaluating its efficacy in addressing the unique slate of challenges faced by transgender children in schools.

The study's findings reveal strengths and shortcomings in the current legal and policy framework, providing insight into gaps hindering adequate protection. The analysis of South Africa's legislative framework emphasises a need for a nuanced and comprehensive approach to address the diverse needs of transgender children with consideration for aspects of identity, mental health and social integration. This critical analysis contributes to the broader conversation on inclusivity and equality and highlights the necessity of proactive action to nurture a supportive educational environment for all students.

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CHAPTER 1

BACKGROUND TO THE STUDY

I INTRODUCTION

A transgender person is an individual whose gender identity does not correlate with the biological sex they were assigned at birth. This can be expressed as a feeling of gender incongruence. The difference between 'gender' and 'sex' is essential to understanding the experience of a transgender person since the two terms are often used interchangeably and the concepts are conflated. Further, the belief that 'gender' and 'sex' are one and the same confuses and undermines the state of gender incongruence that transgender individuals experience through the process of affirming their own gender identity.¹

As the *boni mores* of society change and evolve, the visibility of transgender persons at all levels including, school environments, through protective policies such as the "Draft Guidelines on gender identity and sexual orientation in public schools of the Western Cape Education Department"², and sports is gradually improving. The cases of *Nare Mphela*³ and *September v Subramoney*⁴ exemplify how domestic law has been interpreted and applied to effectively uphold and protect the rights of all citizens, including transgender persons.

However, the parameters by which society should protect and affirm gender identity is a topic that is highly polarising and fiercely debated in global north countries such as the United States of America (US) and Canada. The US made headlines for its approach to elite-level sport and the integration of transgender persons to compete in the category of their presenting gender, a decision that has been met with

¹ E L Green et al... "Transgender' Could Be Defined Out of Existence Under Trump Administration' *New York Times Online* 21 October 2018, available at <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> , accessed on 5 September 2022.

² Western Cape Provincial Government *Draft Guidelines on gender identity and sexual orientation in public schools of the Western Cape Education Department* (2020).

³ *Mphela v Manamela and others* (2016) case no1/2016 Seshego Magistrates Court.

⁴ *September v Subramoney NO and Other* [2019] 4 All SA 927 (WCC).

disapproval due to the inherent biological differences between men and women.⁵ This conflates the difference between gender identity and sex. As will be explored in this study, this can be a challenge to navigate from a legal perspective since balancing the protection of the rights of individuals with the rights of the collective is complex.

The issue presented in sports translates to all facets of society. From a South African perspective, this study focuses on transgender children in schools to demonstrate the importance of explicitly separating gender identity from sex in legislation. This will empower the rights to equality, freedom of expression and security of the persons as well as the right to basic education.

The rights entrenched within the Bill of Rights are all intrinsically connected, this study intends to focus on a few of these rights within the scope of gender identity and the rights of the child; the right to dignity,⁶ and the right to be protected against unfair discrimination based on sex and transgender identity.⁷ The existing legislation and policy landscape in South Africa is relatively empowering to transgender children if it is applied and interpreted correctly without bias. However, these rights are difficult to protect and enforcing protective legislation can pose a formidable challenge due to interpretation by the courts as will be demonstrated in the response to transgender children in schools.

Legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act⁸ (hereafter referred to as 'PEPUDA'), the South African Schools Act 84 of 1996 as well as the National Education Policy Act 27 of 1996 will be applied to inform the view that transgender children are entitled to protection from discrimination within the school environment and demonstrate that there is legislation in place exhibiting an intolerance for any unfair discrimination and promoting accessibility to educational opportunities. The *Mphela* case⁹ was the first case addressing the discrimination faced by transgender children and is a good example of the implicit infringement on her right to education, through the discrimination she suffered

⁵ I Dodds 'Critics accuse trans swimming star Lia Thomas of having an unfair advantage. The data tells a different story' *The Independent* 31 May 2022 at 16:27, available at <https://www.independent.co.uk/news/world/americas/lia-thomas-trans-swimmer-ron-desantis-b2091218.html>, accessed on 5 August 2023.

⁶ Constitution of the Republic of South Africa, 1996. Section 10.

⁷ Constitution of the Republic of South Africa, 1996. Sections 9(3) and 9(4).

⁸ Promotion of Equality and Prevention of Unfair Discrimination Act No. 4, 2000.

⁹ *Mphela* (note 3 above)

because of her gender identity. Nare was a transgender woman who was harassed by her school principal and fellow learners, the effects of which led her to leave school. She was therefore unable to complete her education at the time.¹⁰ The school environment perpetuates experiences of resentment and prejudice towards transgender students leading to substantial dropout rates and minimal advancement to higher education, as a result the community is documented as experiencing economic hardship.¹¹

This study also intends to examine the foreign law perspectives of Canada and India and makes brief reference to the United States of America (US) and the United Kingdom (UK). These are countries in which transgender policies, particularly within the school environment are fairly developed and well established. These foreign perspectives serve as comparators for South Africa's legislative framework and provide examples of steps that can be taken to improve legal protection. The response to transgender students' security of placement in single-sex schools will be considered briefly since South Africa's policies, particularly in the "Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners"¹² appear to address general protections of students in co-ed schools. It does not make explicit reference to single-sex schools. When considering the approach of single-sex schools to children who are transitioning into the opposite sex, the approach taken at schools in different countries will reveal conflicting views about whether the school is required to accommodate the student and whether this is fair discrimination in the given circumstance.¹³

II RATIONALE OF STUDY

The topic of study is important because it provides perspective on how supporting a child's gender identity overlaps with fundamental rights to equality and human dignity. This issue is also important to consider through the lens of the South African education

¹⁰ L Ubisi 'Queering South Africa's Protective School Policy for LGBT+ Youth: The Nare Mphale Case' 2022 *Journal of Educational Studies Special Issue 2021* 106 and 107.

¹¹ Divan V... et al 'Transgender social inclusion and equality: a pivotal path to development' (2016) 19(3) *J Int AIDS Soc* available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4949312/>, accessed on 7 January 2024.

¹² GN 776 of GG 18900, 15/05/1998.

¹³ M Bryan 'A School's Legal Obligations With Respect to Transgender Students' *School Governance* 21 September 2022, available at <https://www.schoolgovernance.net.au/news/a-schools-legal-obligations-with-respect-to-transgender-students>, accessed 10 October 2022.

system and a children's rights perspective because the school system itself, as an organ of state and an extension of the community, does not always support the best interests of the child.

Therefore, this study's contribution is to provide a children's rights perspective on the realisation and protection of the rights of transgender persons within the school environment. This study intends to enrich the reader's knowledge of gender identity demonstrating legal protection as an essential part of one's identity. Affirming gender identity expands beyond the conversation about appropriate pronouns and the use of public bathrooms. The type of discrimination that transgender children face in schools amounts to bullying and harassment and therefore infringes on many of their basic human rights. Through this lens, the intention of this study further encourages the evaluation of the role of the state with the social responsibility of its people and how both groups have a shared responsibility to address discrimination faced by transgender people.

III BACKGROUND

Scholars acknowledge the capacity of the Bill of Rights as a protective mechanism and useful tool in the protection of the rights of marginalised groups, however, while it is intended for the protection of all citizens, transgender people are still not explicitly protected. This is demonstrated by De Vos and Luhur.

De Vos¹⁴ expresses concern over how South African law is reflective of a society that does not expressly protect the marginalisation and discrimination against transgender persons. The author poses a few notable issues regarding the protection of the rights of transgender persons and the current South African human rights protection instruments; specifically, the Constitution and PEPUDA. The prohibition of unfair discrimination against transgender persons has not been explicitly prohibited. There are limited cases that have been heard by the South African courts regarding the rights and protection of transgender persons. The precedent that the courts could set in handing down a progressive judgment will challenge the discrimination that

¹⁴ P De Vos 'Time for our courts to strengthen the rights of transgender South Africans' 6 November 2018, available at *Time for our courts to strengthen the rights of transgender South Africans » Constitutionally Speaking*, available at, <https://constitutionallyspeaking.co.za/time-for-our-courts-to-strengthen-the-rights-of-transgender-south-africans>, accessed on 25 August 2022.

transgender persons face in South Africa. However, this will not immediately end the prejudiced societal views against transgender persons. At the time of these assertions, *September v Subramoney*¹⁵ was yet to be heard by the Constitutional Court.

Ubisi¹⁶ offers a glimpse into the discrimination suffered by transgender students from the perspective of the *Mphela case*. She remains one of the first female transgender youth to be compensated for the abuse she suffered at the hands of her school principal who encouraged other learners at her school to bully her and grab at her genitals. Ubisi draws attention to the significance of The South African Schools Act 84 of 1996 and its potential to offer legal protection to transgender students and access to equal learning opportunities. He notes that the literature addressing transgender students and education is limited compared to the growing body of knowledge around medical transitioning or the psychology of gender identity. This means there is a gap in the knowledge concerning the right to education and gender identity. Nduna¹⁷ reiterates this by discussing the limited literature based on gender identity issues in the African continent, such limitation has led to conflation between gender identity and sexuality, spreading unnecessarily hateful propaganda.

On an international sphere, there is a growing body of knowledge specific to issues regarding transgender rights, however, research that focuses on the inequalities and discrimination faced by transgender children in the school environment is still limited. In New Zealand, much like South Africa, sex and sexual orientation are both protected grounds outlined in the Human Rights Act of 1993. It is noted that single sex schools can refuse to enrol students based on their sex, however they cannot expel a student who starts the process of transitioning while at that school.¹⁸

In Australia, schools are bound by anti-discrimination laws where it is generally unlawful to discriminate against someone based on their sex, sexuality, gender identity or intersex status. Single-sex schools are an exception to this, where for instance an all-girls school may refuse to enrol a boy even if the child identifies as female.

¹⁵ *September* (note 4 above)

¹⁶ Ubisi (note 10 above) 107 and 108.

¹⁷ M Nduna 'Transgender, HIV risk and prevention in South Africa: thematic focus: transgender studies' (2012) *New voices in psychology* 8(2), 103-109.

¹⁸ 'Rainbow Rights in Aotearoa' available at <https://rainbowrights.nz/school>, accessed 5 September 2022.

However, the New South Wales Department of Education's Bulletin 55 suggests that 'If the student is seeking enrolment at a single-sex school, a decision about their eligibility to enrol should be made on the basis of their identified gender.'¹⁹

The literature fails to mention the consequences for students in single-sex schools who do not identify with the sex assigned to them at birth, in South Africa. The government's focus, while well-intentioned, provides guidelines for co-ed schools. A few questions arise: what happens to students who choose to transition while enrolled at a single-sex school? Will they no longer be permitted to attend that particular single-sex school and will they be restricted in terms of the transition process should they choose to begin the transition process? Schools in South Africa are provided a loose set of guidelines and standards by which to follow which leaves room for infringements of the rights of the learners since the Department of Basic Education's guidelines for a Code of Conduct for learners requires input from the learners, parents, and educators, yet there are no further provisions in place to ensure the fairness and surety of their inclusion.²⁰

Ultimately, transgender children and adults face discrimination in many spheres, including the workplace.²¹ Legislation empowers all persons with the right of access in all areas of life; access to healthcare, education, and public amenities, to name a few. Steyn illustrates a disproportionate division of ablution facilities available to men and women in the workplace; there is less accessibility for women and this represents the extent of discrimination in the broader sense. This is a psychological schematic problem because the spaces women occupy infiltrate how they should see themselves in the workplace and represent how policymakers view them.²² Similarly, the limited research conducted on the rights of transgender children is discriminatory and suggests indifference on the part of legislators. Transgender children are entitled to

¹⁹ M Bryan 'A School's Legal Obligations With Respect to Transgender Students' 21 September 2022, available at <https://www.schoolgovernance.net.au/news/a-schools-legal-obligations-with-respect-to-transgender-students>, accessed 10 October 2022.

²⁰ F Veriava et al... 'Basic Education Rights Handbook – Education Rights in South Africa' 2017 SECTION27 at 179 available at <https://section27.org.za/resources/section-27-publications/basic-education-handbook/> accessed on 18 June 2023.

²¹ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* (2010) 31 ILJ 2383 (LC) at para 1 : the applicant (a transgender woman) brought an action against the employer seeking reinstatement for damages due to unfair dismissal.

²² R Steyn 'Expanding the suite of measures of gender-based discrimination: gender differences in ablution facilities in South Africa' (2012) 15(2) *SAJEMS* NS 223.

equal access yet are limited from enjoyment of rights due to a lack of research on mechanisms offering specific protection of the right to education.

Further, the 'Southern African HIV Clinicians Society gender-affirming healthcare guideline for South Africa' references the Children's Act in their guidance offered to practitioners but does not refer to the best interests of the child.²³ While there is an abundance of literature on the right to health challenges that transgender persons face and some NGOs and professionals offering targeted services to this population²⁴, there is a gap in relation to the education rights of transgender children.

IV RESEARCH QUESTION

The research unpacked in this study is whether or not and how the South African legislative and policy framework in schools, adequately protects transgender children from discrimination and violations of their right to education.

In order to answer this question a few of the rights associated with the right to education should be examined to reflect the interrelation and interdependence of the nature of the right to education as a fundamental and basic human right. These include the right to dignity, the right to be protected from unfair discrimination based on gender as well as the right to freedom and security of person, including psychological integrity. These rights must be established in terms of international and regional law as well as the legislative framework and relevant constitutional provisions in South Africa. If it is found that the right to education for transgender children in schools is not recognised, guidelines that may be implemented to make this a reality will be assessed and recommended.

The sub-research questions are:

²³'Southern African HIV Clinicians Society gender-affirming healthcare guideline for South Africa' *Southern African Journal of HIV Medicine* available at, <https://sahivsoc.org/Files/SAHCS%20GAHC%20guidelines.pdf>, accessed on 7 February 2024.

²⁴ Nalane Associates for Reproductive Justice' available at, <https://drtpmofokeng.wixsite.com/nalane/contact>, accessed 7 February 2024.

- i. How has the South African courts in its jurisprudence approached children's rights to equality, dignity and education and how may this be interpreted in the context of gender identity?
- ii. What lessons can be drawn for South Africa from foreign jurisdictions, including legislative and policy developments, aimed at realising the rights to equality, dignity and education of transgender children?

V THEORETICAL FRAMEWORK

The theoretical framework for this study will be through the lens of the Interest Theory approach. This theory is based on the child's need for care and protection. If there is a recognition of this need, there will be a collection of moral rights that will be transmuted into legal rights²⁵. In a broader sense, Interest Theory demonstrates that the purpose of a right is to advance the interests of the individual who holds that right, rather than limiting the role of rights to safeguard an individual's choices or free will, interest theory aims to encompass a broader range of areas. Further, the 'best interests of the child' is classified as a moral theory that restricts the scope of adult authority over children²⁶ and is therefore criticised for its implication that a person is unable to possess rights that predominantly protect the interests of others, as in the example of a parent-child relationship. To demonstrate this, Nieswandt uses the example of governmental child support – this is a right of the parent but is intended to protect the interests of the child.²⁷ However, this critique supports the compatibility of interest theory as a framework for this study, as it intends to argue for the interests of the child to first and foremost be recognised and upheld.

This differs from the 'will theory' which states that to acquire a right a person, a person must be able to waive a duty or enforce a duty on behalf of another person.²⁸

²⁵ T Boezaart, ed. *Child Law in South Africa* (2009) 248.

²⁶ P Kalra, M Mahapatra 'Critical Analysis of the Best Interest of Child Theory' (2021) *International Journal of Law & Management & Humanities* 4(4), 383.

²⁷ K Nieswandt 'Authority and Interest in the Theory of Right' in D Plunkett et al... 'Legal Norms, Moral Norms: New Essay on Metaethics and Jurisprudence' *Oxford University Press* 2019 3.

²⁸ Nieswandt (note 23 above; 2).

According to Boezaart, a child must be capable of claiming rights in terms of this theory²⁹. Interest theory demonstrates that a child should not be denied a legal right because they are not viewed as being mature in their capability to make their own informed decisions. However, one of the flaws of this theory is that not all interests of children are transformed into moral rights and thereafter legal rights³⁰.

Eeklaar divided the interests of children into three separate groups which are divided into basic, developmental and autonomy interests. These interests can conflict. When there is conflict between developmental and autonomy interests, developmental interests should take preference.³¹ 'Interest theory' is the most appropriate theory to frame this study because it demonstrates children as rights bearers and legitimises the policy and legislation used to exemplify the protection of the rights of transgender children.

VI RESEARCH METHODOLOGY

This is a desk-top study that intends to analyse primary and secondary resources. It involves an analysis of existing law and literature on the right to education of the child within regional and international frameworks to uncover the limitations upon the application of these policies and frameworks in the experiences of the transgender child. This study will rely on qualitative data which includes the examination of the relevant legislation, statutes, and case law.

The materials considered primary resources national legislation with particular emphasis on the Bill of Rights as entrenched in the Constitution and law and psychology journal articles written by academics who have provided statistical data and analysed the repercussions of the social issues represented by this data. Further the examination of newspaper articles, and previous dissertations regarding gender identity and transgender persons as well as investigations already demonstrating the

²⁹ T Boezaart, ed. *Child Law in South Africa* (2009) 248.

³⁰ J Barnes *A right to legal gender recognition for transgender children in South Africa* (unpublished LLM thesis, Stellenbosh University, 2020) 40.

³¹ Boezaart (note 28 above; 255 -260).

discrimination faced by transgender children in schools will be used as secondary resources.

The databases relied on included; Google Scholar, Sabinet African Journals, Taylor & Francis, SAGE Journals, Lexis Nexis and Juta. These databases provide for a wide range of topics within the area of study. For example, Google Scholar, Taylor & Francis, SAGE Journals and Sabinet helps define the social and psychological aspects and legal issues to be addressed with in this study. Sabinet African Journals is particularly helpful in limiting the search to the African experience and will produce more articles from a South African perspective. Juta and Lexis Nexis are essential for identifying case law in relation to the topic and also provide links to articles and case notes written on the relevant case.

Search terms provided direction for the journal article search included transgender; transgender students; gender and sexual diversity; the right to education; socio-academic challenges; LGBT+ youth; discrimination in South Africa; LGBT+ and the equality clause; LGBT+ and PEPUDA.

The limitations of this study include the lack of empirical data since no interviews were conducted and all the research and observations that have been determined and expressed through the examination of research and results of academics who have examined a derivative of the topic in their own work.

VII CHAPTER OUTLINE

Chapter one introduces the topic, frames the statement problem, outlines the research objective, identifies research questions, research methodology, theoretical framework and chapter outline.

Chapter two comprises the South African domestic law chapter and provides an analysis of global and regional instruments and seeks to determine whether or not the right to education of transgender children is recognised. This chapter will examine the South African Constitution, PEPUDA, The Schools Act, The National Education Policy Act and briefly outline the contribution of the United Nations Convention on the Rights of the Child. Jurisprudence including the *Nare Mphela* and the *September v*

Subramoney case will provide a critical analysis of the Court's approach to protecting the rights to equality, dignity and the freedoms of the constitution and how this can be interpreted in the context of gender identity.

Chapter three is the foreign law chapter which briefly outlines how the US, Canada and India have legislative protections for the transgender community. The UK is briefly mentioned due to the country's approach to transgender children in single-sex schools. The chapter aims to demonstrate the approach taken to affirm and protect transgender rights in other jurisdictions whilst acting as a frame of reference for how South Africa can legally develop its own framework to offer greater legal protection.

Chapter four offers the study's conclusion and recommendations and summarises the findings in the previous chapters. Practical recommendations are offered for the response of governments and schools to uphold the right to education of transgender children.

CHAPTER 2

International and domestic law on gender identity and rights

I Introduction

This chapter aims to investigate whether the legislative and policy framework in South African schools adequately safeguards transgender children from discrimination and violations of their right to education. In order to address this question, various rights associated with the right education are examined, including the right to be protected from unfair discrimination based on gender, dignity and psychological integrity. In consideration of these constitutional rights, this chapter will analyse international and regional instruments and whether these frameworks adequately protect the right to education of transgender children.

This chapter will conceptualise the issue with reference to the case of *Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department of Education (2017)*³² by unpacking the specific infringements of her rights noted above. Further, the applicability and scope of PEPUDA will be discussed in terms of its protections of non-discrimination and gender identity. The Western Cape Department of Education Draft Guidelines on Gender Identity and Sexual Orientation in Public Schools³³ will be read with SADTU's Draft Gender Policy.³⁴ The relevant provisions of the National Education Policy Act³⁵, the South African Schools Act³⁶, The United Nations Convention on the Rights of the Child³⁷, as well as the Yogyakarta principles³⁸, will be outlined in terms of these documents' protection regarding education and gender identity. This will illustrate the current protection available for a child's right to education to affirm the responsibility

³² *Mphela* (note 3 above).

³³ GN 8223 of PN 26/2020 of 23/03/2020.

³⁴ 'SADTU Draft Gender Policy' *SADTU* Accessed at, <https://www.sadtu.org.za/documents/sadtu-gender-policy/>, accessed on 23 June 2023.

³⁵ National Education Policy Act 27 of 1996.

³⁶ South African Schools Act 84 of 1996.

³⁷ The United Nations Convention on the Rights of the Child 1989.

³⁸ International Commission of Jurists "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" (2007) accessed at, <https://yogyakartaprinciples.org/principles-en/yp10/>, accessed on 28 September 2022.

that schools should assume in protecting transgender children from discrimination and realise the right to education.

This chapter argues that the precedent that the courts set in handing down progressive judgments in both *September v Subramoney NO and Others (2019)*³⁹ (hereafter referred to as *September v Subramoney*), as well as the Mphela case, in protecting the rights of transgender persons, may challenge the discrimination that transgender persons face in South Africa. However, these victories will not immediately end the prejudiced societal views toward transgender persons.⁴⁰ Therefore, policies and South Africa's legal framework, as a whole, are simply one component to the greater issue at large meaning the protection of the rights of transgender children is as much a social issue as it is a legal one.

II Transgender children's rights as a social issue

When considering transgender children's rights from a social and legal perspective, it is essential to consider the right to legal gender recognition. Social inequalities, as defined by Albertyn, "result in patterns of inclusion and exclusion in which the identity, norms and behaviours of a particular group are stigmatised and/or marginalised, while another group is affirmed or privileged".⁴¹

Open Society Foundations, in a legal gender recognition issue brief, compiled some of the arguments against the right to legal recognition.⁴² The arguments put forth are based heavily on social biases, many of which appear to be founded by a lack of understanding. One of these arguments is that legal recognition of transgender children's identities means that their rights will take preference over cisgender children. This will manifest in sex-segregated activities where parents will not have the right to object to their own cis-gendered children being in the same change room or

³⁹ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC).

⁴⁰ P De Vos 'Time for our courts to strengthen the rights of transgender South Africans' 6 November 2018, available at, <https://constitutionallyspeaking.co.za/time-for-our-courts-to-strengthen-the-rights-of-transgender-south-africans/>, accessed on 25 August 2022.

⁴¹ Albertyn C 'Law, gender and inequality in South Africa' (2011) 39(2) *Oxford Development Studies* 139 at 140-141.

⁴² Open Society Foundations 'License to be yourself: Trans Children and Youth' *A Legal Gender Recognition Issue brief* available at, https://www.opensocietyfoundations.org/uploads/a958c063-2b80-4173-b5b4-3811eab51919/lgr_trans-children-youth-20151120.pdf, accessed on 9 September 2023.

sports team as a transgender child.⁴³ Ironically, the lived reality is that cis-gendered children's rights take preference over transgender children's rights – this affects inclusion on sports teams and preference in changing rooms leading transgender children to be acutely aware of their differences.⁴⁴

In consideration of Albertyn's description of social inequality, Luhur refers to a study conducted on transgender youth in schools, where it was determined that transgender students not only experience bullying at the hands of their peers but also their teachers and members of staff.⁴⁵ The forms of bullying can range from verbal to physical and was found to be more common in high schools than in primary schools.⁴⁶ The observation of this data is exemplified in the Nare Mphela case which will be discussed in the next section.

Additionally, there is a general lack of understanding regarding concepts such as 'gender' and 'gender identity' and more importantly the distinction between 'gender'⁴⁷ and 'sex'⁴⁸. The courts in *KOS and others*⁴⁹ stated:

"Many might think that that is to state the obvious, but the literature on transgenderism describes that there is an all-too-common tendency to conflate sex, gender, and sexuality, which is misconceived".⁵⁰

It is submitted that this lack of understanding is fuelled by a history of an absence of political will to unpack and validate these concepts. This is evident through the limited investigative reports conducted on the experiences of transgender persons, with accessible information and advocacy campaigns rooting from non-profit

⁴³ *Ibid* 17.

⁴⁴ *Ibid* 18.

⁴⁵ W Luhur et al... 'Public Opinion of Transgender Rights in South Africa' 2021, *UCLA School of Law*, 3.

⁴⁶ *Ibid* 3.

⁴⁷ Gender can be defined as 'the attitudes, feelings, and behaviours linked to the experience and expression of one's biological sex.' In essence these are the social norms, roles and behaviours ascribed to a particular sex. It is completely separate from an individual's biology.

S winter et al... 'Transgender people: health at the margins of society' (2016) 388 *The Lancet* 391.

⁴⁸ Sex' refers to 'a person's biological status including their chromosomal, hormonal, gonadal, and genital characterisation between male or female. Therefore, when identifying an individual's sex at birth, it is usually based on genital appearance, provided that this consistent with the other biological - status factors listed above.

S winter et al... 'Transgender people: health at the margins of society' (2016) 388 *The Lancet* 391.

⁴⁹ *KOS and Others v Minister of Home Affairs and Others* 2017 (6) SA 588 (WCC).

⁵⁰ *Ibid* para 16.

organisations in South Africa, such as Gender Dynamix.⁵¹ There has also been a lack of financial allocation to conduct research to help support and understand the plight of transgender persons which has had detrimental effects on how transgender persons are socialised.⁵² Jones reiterates the difficulty South Africa faces is its inconsistency in addressing LGBT education rights due to regional opposition and a lack of funding.⁵³ However, it is acknowledged that in 2017 the government submitted a report to the UN Committee on Economic Cultural and Social Rights, in which they expressed a commitment to equality and addressing challenges faced by the LGBT community, including harmful and degrading treatment towards transgender persons. This initiative is said to be led “at the highest level by an established task team.”⁵⁴

The issue of children’s rights becomes more complex through the lens of transgender children’s rights as a social issue, because decisions about quality of life and freedoms are fuelled largely by social biases and a perpetual cycle of misinformation and misunderstanding as well as fear from parents rather than children. The issue, therefore, extends beyond addressing children by the correct pronouns. The interest in promoting and advocating for fairness and equal treatment pertains to the protection of transgender children from incidences of bullying and harassment so that they may complete their education and grow into functional members of society.

III International law - The UNCRC and the Yogyakarta Principles

The primary international instruments relevant to this study that address safeguarding transgender children’s rights are the United Nations Convention on the Rights of the Child (UNCRC) and the Yogyakarta Principles, a soft law instrument. Legal systems frequently perpetuate the marginalisation of diverse groups due to a lack of explicit legal protection which exacerbates inequality and violence against transgender

⁵¹ ‘Gender Dynamix (GDx) is the first registered Africa-based public benefit organisation to focus solely on trans and gender diverse communities.

‘Gender Dynamix Online Educational Portal’ *Gender Dynamix*, available at <https://www.genderdynamix.org.za/>, accessed on 16 February 2023.

⁵² N Sanger ‘Young and Transgender’ 2014 *The University of the Western Cape*, 9.

⁵³ T Jones ‘South African contributions to LGBTI education issues’ (2019) 19(4) *Sex Education*, 469.

⁵⁴ R Sloth- Nielsen ‘September v Subramoney and its implications for transgender persons in South Africa’ (2021) 29(2) *African Journal of International and Comparative Law*, 333.

individuals. Every individual is inherently entitled to fundamental human rights that nations are required to uphold under international law, however, transgender persons are often denied protections under State obligations⁵⁵.

In 2011, the UN General Assembly curated a plan in response to the HIV epidemic. The World Health Organisation (WHO) substantiated this plan by formulating practical guidelines concerning the stigma and discrimination experienced by key populations, including transgender people. These recommendations advocate for the adoption of rights-based legislation and policies by nations emphasising the importance of monitoring and oversight to ensure consistent implementation and maintenance of standards. Furthermore, mechanisms should be established to enable anonymous reports of incidents of stigma and discrimination encountered by transgender individuals (when seeking healthcare services).⁵⁶ Although this response is streamlined to accessibility in healthcare, the aspect of protection from discrimination is a relevant example of procedures already established.

The Yogyakarta Principles were created with the intention of setting international human rights standards for sexual orientation and gender identity issues.⁵⁷ This means that the guidelines can act as a supporting mechanism to the UNCRC due to its specificity to gender identity and therefore fills in some of the gaps pertaining specifically to transgender children. This is not a critique of the UNCRC as its accommodation of gender identity is progressive and, as a whole, the document is instrumental in the current protections afforded to the rights of children.

The case of *September v Subramoney NO & others*⁵⁸ was the first case in South African law where the court cited the Yogyakarta principles. The court's rationale and findings will be unpacked later in this chapter. Although Yogyakarta is soft law and is not binding on South Africa, it can provide fundamental support in interpreting domestic law and, in this context, the Constitution.⁵⁹

⁵⁵ Divan V... et al 'Transgender social inclusion and equality: a pivotal path to development' (2016) 19(3) *J Int AIDS Soc* available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4949312/>, accessed on 7 January 2024.

⁵⁶ Divan (note 11 above).

⁵⁷ International Commission of Jurists "The Yogyakarta Principles Plus (note 38 above), preamble.

⁵⁸ *September* (note 4 above)

⁵⁹ *Ibid* para 126.

The applicant September expressed that in the future she wished to present fully as a woman through medical intervention, her circumstances at the time limited how she presented as a woman and was therefore pleading for the right to express herself through feminine clothing, hairstyles and makeup at the correctional facility to which she was sentenced.⁶⁰ While school environments are by no means being compared to prisons, this case does provide insight into how controlled environments such as schools or the workplace can limit the individual's right to equality and human dignity.

The case of *Atkins v Datacentrix (Pty) Ltd* expands on this. The applicant informed his employer that he intended to undergo gender-reassignment surgery after being offered a contract of employment. The employer claimed misrepresentation and terminated the contract⁶¹. The court notably referred to the equality clause of the Constitution citing the only defence against the termination would be to prove that it was fair⁶². The court did not determine fair discrimination and instead noted that had the intention to medically transition arisen during the interview process, the applicant would never have been hired.⁶³

Furthermore, the court in *September v Subramoney* referred to principles 6, 19 and 32 of the Yogyakarta principles. Principle 6 relates to the choice to disclose information regarding gender identity. The court highlighted that the state has a duty to repeal laws that prohibit any actions that do not allow one to express their gender identity.⁶⁴ Principles 19 and 32 place further emphasis on the right to freedom of expression and opinion regardless of gender identity and the right to bodily and mental integrity, respectively.⁶⁵

The Committee on the Rights of the Children under General Comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration interprets the link between the "best interests of the child principle"⁶⁶ with other rights mentioned in various articles of the Convention. In consideration of

⁶⁰ Ibid para 16.

⁶¹ *Atkins v Datacentrix (Pty) Ltd* 2010 4 BLLR 35 (LC) para 1.

⁶² Ibid para 11.

⁶³ Ibid para 16.

⁶⁴ *September* (note 4 above) para 98.

⁶⁵ Ibid para 99 &100.

⁶⁶ The United Nations Convention on the Rights of the Child 1989. Article 3(1) "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

their other rights, focusing on the best interests of the child is an important principle. This means that the child's specific situation must be analysed and the focus on the child's views and circumstances should be flexible⁶⁷.

Article 2 of the UNCRC states that there will be no discrimination towards a child based on various grounds including "or other status". Sandberg explains that 'other status' has been interpreted by the Committee to include sexual orientation and gender identity.⁶⁸ The Committee stated that the right to non-discrimination prohibits all forms of discrimination against the rights outlined in the Convention and requires the State to take suitable and proactive steps. These steps are essential in ensuring that all children have equal opportunities to fully experience the rights established in the Convention.⁶⁹ Barnes states that these steps extend to transgender children as discussed in General Comment 15⁷⁰. Further, The Yogyakarta Principles define discrimination in principle 2 as any exclusion, distinction, restriction or preference based on sexual orientation or gender identity which has the effect of impairing everyone's equal enjoyment of their rights and freedoms.

Article 6 refers to the right to life, survival and development. The Committee stated that States must create conditions that respect human dignity and guarantee the development of the child, with consideration of the child's best interests. The State must therefore have full respect for the right to life, survival and development.⁷¹

Article 12⁷² on the right to be heard must be read together with the best interests principle. Article 3(1) cannot be applied without the requirements of Article 12 having been met. Whilst Article 3 paragraph 1 focuses on the best interests of the child, article

⁶⁷ C Paechter 'The rights and interests of trans and intersex children: considerations, conflicts and implications in relation to the UNCRC' (2021) 30(7) *Journal of Gender Studies*, 845.

⁶⁸ K Sandberg 'The Rights of LGBTI Children under the Convention on the Rights of the Child' (2015) 33(4) *Nordic Journal of Human Rights*, 339.

⁶⁹ General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)

⁷⁰ J Barnes *A right to legal gender recognition for transgender children in South Africa* (unpublished LLM thesis, Stellenbosch University, 2020) 131.

⁷¹ *Ibid* 69.

⁷² The United Nations Convention on the Rights of the Child 1989. Article 12 "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

12 outlines the approach for hearing the views of the child, including the child's expression of their best interests.

Additionally, the UNCRC discusses the right to identity in Article 8. Sandberg's interpretation of the right to identity is that the identity of a person can be interpreted in a broader sense to include everything constituting a person's sense of self as well as distinguishing self from others. This means that gender identity would be classified as part of the definition of identity.⁷³ Bucataru reiterates this point by stating that the interpretation of 'and other status' in Article 2 of the UNCRC, through the application of the *ejusdem generis* doctrine, it can be assumed that gender identity is protected.⁷⁴ It is submitted that gender identity is similar to other grounds mentioned in Article 2, the acknowledgment of gender identity as a ground for protection against any form of discrimination is tantamount to the evolution of society and the intention of the UNCRC. It can be determined that when Article 28 of the UNCRC regarding a child's right to education, is read together with Article 2 that state parties have an obligation to ensure that access to education is possible for all children which includes transgender children.

Considering the international law that underscores the entitlements of transgender children, the protection of gender identity is assured at this level and activates obligations on the part of State parties such as South Africa in relation to the realisation of the right to education (and other attendant rights).

Next follows a discussion of the seminal equality case of *Mphela* which offers a perspective on the application in the sphere of anti-discrimination legislation, followed by an analysis of the *September* case.

IV Analysis of the Mphela case

⁷³ K Sandberg 'The Rights of LGBTI Children under the Convention on the Rights of the Child' (2015) 33(4) *Nordic Journal of Human Rights*, 343.

⁷⁴ A Bucataru 'Using the Convention on the Rights of the Child to Project the Rights of Transgender Children and Adolescents: the Context of Education and Transition' (2016) 3(1) *Queen Mary Human Rights Law Review*, 62, 67-69.

At this juncture, the study investigates the rights framework in the domestic sphere in South Africa and the courts' interpretation of the rights to equality, human dignity and psychological integrity.

The case of Nare Mphela was and is the first of its kind in South Africa pertaining specifically to the rights of transgender children. The matter was heard in the Equality Court. At this stage it is an unreported judgement, *Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department of Education* (2017). The first notable aspect of this case is that it was brought before the court in 2015 where Nare Mphela had lodged a complaint detailing the harassment and intimidation and violence she had experienced at her former high school.⁷⁵ The presiding officer did not believe that the protections afforded by PEPUDA were relevant in the circumstances.

The South African Human Rights Commission (SAHRC) lodged a complaint to the Equality Court. Nare testified, identifying the abuse suffered as a result of the actions of the principal (and first respondent) who would not allow Nare into the classroom, humiliated her in the classroom – the physical learning environment - and an incident of being beaten by a stick was mentioned.⁷⁶ As a result, she stated that she did not like this behaviour and, most compelling for the discussion to follow, she felt the school system had failed her due to separation from her personal needs which led to a learning environment that lacked the safety she is necessarily entitled to as a student and as a human being. These incidences of humiliation and degradation were witnessed by members of the school community (the specificity between peers or staff members were omitted), none of whom were called to testify on Nare's behalf. As a result of the abuse sustained Nare did not complete her education and at the time and was not able to obtain her matric certificate. The court held that the responsibility to create a safe, protective stress- stress-free learning environment is that of both the principal of the school as well as the Limpopo Provincial Department of Education and both parties failed in this regard. The court also expressed that the lack of intervention and guidance from the Limpopo Department of Education was 'shocking'⁷⁷. The

⁷⁵ *Mphela* (note 3 above).

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

SAHRC was successful in proving that the complaint was in line with section 10 of PEPUDA.⁷⁸

The Equality Court appeared to acknowledge the differentiation between Nare Mphela's 'born sex' and 'sexual identity', yet still referred to her using male pronouns throughout the judgment. The justification for this was that it is a court that deals with facts and therefore referred to 'the complainant in the male form'⁷⁹. She had expressed to the court that she identified as female from a young age and she had socialised herself as female by wearing girls' clothes and using female bathrooms. In this regard, the court failed in its responsibility to promote and respect the basic right to human dignity, equality and freedom and security of Mphela and these infringements are indicative of a court that also lacked an understanding of the distinction between gender and sex, since the focus was on sexual identity rather than gender and gender identity.⁸⁰ The question of identity and its derivatives is imperative to the discussion of the mechanisms in place that protect the rights of transgender children.

In section 1(b) of PEPUDA, 'discrimination is defined as "withhold[ing] benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;"

'Prohibited grounds' include additional grounds (other than those stated in section 9(3) and (4) of the Constitution) where discrimination on that ground undermines human dignity, causes systemic disadvantage or affects a person's equal enjoyment of their rights or freedoms.⁸¹ By applying this definition to the facts of the case,

⁷⁸ Section 10 states that:

"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

(a) be hurtful;
(b) be harmful or to incite harm;
(c) promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21 (2) (n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation".

⁷⁹ *Mphela* (note 3 above).

⁸⁰ *Mphela* (note 3 above).

⁸¹ The "prohibited grounds" are defined in section 1 as:

"(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; and HIV/AIDS status; or

paragraph (b) offers some legal protection and courts are required to assess discrimination based on subsections 13 (burden of proof) and 14 (determination of fairness or unfairness) however, this case demonstrates that there is room for misinterpretation of PEUPDA to exclude transgender persons.⁸²

The additional ground upon which she experienced discrimination was her gender identity. Discrimination on this unlisted ground firstly perpetuates systemic disadvantage, because the harassment she endured did not allow her to complete her education. The Constitutional Court in the case of *Governing Body of the Juma Masjid Primary School v Essay* substantiates on this point of systemic disadvantage by expanding on the significance of basic education for overall development in our democratic dispensation considering the legacy of apartheid:

“The inadequacy of schooling facilities, particularly for many blacks, was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified”.⁸³

At the time, the emphasis of the word ‘everyone’ in section 29(1)(a) was likely intended to merge the basic educational gaps created by Apartheid. The court further explained:

“Today, the lasting effects of the educational segregation of apartheid are discernible’ due to inadequate facilities and the discrepancy in the level of basic education for the majority of learners.”⁸⁴

Additionally, when considering Mphela’s right to human dignity, Sloth-Nielsen discusses the recognition of an individual’s gender identity as being central to the fundamental right to human dignity because gender forms the essence of a person’s self-perception and is a fundamental aspect of personal identity, framing the validation of gender identity as intricately connected to the right of dignity and freedom that is

(c) any other ground where discrimination based on that other ground-

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);”

⁸² C Albertyn... et al Submission to the Department of Justice and Constitutional Development on Amendments to The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000’ *Wits School of Law* 30 June 2021 at 14 available at, <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/sarchi-equality-chair/SARChISubmission.pdf>, accessed on 15 September 2023.

⁸³ *Governing Body of the Juma Masjid Primary School v Essay* 2011 (8) BCLR 761 (CC) para 42.

⁸⁴ *Ibid.*

safeguarded by the Constitution.⁸⁵ While the Equality Court was not able to distinguish the link between affirming one's gender identity and the right to human dignity, it cannot be disputed that based solely on her experience with the principal and fellow peers undermining her gender identity through physical and verbal harassment, Mphela's right to human dignity had been infringed in addition to her right to equality.⁸⁶

Section 8 of PEPUDA states that no person may be unfairly discriminated against based on the ground of gender, but this provision makes specific reference to protection from the limitation of rights of women who are a vulnerable group⁸⁷. This explicit reference is essential in the protection against unfair discrimination. In this same way, the explicit reference to gender identity forming part of the protection from unfair discrimination based on gender would be a more holistic interpretation and application of the provision. To further contextualise the necessity of an amendment, initially in the *Mphela* case, her complaint was not pursued because the presiding officer believed that it was outside of the scope of the protections of PEPUDA.⁸⁸ However, had Mphela been a cis-gendered woman, there would be no ambiguity regarding the relevance of section 8 to her case. Albertyn et al's submission on Amendments to PEPUDA consolidate this point and emphasises the need for clarity to mitigate the increased burden of proving an unlisted ground:

“The Constitution does not prohibit unfair discrimination on the ground of transgender identity but rather on the grounds of gender and sex and there is no precedent for including transgender identity in gender.”⁸⁹

Furthermore, the dehumanising act of discrimination based on gender identity has emotional and psychological ramifications to which the law has a role in policing these harms. The Court's decision to award damages for psychological harm is noteworthy considering the effect the abuse she experienced would have had on her mental health, this is evident in her choice to leave school. Adolescence and young

⁸⁵ Sloth- Nielsen (note 54 above, 331).

⁸⁶ Constitution of the Republic of South Africa 1996, s10 “Everyone has inherent dignity and the right to have their dignity respected and protected”.

⁸⁷ For example, section 8(g) of the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4, 2000: ‘Limiting women's access to social services or benefits, such as health, education and social security.’

⁸⁸ *Mphela* (note 3 above).

⁸⁹ Albertyn... et al (note 82 above) 13.

adulthood are defined by stages of intense identity development.⁹⁰ Differential health inequalities are observed among transgender individuals in comparison to cisgender individuals, encompassing elevated incidences of disabilities, multiple chronic conditions mental health disorders and substance abuse. There is also an increased risk of young people facing homelessness and material deprivation.⁹¹ A survey conducted in 2021 on LGBT+ youth mental health determined a “2-to-3 fold increase” in both depression and suicide in transgender youth and more than 75% of transgender youth and gender-diverse persons experienced symptoms indicative of generalised anxiety disorder.⁹²

A study conducted on “Mental Health and Psychosocial Risk and Protective Factors Among Black and Latinx Transgender Youth Compared With Peers”⁹³ anticipated discovering that feelings of being connected to school and having supportive relations with adults would act as a safeguard against mental health issues in these specific demographics. This pattern did not emerge in the present study. This indicates the importance of healthcare practitioners to screen for school-related bullying and collaborate with schools to address such forms of harassment.⁹⁴

Another study by Rodriguez et al, evaluating anxiety and depression in transgender youth determined that the anxiety and depression levels of transgender youth who had undergone a social transition were comparable to or slightly higher than siblings and cisgender peers. The authors emphasised that these findings do not diminish the struggles faced by transgender individuals dealing with mental health difficulties. The authors pointed out factors such as early social transition, racial demographics, higher socioeconomic status and strong identity support among participants might contribute to these results. However, further research is necessary to fully understand how these factors influence the outcomes.⁹⁵

⁹⁰ J Fenaughty...et ‘Sexual Orientation and Gender Identity Change Efforts for Young People in New Zealand: Demographics, Types of Suggesters, and Associations with Mental Health’ (2023) 52(1) *Journal of Youth and Adolescence*, 140 & 151.

⁹¹ *Ibid.*

⁹² T Rodriguez ‘Addressing the Mental health Needs of Transgender Youth’ *Haymarket Media Inc* 16 July 2021, available at, <https://www.psychiatryadvisor.com/home/topics/child-adolescent-psychiatry/methods-for-better-mental-health-support-of-transgender-youth/>, accessed on 10 July 2023.

⁹³ S Vance...et al ‘Mental Health and Psychosocial Risk and Protective Factors Among Black and Latinx Transgender Youth Compared With Peers’ (2021) 4(3) *Jama Network open*, 2.

⁹⁴ Rodriguez (note 92 above).

⁹⁵ *Ibid.*

Although the court did not unpack the right to psychological integrity in great detail, the literature indicates that gender-affirming environments have a positive impact on transgender youth's mental health and sense of self. The Court's acknowledgment of the responsibility of both the principal and the Limpopo Provincial Department of Education in creating a stress-free environment for students is commendable, as well as finding in favour of Mphela through the application of section 10 of PEPUDA. However, as laid out above, there was a myriad of alternative avenues the Court could have considered, to rule in favour of Mphela, including the application of Yogyakarta Principles such as the principle of education,⁹⁶ as well as the right to freedom of expression and opinion regardless of gender identity and the right to bodily and mental integrity⁹⁷ which was applied by the court in *September v Subramoney*. Furthermore, as a signatory to the UNCRC the court could have applied any one of the articles outlined above to more clearly demonstrate the infringements of basic rights that occurred, even if the court did not consider gender identity to be one of those rights.

V Analysis of the September case

Following the *Mphela case*, a similar action was brought forward in *September v Subramoney*. This case has been outlined briefly earlier in the chapter. Ms Jade September who, at the time the facts were presented, was anatomically male, was serving her sentence at a male correctional facility. Her application was in the interest of obtaining permission by the respondents to express her gender identity.

The court stated that there are a variety of reasonable steps available to the government that would allow them to accommodate Ms September's gender expression whilst not compromising her safety. The court used international examples such as adopting policies that allowed transgender persons to access clothing and products congruent with their identity or intervention of a gender identity panel consisting of doctors and therapists who can assist in considerations rather than

⁹⁶ International Commission of Jurists "The Yogyakarta Principles Plus 10" (note 38 above). Principle 16:

⁹⁷ Ibid principles 19 and 32.

leaving the decision exclusively to correctional officers.⁹⁸ It was found that while there are resource constraints, the respondents have the capacity to implement certain changes that will ensure the dignity and respect of transgender inmates, 'which is their constitutional right.'⁹⁹ In terms of this judgment, Sloth-Nielsen observes that the reasonable accommodation remedy outlined in the case would likely apply to other state-run facilities. She uses the example of a learner at a state-run school being allowed to express their gender identity at school by using a uniform that fully represents their gender identity¹⁰⁰.

Sloth-Nielsen makes the compelling argument that the Equality Court in *September v Subramoney* paves the way for claims of unfair discrimination based on gender identity that may arise in the future. She suggests that the judgment upgrades gender identity to an analogous ground in terms of the Constitution under the prohibition of unfair discrimination, by using dignity as the starting point and illustrating the treatment of Ms September to not only be an infringement of her dignity but an infringement of her right to equality.¹⁰¹ The court aptly concluded in its finding on 'transgender' as a listed ground that while the term is not a listed ground in the Constitution or PEPUDA, equality and its relation to dignity and freedom of expression was at the core of the issue brought before the court, therefore dignity includes the right to gender identity.¹⁰²

In the case of *MEC for Education: KZN v Pillay*¹⁰³, a student adorned a nose stud which was against the school's code of conduct but was an expression of a religious tradition¹⁰⁴. The student (Sunali Pillay) believed that the nose stud was an essential part of her culture and religious expression of female maturity.¹⁰⁵ However, it was found that wearing a nose stud is not a mandatory practice.¹⁰⁶ The court determined that this finding did not justify the discrimination that Sunali faced.¹⁰⁷

⁹⁸ *September* (note 4 above) para 129.

⁹⁹ *Ibid* para 133.

¹⁰⁰ Sloth-Nielsen (note 54 above, 335).

¹⁰¹ *Ibid* 336.

¹⁰² *September* (note 4 above) para 122.

¹⁰³ *MEC for Education: Kwazulu-Natal and Others v Pillay* (2007) 28 ILJ 133 (CC).

¹⁰⁴ *Ibid* para 5 & 60.

¹⁰⁵ *Ibid* para 7.

¹⁰⁶ *Ibid* para 60.

¹⁰⁷ *Ibid* para 172.

The Pillay case lays the groundwork for Sloth-Nielsen's point that the *September* judgment elevates gender identity to an analogous ground by demonstrating an infringement on the rights to dignity and equality. The Court in the Pillay case notably emphasises the interrelatedness of the underlying values of dignity, equality and freedom and how all rights should be interpreted to promote the interrelation between these rights.

Freedom is one of the underlying values of our Bill of Rights and courts must interpret all rights to promote the underlying values of 'human dignity, equality and freedom'. These values are not mutually exclusive but enhance and reinforce each other [...] A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues.'¹⁰⁸

It is submitted, with consideration to Sloth-Nielsen's observation, that the emphasis on constitutional rights and the discussion on reasonable accommodation in the context of transgender persons emphasises a responsibility on the part of the respondents (the detention facility) to recognise and to the best of their ability, facilitate an environment in which these rights can be fully realised and respected. Therefore, without disregarding the *September* judgment, even if there is no specific legislation referring to gender identity as a ground for non-discrimination, both *September v Subramoney* and the *Pillay case* aptly demonstrate that when interpreting all rights, the underlying values of dignity, equality and freedom must be recognised and there is "constitutional substantiation for the affirmation and celebration of identity, also and especially the identity of the Other".¹⁰⁹ The Bill of Rights as a whole applies to 'everyone' which is reiterated in countless provisions and perhaps should have been the initial consideration in the *Mphela case* – the duty of the school to uphold and respect the constitutionally protected rights to equality, dignity and freedom and security of the person. Reasonable accommodation is a concept that embraces diversity of humanity – whether gender identity or disability. Having sketched the difficulties faced by the Equality Courts, even in the two successful outcomes of *Mphela* and *September*, it is necessary to turn to an analysis of the relevant legislative provisions on education.

¹⁰⁸ *Pillay* (note 107 above), para 63- 64.

¹⁰⁹ L du Plessis 'Religious Freedom and Equality as Celebration of Difference: A Significant Development in recent South African Constitutional Case-Law' (2009) 12(4) *Potchefstroom Electronic Law Journal* available at <https://www.saflii.org/za/journals/PER/2009/17.html>, accessed on 16 July 2023.

VI Legislation pertaining specifically to schools that applies to the promotion of equality and dignity of transgender children.

Section 4 of the National Education Policy Act 27 of 1996 seeks to protect ‘every person’ from unfair discrimination and this provision places that responsibility on an education department. The National Education Policy Act, the complexities of which is discussed below, is also aimed at the advancement and protection of the Bill of Rights¹¹⁰.

The South African Schools Act 84 of 1996 states that public schools must “admit learners and serve their educational requirements without unfairly discriminating in any way”¹¹¹. Section 46 of the Act discusses registration of independent schools and section 46(3)(b) states, “the admission policy of the *school* does not discriminate on the grounds of race;” Ubisi makes the valid assertion that the Act fails to include other grounds such as discrimination based on gender or sexual orientation. He uses the example of single-sex, faith-based schools stating that the inconsistency allows such private schools to interpret the policy to perpetuate discrimination through their own view of what gender, sexuality and religious school cultures should be.¹¹²

Jurisprudence on the right to education characterises it as an essential socio-economic right that promotes the development of a “child’s personality, talents and mental and physical abilities to his or her fullest potential”, further, “basic education also provides a foundation for a child’s lifetime learning and work opportunities.”¹¹³ It is submitted that the nature of the right to education as described in case law, demonstrates that it is not only a basic human right but accessibility to education can also improve a person’s quality of life (the preamble’s intention to improve the quality of life for all citizens has already been discussed previously in this chapter) through the development of the child to reach their potential. In consideration of the Schools Act’s use of the word ‘serve’, it can be argued that it is the responsibility of the school to create an environment in which the child’s right to education is realised. However,

¹¹⁰ Section 3: ‘Determination of national education policy by Minister.—(1) The Minister shall determine national education policy in accordance with the provisions of the Constitution and this Act.’

¹¹¹ The South African Schools Act 84 of 1996 s5(1).

¹¹² Ubisi (note 10 above) 130.

¹¹³ *Juma Musjid* (note 83 above) para 43.

this cannot be done without protecting the rights to dignity, non-discrimination and freedom and security of the person. This is evident from the Nare Mphela case where the student was subjected to humiliation and harassment that forced her to leave school. It is therefore the school's responsibility to make reasonable accommodations for these students to ensure their accessibility to education as per section 29(1) of the Constitution.

In her discussion about the state's obligation to recognise a third gender, Sloth-Nielsen discusses the potential argument of the state; that accommodating a third gender may be too costly¹¹⁴. A similar argument may be proposed by schools that it would be too costly taking into account the time it would take to educate the school community on how to better support transgender children or considerations such as bathroom accommodations would be too hefty a financial burden. However, as Sloth-Nielsen suggests, there would have to be a justification for limiting the right to equality.¹¹⁵ The court stated in the Pillay case, specifically regarding cultural and religious accommodation:

As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution.¹¹⁶

Similarly, it is submitted that the accommodations that are made in schools to affirm transgender learners' gender identity will also lead to the society envisaged in the Constitution.

Reasonable accommodation is a factor that is applied when the court determines the fairness of discrimination.¹¹⁷ Holness and Rule¹¹⁸ reference the Convention on the Rights of Persons with Disabilities (CRPD), article 2 which defines reasonable accommodation as necessary measures and modifications that can be taken where needed but does not cause further limitation to ensure the equal enjoyment of all rights

¹¹⁴ R Sloth-Nielsen 'Failure to recognise a third gender option: unfair discrimination or justified limitation?' (2021) 25 *Law democr. Dev.* Available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072021000100004, accessed 8 June 2023.

¹¹⁵ *Ibid.*

¹¹⁶ *Pillay* (note 107 above) para 107.

¹¹⁷ *September* (note 4 above) para 128.

¹¹⁸ W Holness and S Rule 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 17(5) *Potchefstroom Electronic Law Journal (PELJ)* 1907-1963.

and freedoms of persons.¹¹⁹ Although this definition is specific to disabilities, however, for reasonable accommodation of transgender children in schools, the same measures should apply. In the *Pillay* case, dealing with cultural or religious identity, the child's right to equality through the provision of reasonable accommodation was upheld. The case of *Oortman* will demonstrate these 'reasonable accommodations' below.

VII Reasonable Accommodation examples outside of the context of 'gender identity'

At the risk of minimising the gendered experience of transgender children, another diverse group of children who have faced discrimination in schools is that of disabled children. The legal principles discussed in the *Oortman* judgment¹²⁰ will be used to further expand on how schools can more effectively protect against discrimination against transgender children.

St Thomas Aquinas Private School enrolled a learner with physical disabilities, a wheelchair user, and denied her readmission due to these disabilities. While the school did make accommodations for the learner's physical disabilities such as allocating her classes to all remain on the ground floor and providing her with a toilet facility these accommodations were not followed through because the classrooms and toilet had high- steps making them inaccessible with her wheelchair and she often needed help¹²¹. The school therefore failed to follow through on their accommodations and the court found that they had failed to reasonably accommodate the learner. The court ordered minor advancements at the school to accommodate the learner such as building ramps at the classrooms and the toilet facility. The court stated that this "should not be expensive".¹²² It was also suggested that some teachers attend a course on how to work with disabled persons.¹²³

¹¹⁹ UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly, A/RES/61/106*, 24 January 2007.

¹²⁰ *LH Oortman v St Thomas Aquinas Private School* (EqC) unreported case number 1/2010 Witbank of 3 December 2010.

¹²¹ *Ibid* 4.

¹²² *Ibid*.

¹²³ *Ibid* 6.

It is submitted that any accommodations and considerations that are made for diverse learners are not an additional burden for the school. Although, for example, the *Pillay* case does state:

“The State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms”.¹²⁴

In consideration of the greater picture, if school environments are an extension of the community and prepare children to grow into tolerant, functional people who work cohesively with others, the school environment should set the example, therefore additional hardship or expense is not a burden. Similarly, for transgender children, adjustments do not have to be radical or implemented instantaneously, but measures such as set standards in the school’s code of conduct for punishment of bullying, bathroom stalls with doors to accommodate transgender students and discussion groups for educating peers could be a positive and affirming start.

It should also be considered that many diverse groups of children have different needs and abilities. Schools should avoid retrofitting the learning environment to be accessible to each specific group. Instead, the classroom should be accessible to everyone to ensure that in future another diverse group will not have to endure the trauma of court proceedings and fighting against their school to honour their basic human rights. In this regard, the ultimate goal is to have schools exercise less reasonable accommodation because the schools and their learning models are already inclusive to diverse groups of children.

From a legal perspective, the legislation does not require extensive amendments to be more inclusive. The issue lies in the way the law is enforced and as demonstrated by all the jurisprudence discussed up until this point, the courts play a vital role in how legal principles are applied and set an example of how they should be applied. For example, the Equality Court’s role is to hold specific people and bodies accountable for the discrimination prohibited by the Constitution. Considering these points, from the assessment of the legislation, the National Education Policy Act and the South

¹²⁴ *Pillay* (note 83 above), para 63- 64.

African Schools Act need stronger provisions protecting against discrimination of LGBT+ youth in the educational environment.

Holness and Rule stated with reference to progressive judgments handed down in disability law, including the *Oortman* judgment, that the findings of the court unquestionably represented progress in the right direction.¹²⁵ The same can be said about the court's findings in the *Mphela* case as well as the *September* case. They explain further that a crucial aspect of the disability law judgments is the legal principles outlined in these cases and the victory of such cases which should be used for political advocacy, not just to raise awareness about the responsibilities of both the government and private entities in ensuring accessibility for individuals in public and private spaces but also to remind the government of the advancements made and their ongoing obligations to the people they are required to protect.¹²⁶ It is argued that these sentiments are equally appropriate in the context of this study as the government's responsibility in policy formation and spreading awareness extends beyond the conclusion of a successful court case.

Further, the SAHRC, as a Chapter 9 institution, failed to make any further efforts to educate the public about the violence and infringements to basic human rights that transgender persons face such as advocacy through media outlets, the last found report was in 2020 reporting Nare Mphela's tragic passing.¹²⁷ Additionally, they failed to provide solutions for how the general public can assist in ensuring that this is no longer a lived reality for transgender and gender-diverse people.

Another noteworthy aspect of the *Oortman* judgment is that the court ordered disability sensitive training for the teachers to better equip them with the tools to teach children with disabilities.¹²⁸ It is submitted that such training should be mandatory in all schools to promote the rights of diverse populations, including those with disabilities and transgender children, amongst others.

¹²⁵ Holness & Rule (note 118 above).

¹²⁶ Ibid.

¹²⁷ C Maphanga 'Transgender activist Nare Mphela found murdered, boyfriend questioned' *News24* 9 January 2020 available at, <https://www.news24.com/news24/transgender-activist-nare-mphela-found-murdered-boyfriend-questioned-20200109>, accessed on 3 July 2023.

¹²⁸ *Oortman* (note above 120), 6.

In conclusion, it is submitted that the concept of reasonable accommodation is helpful for schools in promoting diversity and affirming the rights to equality and dignity of all persons, including transgender students.

VIII Policies in place that address ‘gender identity’ in the South African school system

The Western Cape Department of Education draft guidelines were created to help schools navigate gender identity and sexual orientation. These guidelines are the first of their kind in South Africa in attempting to navigate the inclusivity of transgender students specifically. Ubisi describes the guidelines as a ‘grassroot-level approach’ where schools have come together to create a provincial policy, known as a bottom-up approach.¹²⁹ A document was compiled with input from organisations commenting on the improvements that can be made to the draft policy, a few of these points will be referred to below.¹³⁰

Firstly, a significant drawback of the guidelines is the failure to consider the intricate interplay between gender, sexuality and other modes of identification such as race and cultural background¹³¹. Secondly, the guidelines are sensitive to the freedom with which public schools have been empowered, ‘the admission policy of a public school is determined by the governing body of such school’¹³², encouraging school governing bodies to act at their discretion and to ensure decisions that are taken to be more inclusive are still in line with the best interests of learners who do not identify as part of the LGBT+ community. However, civil society organisations have submitted that this policy’s provision which requires consultation with parents when determining

¹²⁹ Ubisi (note 10 above) 132.

¹³⁰ Legal Resources Centre et al ‘Submission to the Western Cape Education Department on Draft Guidelines on Gender Identity and Sexual Orientation in Public Schools of the Western Cape Education Department’ *Legal Resources Centre, Triangle Project, Women’s Legal Centre & Lawyers for Human Rights* 19 June 2020, available at <https://wlce.co.za/wp-content/uploads/2021/02/LRC-Triangle-Project-WLC-LHR-2020-Submission-on-WCED-Draft-Guidelines-on-Gender-Identity-Sexual-Orientation.pdf> accessed on 6 July 2023.

¹³¹ Ubisi (note 10 above) 133.

¹³² GN 8223 of PN 26/2020 of 23/03/2020; 5.

specific admittance of an LGBTQI+ learner is discriminatory, since this is not general practice upon admission of learners.¹³³

It is submitted that the draft guideline's clauses are quite passive in the recommendations, using language such as "may make provision" regarding unisex toilets or referring to the dress code; schools "may" or "are encouraged" or it is "recommended" that the school follows certain actions to support learners, the liberty to act and essentially uphold the rights to dignity, psychological integrity, protection from unfair discrimination as well as the right to education appear to depend mostly on the discretion of the school.¹³⁴

Allowing schools a wide discretion in terms of how they choose to approach transgender students leaves room for infringements of their constitutional rights and can certainly be considered a contributing factor to the type of differential treatment and in more extreme circumstances, as the Nare Mphela case demonstrated, harassment that transgender students face within the learning environment. Therefore, the guidelines require further amendments, in which constitutional rights – including those listed above – are used to navigate how schools approach the needs of transgender students rather than prioritising the opinions of parents and learners. The guidelines indicate that 'Schools may engage in suitable education campaigns with the parents and learners to ensure that the decision of the school to include the admission of LGBTQI+ learners is understood by the parents and learners'¹³⁵ to determine how best to accommodate transgender learners and other members of the LGBT community.

In the context of interest theory where a child should not be denied a legal right because they are not viewed as being mature in their capacity to make their own informed decisions,¹³⁶ the guidelines undermine this assertion. Learners are required to disclose their gender identity to the school, and they are also required to speak with a psychologist.¹³⁷ Disclosure is therefore mandatory to access accommodations. This is problematic for two reasons; firstly, it assuages the school's responsibility of

¹³³ Legal Resources Centre et al (note 130 above) 16 & 17.

¹³⁴ GN 8223 of PN 26/2020 of 23/03/2020; 5.

¹³⁵ *Ibid* 6.

¹³⁶ J Barnes *A right to legal gender recognition for transgender children in South Africa* (unpublished LLM thesis, Stellenbosch University, 2020) 40.

¹³⁷ GN 8223 of PN 26/2020 of 23/03/2020; 5.

addressing the practical needs, within the school environment, of transgender learners. For instance, the school might not consider pre-conceiving a proactive plan before the need arises for a unisex bathroom or a more flexible dress code. The guidelines further indicate that only when a learner has approached the school about their gender identity, will the school then take steps to initiate a productive learning environment.¹³⁸ Disclosure is therefore mandatory to access accommodations. Secondly, the requirement that transgender children speak with a psychologist undermines the child as a person capable of making their own informed decisions and therefore able to determine for themselves whether counselling is necessary, creating the impression that transgender learners are in need of medical and psycho-social intervention.¹³⁹ For example, considering sexual reproductive health services – counselling is not mandatory before and after the termination of a pregnancy.¹⁴⁰

The WCED should highlight South Africa's stance on safeguarding the bodily autonomy of individuals with intersex traits or differences in sexual development. This involves ensuring defence against any coercive, non-consensual or unjustified medical procedures aimed at 'normalisation'.¹⁴¹ Some argue that a transgender person's gender identity is not validated, unless specific avenues are followed for their gender identity to be affirmed. Luhur¹⁴² refers to the gender recognition law - the Alteration of Sex Description Act of 2003 – requiring a medical diagnosis to confirm whether a person qualifies for gender-affirming treatment. However, Luhur also states that the Act allows individuals to apply to have their sex description changed if they can provide medical evidence that they have undergone medical or surgical treatment to change their sex characteristics.¹⁴³ This suggests that medical intervention is an essential part of the transitioning process in South Africa. Persons who do not wish to receive gender-affirming surgeries as well as those who cannot follow through with these procedures due to ill-health are also denied the option to obtain proper legal documentation. This results in inaccessibility to basic services including health care, education and employment or accessing temporary housing, acquiring a driving

¹³⁸ *Ibid.*

¹³⁹ Legal Resources Centre et al (note 130 above) 10.

¹⁴⁰ Choice on Termination of Pregnancy Act 92 of 1996, s4: "The State shall promote the provision of non-mandatory and non-directive counselling, before and after the termination of a pregnancy."

¹⁴¹ Legal Resources Centre et al (note 130 above) 4.

¹⁴² W Luhur et al... 'Public Opinion of Transgender Rights in South Africa' 2021, *UCLA School of Law*, 2.

¹⁴³ *Ibid.*

license, and voting¹⁴⁴. It is further submitted that the preamble of the Constitution illustrates an intention to improve the quality of life for all citizens,¹⁴⁵ an inability to access basic services, especially that of education appears to be a quality-of-life issue. Therefore, recognising gender identity means having respect for the right of the individual to identify which is a crucial aspect of personhood and citizenship. A guarantee of gender identity provides accessibility to everyday necessities that a cisgender person would not be denied on the basis of gender identity hence, recognition may ensure social integration and economic advancement.¹⁴⁶

Bhana discusses the role of teachers in changing the narrative and general approach to supporting homosexual students in schools. She suggests that the Department of Education should develop intervention programs alongside teachers in which they explore heterosexual dominance in schools and how this can be damaging to homosexual learners' experiences. Teachers must engage in discussions about sexual orientation with students to encourage conversations about protecting the rights of homosexual students and through these discussions they will have the knowledge and skills to act accordingly.¹⁴⁷ The inference that teachers are an essential component to changing the narrative and attitude of children towards homosexuality can also apply to the protection of transgender learners and it is argued that such intervention programs should also consider addressing heteronormativity, as it reinforces the gender binary in schools and how it undermines the identity of transgender children, particularly in single-sex schools.

The South African Democratic Teachers Union (SADTU) created a draft Gender Policy focusing predominantly on addressing the gender disparities amongst teachers, education workers as well as learners, in the South African education system. There is a strong emphasis on a commitment to eliminate discrimination in

¹⁴⁴ *Ibid.*

¹⁴⁵ Preamble of the Constitution.

¹⁴⁶ Divan (note 11 above).

¹⁴⁷ D Bhana 'Understanding and addressing homophobia in schools: a view from teachers' (2012) 32(3) *South African Journal of Education*, available at https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-01002012000300007 accessed on 12 August 2023.

education to embody the vision of a democratic South Africa. This is stated in the preamble.¹⁴⁸

It is argued that the policy has the potential to be transformative and fulfils Bhana's vision of creating intervention programs for supportive mechanisms for LGBTQQIP2SAA learners. The Policy states that it is committed to designing programmes for reaching out to vulnerable groups including LGBT+ people to protect them against gender-based violence. This includes transgender persons; however, gender identity is only mentioned once throughout the whole document stating:

“SADTU will ensure that there is no exclusion from participation of educators based [on] sexual orientation and gender identity.”¹⁴⁹

It is submitted that an essential part of inclusivity and advocacy is expanding on how the policy intends to protect gender identity, especially since the policy wishes to address gender inequality. Gender inequality should include consideration for gender identity and the imbalance between cisgender and transgender and non-binary persons as a marginalised group. It should not only be limited to imbalanced treatment between men and women.

The document uses the acronym 'LGBTIQ' to include transgender people as a protected group from discrimination. However, the discussion on discrimination towards the LGBT community is focused predominantly on sexual orientation and homophobia. This is likely because sexual orientation is a protected group from unfair discrimination in the Constitution and in society, at present, conversations about homosexuality are more common and to some extent more palatable since there are more protective measures in place for sexual orientation – the Gender Policy being an excellent example of this. This is not suggesting that homophobia is not a serious issue. The policy uses 'LGBTIQ' as an umbrella term to cover all bases and validate the protection of transgender persons - the 'T' in LGBT – but fails to fully provide specific intervention for harassment or exclusion of transgender persons. The policy's

¹⁴⁸ SADTU Draft Gender Policy' *SADTU* Accessed a <https://www.sadtu.org.za/documents/sadtu-gender-policy/t>, accessed on 23 June 2023.

¹⁴⁹ *Ibid.*

heavy emphasis on eradicating discrimination is commendable and the policy itself is a positive base mark for the inclusion and protection of gender identity.

IX Conclusion

This chapter intended to unpack the rights of equality, dignity and freedoms guaranteed by the Constitution, legislation that empowers the right to education and jurisprudence that illustrates how the courts' approach to empowerment of transgender rights can be applied to the protection of transgender children within the school environment. Based on the application of legislation and policies in case law (*Mphela* and *September*), it is clear that there is a need for clarity in the use of the words 'transgender' and 'gender identity.' The nature and wording of South Africa's legislation ensures that blanket terms, such as 'prohibited grounds' can be interpreted to include diverse groups such as the transgender community, but this leaves room for misinterpretation and exclusion by the courts. Amendments to explicitly include these words in PEPUDA, the Schools Act and the National Education Policy Act will reduce interpretive misconceptions by the court, the State and the general public in the application of legislation.¹⁵⁰

Different areas of law provide concepts that can be borrowed to tackle varying issues. The disability concept of reasonable accommodation in schools elucidated by the *Oortman* judgment, proved by the court in the *September* case to be an essential component to empower the rights to equality, dignity, and freedoms of the Constitution by requiring the respondents to make allowances for the applicant to express her gender identity through dress and appearance. An essential aspect of the integration and socialisation of transgender children in schools is reasonable accommodation, including teacher diversity and sensitivity training, gender-neutral bathrooms and the provision of psychological and mental health support should the child require it.

The Western Cape Education Department's draft guidelines has proven to be a positive stride with explicit guidelines for gender identity. However, the discriminatory provisions reflect a broader inclination to police the visibility and participation of transgender students in school life contradicting the purpose of non-discrimination,

¹⁵⁰ Albertyn... et (note 82 above 14).

whether this is direct or indirect.¹⁵¹ The same can be said about the SADTU draft gender policy, with its aim to address gender disparities in the education system, yet seldom makes mention of proactive measures to protect gender identity. These policies reflect an intention to institute wilful legal protection for transgender students, yet the execution of the documents is imbalanced and in some instances contradictory to their specific intention. Therefore, the legislation, jurisprudence and policies indicate that South Africa is in a position to develop a framework that is empowering to transgender students. The current mechanisms in place are satisfactory, however, a more explicit inclusion of gender identity with actionable steps is required. Moreover, governmental initiatives, bolstered by advocacy efforts from Chapter 9 institutions are imperative in the pursuit of justice against acts of violence.

The next chapter seeks to identify and consider lessons from legislation and policy from comparative jurisdictions for South Africa.

¹⁵¹ GN 8223 of PN 26/2020 of 23/03/2020; 3.

CHAPTER 3:

Lessons from comparative jurisdictions

I. Introduction:

South African legislation lacks explicit consideration for gender identity and gender diversity with the result that the burden of interpretation of relevant legislation is left to the courts. The *Mphela* case, for instance, illustrates the latitude for misinterpretation of applicable legislation. Further, the draft policies reviewed lack much-needed insight from relevant stakeholders. Consequently, this provides public schools with inadequate guidelines to apply in their specific approach to supporting transgender students in schools. This chapter therefore aims to draw from legislative frameworks of comparative jurisdictions to enhance the conceptualisation of the legal procedures that may be used to validate gender identity in South Africa. This chapter unpacks the legislative framework and policies that offer specific protection to the transgender community and their gender identity in the United States of America (US), Canada, and India.

Discussion on the US is limited to an interpretation of disability law and its all-encompassing nature which has the capacity to apply to diverse groups.

Canada provides exemplary guidance on the integration of gender identity into domestic legislation including the Canadian Human Rights Act¹⁵² and the Criminal Code¹⁵³. An ideology that illustrates the scope for misinterpretation of protective provisions in favour of gender identity is also mentioned to validate the necessity of explicit legal protection for the transgender community. Since the South African anti-discrimination jurisprudence and legislation borrows from Canada in some respects, there are similarities worth considering despite the divergent socio-economic contexts.

A brief discussion follows on transgender students attending single-sex schools and the United Kingdom (UK) is referenced briefly to expand on recent policy developments regarding single-sex schools and transgender students.

¹⁵² Canadian Human Rights Act 1985.

¹⁵³ Criminal Code 1985.

Finally, India has numerous examples of articles in their Constitution, legislation specific to education and jurisprudence that speak to a proactive intent to protect and empower the transgender community. The relevant provisions, Acts, and policies will be outlined. India as a global South country is more comparable than the aforementioned countries which are classified as global North countries.

II. United States (US) disability law in the context of legal protection of gender identity

The recognition of transgender people and their rights appear to be particularly polarising at this point in history and the groups at opposing ends (pro-trans rights and anti-trans rights) have adopted equally extremist views of where and how transgender people should exist in society. This is also a reflection of how the varying laws in different States reflect different values. Therefore, there are divided opinions on the role of law as a tool for non-discrimination. For this reason, the US is not a strong comparator to South Africa based on the distinction between legal systems as well as the socio-economic climate in each country. However certain aspects of American jurisprudence are still relevant. The case of *Doe v Massachusetts Department of Corrections*¹⁵⁴, which resembles similar facts to *September v Subramoney*¹⁵⁵ will be discussed briefly due to the plaintiff's discussion on the Americans with Disabilities Act (ADA)¹⁵⁶.

In chapter 2, reasonable accommodation was discussed at length with an analysis of *September v Subramoney* as well as the *Oortman* judgment which was specific to disability law. The brief of *Amici Curaie* in the *Doe* case states that persons with disabilities are classified as disadvantaged due to social perceptions rather than a result of bodily defects. Therefore, any differences that inhibit the full participation for people with disabilities is a reflection of society's unfair treatment of the individual. Considering this 'social model' of disability, people are not disabled due to their

¹⁵⁴ *Doe v Massachusetts Department of Corrections* 1:17-CV-12255-RGS (2018).

¹⁵⁵ *September* (note 4 above).

¹⁵⁶ Americans with Disabilities Act 1990.

limitations but rather society's negative perceptions of their conditions¹⁵⁷. By this definition there is an intersection between society's approach to disability rights and transgender rights, hence the motivation for the applicability of the Americans with Disabilities Act (ADA) in *Doe v Massachusetts Department of Corrections*.¹⁵⁸

The judge issued a partial preliminary injunction directing defendants to implement the following measures: when possible, female staff should conduct strip searches; permission to shower separately at a different time to other inmates and where possible ensuring that a member of staff is available to ensure that fellow inmates do not try to enter during the plaintiff's shower time.¹⁵⁹

In the previous chapter it was emphasised that the ultimate goal for diverse groups was to implement a model that does not require constant refinement due to its established all-inclusive nature. Therefore, if South Africa were to draft and adopt legislation based on the premise of disability being a social deficit (society's negative perception of an individual's limitation), the Act would pacify the negative connotations associated with disability and would have the capacity to provide explicit protection to diverse groups leaving limited scope for misinterpretation by the courts on whether protections under blanket provisions are extended to transgender persons.

Transgender allies and advocates alike have expressed some resistance towards grouping transgender people under the umbrella of disability in terms of protections available under federal disability rights laws. However, by avoiding and trying to refute the applicability of disability law to transgender rights, the stigma towards both groups is compounded and important legal protections that address the types of discrimination that transgender persons face is ultimately ignored.¹⁶⁰ Considering this idea, it is submitted that the law is not developed enough in the area of protections for transgender people, but, disability law has the capacity to remedy

¹⁵⁷ Brief of Amici Curiae for Plaintiff's Motion for Preliminary Injunction, p6, *Doe v Massachusetts Department of Corrections* 1:17-CV-12255-RGS (2018). Accessed at <https://glad-org-wpom.nyc3.cdn.digitaloceanspaces.com/wp-content/uploads/2017/11/doe-v-doc-brief-of-amici-curiae.pdf>, accessed on 4 August 2023.

¹⁵⁸ *Doe v Massachusetts Department of Corrections* 1:17-CV-12255-RGS (2018).

¹⁵⁹ A Moody, L Yu 'Case: Doe v. Massachusetts Department of Corrections' 2020, *Civil Rights Litigation Clearing House* available at <https://clearinghouse.net/case/17373/> accessed on 4 August 2023.

¹⁶⁰ K Barry & J Levi 'Embracing the ADA: Transgender People and Disability Rights' (2021) *Harvard Law Review* available at <https://harvardlawreview.org/blog/2021/02/embracing-the-ada-transgender-people-and-disability-rights/> accessed on 9 October 2023.

the discrimination that they face and this approach can be applied to the learning environment.

Considering the notion that legal frameworks may currently lack specific legal protection for the transgender community, it becomes apparent that disability law has the potential to challenge and rectify the discrimination encountered. This conceptual approach, rooted in the adaptability and inclusivity of disability law, can be applied to the learning environment by leveraging the principles inherent in disability law. Schools can cultivate an environment that supports transgender children and eliminates discrimination through accommodations discussed in Chapter 2.¹⁶¹ This approach is also in line with South African jurisprudence such as the *Pillay* and *Oortman* cases.

The US approach to transgender inclusivity is not without oppositional discourse from conservatives. For example, in 2021, the state of Arkansas enacted a ban on gender-affirming healthcare for transgender children, including gender-affirming surgery (which is extremely rare for children). As of 2023 twenty States have implemented bans on healthcare for transgender children, which is against medical best practices. This legislation has affected the mental health of transgender children with families opting to move to different States that will provide gender-affirming care.¹⁶²

III. Canada

The use of Canada as an example of a progressive approach to transgender children is appropriate since there is expansive research on the recognition of gender identity and gender expression as a protected right. This section will demonstrate the parallels between the Canadian Human Rights Act¹⁶³ and the South African Constitution¹⁶⁴. Education is classified under provincial jurisdiction and therefore each territory has its own set of laws, the scope of educational policies of all seven provinces are too extensive to cover in this research. It will also be acknowledged that in certain

¹⁶¹ Refer to page 36.

¹⁶² R Thoreson 'US Courts Block Anti-Trans Legislation - New Rulings Condemn Anti-Trans Discrimination' *Human Rights Watch* 22 June 2023, available at <https://www.hrw.org/news/2023/06/22/us-courts-block-anti-trans-legislation>, accessed on 7 February 2024.

¹⁶³ Canadian Human Rights Act 1985.

¹⁶⁴ Constitution of the Republic of South Africa, 1996.

circumstances, Canada might appear “too progressive” and whether, objectively, this is to the detriment of cis-gendered learners, since such gender-specific reformation might cause further exclusion.

Canada introduced a Bill, at the time known as C-16 in 2016, to amend the Canadian Human Rights Act¹⁶⁵ and The Criminal Code¹⁶⁶. The Bill was passed in 2017. It added ‘gender identity or expression’ to the list of prohibited grounds of discrimination in the Canadian Human Rights Act as well as the list of characteristics of protected groups from hate propaganda in the Criminal Code. It is submitted that Canada’s legislative framework is an appropriate example for South Africa regarding a way forward within the school system for the protection of the rights to equality, freedom of expression and education. Furthermore, the way in which the discrimination clause in the Human Rights Act is phrased bears similarity to South Africa’s own equality clause which will be analysed in greater detail below.

The Canadian Human Rights Act

The Canadian Human Rights Act has integrated ‘gender identity or expression’ under the purpose of the Act¹⁶⁷ as well as ‘under prohibited grounds of discrimination’.¹⁶⁸

Section 2¹⁶⁹ states that “the purpose of this Act is to extend the laws in Canada to give effect... to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated... without being hindered in or prevented from doing so by discriminatory practices based on” several factors that, as a result of clause 1 in Bill C-16, now includes “gender identity or expression.” It is submitted that the intention behind the ‘purpose of this act’ provision is to ensure that everyone is equal and should have equal access to opportunities regardless of the identifiable

¹⁶⁵ Canadian Human Rights Act 1985.

¹⁶⁶ Criminal Code 1985.

¹⁶⁷ Canadian Human Rights Act 1985, s2.

¹⁶⁸ Canadian Human Rights Act 1985, s 3(1).

¹⁶⁹ Canadian Human Rights Act 1985.

groups to which they belong – protecting diversity and promoting inclusion. This is very similar to section 9(1) of the equality clause in the South African Constitution¹⁷⁰.

However, considering these listed grounds, the Act provides room for certain exceptions in the realm of services, accommodation and employment¹⁷¹. For example, to contextualise the application of these exceptions, sections 15(1)(a) and 15(2) should be reviewed in conjunction. Section 15(1) refers to exceptions regarding employment, where exclusion of any kind is based “on a bona fide occupational requirement¹⁷².” Further, section 15(2) expands on this requirement under the ‘Accommodation of needs’ clause where the employer must justify that reasonable accommodation of needs of a certain group of people would cause “undue hardship” to the employer in being required to accommodate those needs.¹⁷³ It is submitted that the inclusion of exceptions in this Act reads similarly to section 9(5) of the South African Constitution which states that discrimination based on any of the grounds stated in section 9(3) is unfair unless it can be proven that the discrimination was fair.¹⁷⁴ Although the reference to reasonable accommodation is implicit, the constitutional guarantee of the realisation to equality and non-discrimination is empowered through PEPUDA, where the “reasonable accommodation” is explicitly mentioned¹⁷⁵. It has the same effect as that of the accommodation clause in the Canadian Human Rights Code.

Additionally, there are provincial Human Rights codes with specific agencies in Canada that allow the individual provinces to enforce legislation.¹⁷⁶ However, in the interests of discrimination specifically, this research will remain within the scope of legislation applicable to all Canadian provinces.

¹⁷⁰ Section 9(1) everyone is equal before the law and has the right to equal protection and benefit of the law.

¹⁷¹ J Walker ‘Bill C -16: An Act to amend the Canadian Human Rights Act and the Criminal Code’ 2016 *Library of Parliament = Bibliothèque du Parlement* at 2 available at, <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c16-e.pdf> accessed on 17 July 2023.

¹⁷² Canadian Human Rights Act 1985.

¹⁷³ Canadian Human Rights Act 1985, s15(2).

¹⁷⁴ Constitution of the Republic of South Africa, 1996.

¹⁷⁵ Promotion of Equality and Prevention of Unfair Discrimination Act No. 4, 2000, s25(c)(iii) ‘develop codes of practice as contemplated in this Act in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation;’

¹⁷⁶ ‘Overview of Human Rights Codes by Province and Territory in Canada’ *Canadian Centre for Diversity and Inclusion* January 2018 at 4.

Bill C-16 Amendment Act: An Act to amend the Canadian Human Rights Act and the Criminal Code

Bill C-16 Amendment Act¹⁷⁷ into integrated gender identity or expression into section 318(4) of the Criminal Code where it defines gender identity as part of an identifiable group (members of the public part of a group with a specific quality) protected from discrimination. Section 318 falls under hate propaganda, specifically, section 318(2) prohibits the following acts against any identifiable group “killing members of the group”¹⁷⁸ or “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction¹⁷⁹.” Any person found guilty of such acts will face imprisonment.¹⁸⁰ There is no mention of the misuse of pronouns. In any event the misuse of pronouns cannot be equated to advocating the death of transgender people. Therefore, there is no actionable circumstance in this provision leading to prosecution for misgendering a transgender person.¹⁸¹

Section 319(1) establishes a legal violation when someone incites hatred towards a specific group, knowing that it could lead to a disturbance of public order. Section 319(2) criminalises promotion of hatred against a particular group through various communication methods, other than private conversations. Cossman¹⁸² refers to the case of *R v Kerr*, a Supreme Court case in which the Justice clarified the stakes for inciting hatred: the breach of peace must be to the extent that it arouses a harm, or imminent harm to an individual. It is reiterated that a misuse of gender pronouns cannot equate to the severity of physical harm or the potential for physical harm.¹⁸³

To initiate legal action under section 318 and 319(2), the approval of the Attorney General is necessary. However, the section also provides a variety of defences should one be charged under section 319(2)¹⁸⁴. The defences in a nutshell include; proving

¹⁷⁷ Bill C-16, 2016.

¹⁷⁸ Criminal Code, 1985, s318(2)(a).

¹⁷⁹ Criminal Code, 1985, s318(2)(b).

¹⁸⁰ Criminal Code, 1985, s318(1).

¹⁸¹ Cossman, B ‘Gender Identity, Gender Pronouns and Freedom of Expression: Bill C-16 and the traction of specious legal claims’ (2018) 68(1) *University of Toronto Law Journal* 47.

¹⁸² *Ibid.*

¹⁸³ *R v Kerr*, 2004 SCC 44, [2004] 2 SCR 371 at para 91.

¹⁸⁴ Criminal Code, 1985, s319(2).

that the statements made were true; expressing or attempting to establish an opinion on a religious subject in good faith, discussing matters of public interest and reasonably believing them to be true to remove factors that may generate hatred towards an identifiable group. Upon analysis of the defences, Cossman states that the defences emphasise that engaging in discussions about controversial or potentially offensive subjects does not automatically amount to intentionally promoting hatred and in Canada, cases involving the intentional promotion of hate speech are uncommon.¹⁸⁵

Further a person may serve a longer or shorter sentence depending on 'aggravating circumstances' which also include gender identity or expression.¹⁸⁶ Cossman emphasises that in this provision, bias, prejudice, or hatred is considered as part of sentencing, through the empowerment of gender identity or expression in the Criminal Code, these will also be taken into consideration during sentencing. There is no new offence, it simply means that crimes such as murder or assault, that are motivated by hatred may be given harsher punishments. There is no mention of criminalising the misuse of pronouns, for example.¹⁸⁷

Argument against Bill C-16

The literature points to considerable tension between the right to gender expression and the public's perception that misgendering someone will result in a violation of their right to free speech. As Cossman demonstrates, this is a misinterpretation of the application of the clause as well as the right to free speech. In 2016 Jordan Peterson created the rhetoric that Bill C-16 was a violation of the right to freedom of expression suggesting that if a person misgendered someone outside of the binary model, this would amount to hate speech and the individual could be prosecuted for inciting hate speech.¹⁸⁸ This gained traction amongst conservatives whose argument was in opposition to the passing of the Bill. Along with his argument against Bill C -16, he condemned gender- neutral pronouns and the collective of gender non-conforming people.¹⁸⁹ It is submitted that this is worth mentioning because Jordan Peterson's

¹⁸⁵ Cossman (note 181 above) 49.

¹⁸⁶ Criminal Code, 1985, 718.2(a)(i).

¹⁸⁷ Cossman (note 181) 47.

¹⁸⁸ Ibid 44.

¹⁸⁹ Ibid 45.

claims although fairly easy to negate through a basic analysis of the related provisions (which will be unpacked in this section) reiterates the point made throughout chapters 1 and 2: there is fear surrounding what is not understood and the public is more likely to latch onto the narrative in alignment with their belief system without further interrogation of the information they consume. In this example,

“freedom of expression provided a constitutionally principled oppositional discourse to the protection of trans rights by feeding into rising anxieties about political correctness, censorship, human rights commissions, and universities.”¹⁹⁰

However, Cossman does mention that there was some scepticism and criticism of his claims.

It is submitted that Peterson’s huge platform allowed him to spread misinformation because he substantiated his claims through his own field of expertise and scientific literature, but the application of those principles to the law was outside of his scope of expertise, considering the reach of this narrative, it had the potential to fuel further exclusion of transgender people who have limited protection, had the Bill not been passed¹⁹¹.

Additionally, systemic strategies to ultimately eliminate violence and othering of transgender persons should occur at multiple levels. This includes ensuring perpetrators take accountability by enforcing s319(1) of the Criminal Code discussed above, educating the police to enable this work is crucial to the enforcement of this provision; legal and policy reform such as Bill C-16 to integrate gender identity into the legislature; as well as advocacy to educate the public about transgender issues.¹⁹²

Non-discrimination

It is submitted that the example of Canada, particularly the fear that the collectives’ rights will be limited in order to affirm gender identity and expression, can be applied in the South African context because of the similarity in the way anti-discrimination legislation has been expressed as discussed earlier. However, it is a clear necessity to have protective legislative frameworks in place that explicitly protect gender identity

¹⁹⁰ Ibid 79.

¹⁹¹ Cossman (note 181 above) 79.

¹⁹² Divan (note 11 above).

and expression and prohibit unfair discrimination because of personal biases and how easily misinformation can gain momentum, using the example of Jordan Peterson as the authority for this statement. Everyone is entitled to equal protection of the law and marginalised groups are always at the risk of discrimination but are often the groups with the most limited protection from the law. This was discussed within the frame of homosexuality in the *Fourie case*.¹⁹³

It is posited that the purpose of including gender identity under the list of groups protected from discrimination means that transgender people are not excluded or mistreated based on their gender identity. The suggestion that this will result in cisgendered people misgendering or using incorrect pronouns meaning that they are inciting hate speech is unsubstantiated by the law and is a complete misinterpretation of the intention of an anti-discrimination clause, specifically, the ‘proscribed discrimination’¹⁹⁴ clause. At a very basic level, as a universal rule, which has been stated in different ways in documents such as the UNCRC, everyone should be entitled to protection from discrimination and be treated equally and this should not equate to the infringement of another group’s right to freedom of expression and as demonstrated from the Acts, Canada’s parliament has made a commendable effort in striking a balance between the rights of identifiable groups, without infringing on the rights of other groups and ultimately maintaining the best interests of all citizens. The critique of Jordan Peterson’s comments was an attempt to prove this and affirm the necessity of governments’ intervention in passing protective legislation for gender identity and expression specifically. By refuting Peterson’s claims, this also proves that empowering legislation for transgender people will not infringe on the rights of any other groups and would therefore be a positive step forward in South Africa’s own equality clause, in court proceedings there would be far less room for ambiguity or the justification of the infringement of certain rights over others such as the *Mphela case* where the court refused to use the complainant correct pronouns because it is court that deal with ‘facts’.¹⁹⁵

¹⁹³ *Minister of Home Affairs and Another v Fourie and Another* (2006) (1) SA 524 (CC) para 15. “...gays and lesbians are a permanent minority in society who have suffered patterns of disadvantage and are consequently exclusively reliant on the Bill of Rights for their protection;...”

¹⁹⁴ Canadian Human Rights Act 1985, Part I.

¹⁹⁵ Refer to page 19.

However, as will be discussed below, while it is commendable to have such empowering legislation, within the education system the boundaries to the extent of the school's involvement and the type of support and assistance that should be provided to students in their process of understanding their gender identity, are not always clear. This begs the questions: what is the extent of Canada's progressive inclusivity model in schools? And what are the procedures in place for transgender students?

Canadian school protections for transgender students

Considering the progression of Canada's laws to include "gender identity or expression", this makes issues relating to gender identity increasingly relevant in the education system and the steps to accommodate transgender students whilst protecting their rights are important.

Waddington describes reasonable accommodation in the realm of disability in the occupational setting as "an individual analysis" between the abilities of the employee and the demands of the working environment.¹⁹⁶ It is submitted that reasonable accommodation is about finding an equilibrium between the individual's specific needs and the needs of the workplace, which may include the limitations of the workplace since employers will have to make certain accommodations.¹⁹⁷ Within this trajectory, the approach of schools to accommodating transgender children should be quite similar. There should be an individualised analysis between supporting transgender students as well as examining the institution's aptitude to effectively cater to and integrate the needs of transgender students.

However, Martino et al in their case-study researching the lived experiences of teachers and transgender students in Ontario, takes this further. He states that an individualist approach, where accommodation empowers a transgender student to be named and publicly identified, equates to "trans recognition and trans- exceptionalism" and does not address the core issue of the systemic forces fortifying cis-genderism

¹⁹⁶ L Waddington 'When it is Reasonable for Europeans to Be Confused: Understanding When a Disability Accommodation is 'Reasonable' from a Comparative Perspective' (2008) 29(3) *Comparative Labor Law & Policy Journal* 320.

¹⁹⁷ Canadian Human Rights Act, 1985, s15(2).

and cisnormativity. Instead, the article suggests teaching gender diversity in schools to avoid singling out transgender individuals, which is rooted in problematic liberal pluralism and a reactive stance, serves to reinforce the perception of transgender experiences as fundamentally different and therefore transgender students would receive differential treatment.¹⁹⁸

Respondents of a study based on educators' beliefs about raising LGBT issues in schools, indicated that addressing LGBT issues directly, whether this is through curricula or in school policy would be met with resistance. It would be more advisable to curate an LGBT- related curriculum around a general intention for supportive, safe schools and protecting the school community. An example of this would be the development of anti-discrimination policies. This study indicated that such policies elicited feelings of support, protection and comfort.¹⁹⁹

The next argument focuses on single-sex schools and transgender students. Here the argument has been made that conflating gender and sex is not empowering to transgender students.

Conflation of gender and sex

Single-sex schools cater to a learning environment that ultimately serves the best interests of either male or female students. In the previous chapter, the principle of reasonable accommodation as envisioned and applied in domestic law was analysed. At this stage, requiring single-sex schools to accommodate transgender children, specifically students who identified as the sex of the school they are attending to then no longer identifying with that sex, would fall within the scope of reasonable accommodation in the South African context because the South African Schools Act explicitly states that learners are to be admitted and their educational requirements must be served without unfair discrimination²⁰⁰. The presence of transgender students in single-sex schools is a consideration that has been given little attention on a global

¹⁹⁸ W Martino... et al 'Supporting transgender students in schools: beyond an individualist approach to trans inclusion in the education system' (2022) 74(4) *Educational Review* 761.

¹⁹⁹ K Swanson & M Gettinger 'Teachers' knowledge, attitudes, and supportive behaviors toward LGBT students: Relationship to Gay-Straight Alliances, antibullying policy, and teacher training' (2016) 13(4) *Journal of LGBT Youth* 330.

²⁰⁰ The South African Schools Act of 1996 s5(1).

– scale and in particular the research based on South African schools has no considerations of this nature, although, the same rights and accommodations outlined in chapter two apply to these students. The question however is to consider whether there is a justifiable limitation to those students' rights when balancing the interests of single-sex schools and the rights of cisgendered learners in single-sex schools, as well as the expectations when one attends a single-sex school and whether there should even be a consideration for transgender students when reflecting of the intentions of single-sex schools.

Advocates of single-sex schools argue that this model of learning enhances students' drive and academic accolades by customising teaching methods and educational approaches to cater to the specific requirements of each gender, taking into account factors such as differences in learning styles, brain function, interests and classroom participation. Further, they intend to eliminate distractions of the other sex and gender stereotyping²⁰¹. However, it is submitted that the very concept of a single-sex school nullifies this point because single-sex schools, in conjunction with their positive contributions, also promote a narrow ideal of how males and females should present and behave. This is substantiated by Jackson's argument that a focus on the difference in gender, results in finding more differences and amplifying the validity of those differences, therefore acting outside of gender norms might appear problematic, particularly in single-sex schools²⁰². This also risks an individual's autonomy, assuming that everyone of the same gender should be treated the same. Considering the empowering legislation and protective legislation for transgender students in Canada, it is submitted that these binaries can be challenged and there is a space for transgender students in this model of schooling. However, the question of whether these binaries should be challenged will be critically discussed. Further, the equally current example of the United Kingdom will also be outlined since they intend to pass

²⁰¹ M Koniewskia & A Hawrot 'Are single-sex schools more effective than the coed ones? The effect of single-sex schooling on achievement among female adolescents in Catholic schools' (2022) 37(6) *Research Papers in Education* 907-908.

²⁰² J Jackson 'Dangerous presumptions': how single-sex schooling reifies false notions of sex, gender, and sexuality' (2010) 22(2) *Gender and Education* 229.

as yet unnamed guidelines barring transgender students from attending single-sex schools.²⁰³

As outlined earlier, Canada's Human Rights Code outlines circumstances for employment situations where discrimination is justified, such as those in which the burden of accommodating an identifiable group within the discrimination clause, would be too onerous. Therefore, requiring a school to accept transgender students in consideration of some of the objectives of the intention of single-sex schooling outlined above might prove too onerous. Single-sex schools are a model of schooling that exists in our society, as is the growing visibility of transgender students in the schooling system. It is important to recognise the significance of this point, as Martino et al's previous focus on systemic cisnormativity can most accurately be defined by a single-sex educational model. This educational approach is likely to persist and should not be disregarded.

IV. United Kingdom

It would seem counter-intuitive and too onerous on the school to expect that accommodations will be made at a single-sex school since the model of learning is made clear. In the United Kingdom (UK), there are guidelines in the process of being published that will allow single-sex schools to reject the applications of transgender students, admittance will be based on sex rather than gender and this will not be in breach of the UK's Equality Act of 2010, meaning this will not amount to discrimination.²⁰⁴ This sentiment is substantiated by the Department of Education's non-statutory draft guidance for schools.²⁰⁵ This is a move that considers gender and sex separately since transgenderism refers to internal gender identity being

²⁰³ J Elgot 'Ministers consider rule to let single-sex schools bar transgender pupils' *The Guardian* 18 April 2023, at, <https://www.theguardian.com/education/2023/apr/18/ministers-consider-rule-to-let-single-sex-schools-bar-transgender-pupils> accessed on 27 September 2023.

²⁰⁴ *Ibid* 189.

²⁰⁵ 'Gender Questioning Children Non-statutory guidance for schools and colleges in England' December 2023 *Department of Education* at 18 available https://consult.education.gov.uk/equalities-political-impartiality-anti-bullying-team/gender-questioning-children-proposed-guidance/supporting_documents/Gender%20Questioning%20Children%20%20nonstatutory%20guidance.pdf, accessed on 7 February 2024.

incongruent to the sex assigned at birth,²⁰⁶ risking conflating the gender identity and sex could lead to potential infringements on the rights of cis-gendered students. This is stated to emphasise the sex difference, not to undermine a transgender person's gender identity. Furthermore, in circumstances in which a student is socially transitioning from the gender they were believed to be upon admission to the school, the UK guidelines do not require those students to leave the school.²⁰⁷ It is submitted that in these circumstances, it is not too onerous on the school to support these students, and accommodations in such circumstances can include diversity and sensitivity training for teachers, upgrading bathrooms and changing facilities to have cubicles and curtains for privacy. This is reasonable in this particular circumstance because it cannot be guaranteed that every student attending a single-sex school identifies with the sex assigned to them at birth and as a result, they should have the necessary support structures to navigate the process and to have their rights respected.

V. India:

India's legislative framework serves as a compelling comparator to South Africa with consideration of the progressive approach to constitutional interpretation implemented by South Africa's Constitutional Court and The Supreme Court of India. Henrico highlights this correlation by stating that both countries currently share international economic and political relations as members of BRICS and the apex courts "enjoy a "cross-pollination" of jurisprudence."²⁰⁸

The *September* case applied The Supreme Court of India's application of dignity thereby demonstrating the similarities between South Africa and India's legislative frameworks and the application of each framework. The Equality Court stated:

"The Indian Supreme Court has expressly held that the right to dignity includes the right to respect of one's gender identity."²⁰⁹

²⁰⁶ M Connolly... et al 'The Mental Health of Transgender Youth: Advances in Understanding' (2016) 59(5) *Journal of Adolescent Health* 489.

²⁰⁷ *Ibid* 189.

²⁰⁸ R Henrico 'Judicial review in South Africa and India: advancing constitutionalism or undue activism?' (2022) 43(4) *Obiter* 798.

²⁰⁹ *September* (note 4 above) para 119.

The context of the Supreme Court of India's application will be discussed below.

The landmark judgment of *National Legal Services Authority v Union of India*²¹⁰ addressed the legal recognition of a third gender for persons identifying outside of the typical male or female gender binary. The Court provided a slate of recommendations emphasising the necessity of public awareness initiatives to address societal stigma against the transgender community. Additionally, both Central and State governments were instructed to undertake various measures to uplift and support the community, including; incorporating legal acknowledgement of a third gender in all official documents²¹¹, designating individuals of the third gender as a “socially and educationally backward class of citizens” increasing their favourability for employment and acceptance into educational institutions²¹² and initiating actions to formulate social welfare programs specifically tailored for the well-being of the transgender community.²¹³

Under the discussion of equality (article 14 of the Constitution of India)²¹⁴, the Court succinctly expressed the extreme obstacles transgender persons face, and these examples can be interpreted globally. Additionally, the Court indicated the provision does extend legal protection to the transgender community through the use of the word ‘person’, however, legally this does little to placate the discrimination suffered. Non-recognition of the identity of transgender persons denies equal protection under the law and results in heightened incidences of harassment, violence and sexual assault. This vulnerability is pervasive in public spaces, homes, and detention facilities including instances involving law enforcement. Further, petitioners demonstrated through facts and figures that a lack of legal recognition of gender identity contributed to discrimination in crucial areas of life including, education, employment and healthcare. This is despite the use of the word ‘person’ which is an umbrella term that is non-restrictive to males or females and the transgender community is:

²¹⁰ *National Legal Services Authority (NALSA) vs. Union of India* Air 2014 SC 1863.

²¹¹ Ibid para 129(1).

²¹² Ibid para 129(3).

²¹³ Ibid 129(7).

²¹⁴ The Constitution of India, 1950. ‘The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.’

“entitled to legal protections in all spheres of State activity... as enjoyed by any other citizen of th[e] country.”²¹⁵

The Court argued that ‘gender identity’ falls under the Constitution’s (articles 15 and 16) prohibition against discrimination based on ‘sex’.²¹⁶ The framers of the Constitution appear to have prioritised the fundamental right to be free from sex discrimination in order to discourage both an implicit and explicit tendency to treat individuals differently based on non-conformity to typical generalisations of gender. The Court therefore asserted that sex comprises gender and biological attributes.²¹⁷ It is submitted that grouping ‘gender identity’ with ‘sex’ insinuates that the court views these factors as one in the same. Arguing that ‘gender identity’ is already a protected group under ‘sex’ in the Constitution undermines the very definition of transgenderism – a person whose gender identity does not match the sex they were assigned at birth. The opening paragraph of this study emphasises the importance of differentiating between the two terms in affirming a transgender person’s identity.²¹⁸

Article 19(1)(a) of the Constitution of India pertains to freedom of expression and article 21 addresses dignity. These articles read together illustrate how dignity encompasses the diversity in self-expression and personal autonomy, including gender identity which in turn results in maintaining one’s dignity²¹⁹. Furthermore, this also means there has to be consideration for a third gender outside of the binary under the Constitution.²²⁰

A person’s gender can be expressed through dress, words, actions and behaviour, although gender expression is not limited to these factors.²²¹ The Court referred to the US case of *Doe v. Yunits et al*²²² to highlight the point that a person has the right to wear clothing that aligns with their gender identity to support protected speech and expression.

²¹⁵ *NALSA* (note 210 above) para 54.

²¹⁶ The Constitution of India, 1950. Articles 15 and 16.

²¹⁷ *NALSA* (note 210 above), para 59.

²¹⁸ Refer to page 1.

²¹⁹ *NALSA* (note 210 above) para 69.

²²⁰ *NALSA* (note 210 above) para 74.

²²¹ *NALSA* (note 210 above), para 62.

²²² The court cited the case ‘*Doe v. Yunits et al.*, 2000 WL33162199 (Mass. Super.), the Superior Court of Massachusetts, 2000 WL33162199.’

“by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with the gender. In addition, plaintiff’s ability to express herself and her gender identity through dress is important for her health and well-being. Therefore, plaintiff’s expression is not merely a personal preference but a necessary symbol of her identity.”

These sentiments read very similarly to the Pillay case mentioned in Chapter 2, while the court focuses on preservation of self-identity in *Doe v Yunis*, the Constitutional Court in the Pillay case emphasises the safeguarding of South Africa’s Constitutional values and democracy through its encouragement of cultural accommodations.²²³ The interpretation of self-expression outlined by the Superior Court of Massachusetts and adopted by India to illustrate that freedom of expression can include the freedom to express one’s chosen gender, can also be read in terms of South Africa’s Constitution. Learners should feel free to express their identity in school to realise the society envisaged in the Constitution.

As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture... [is a] pageant of diversity which will enrich our schools and in turn our country²²⁴.

Additionally, the Court referenced the applicability of the Yogyakarta principles due to its coherence with the provisions referenced of the Indian Constitution:

“[...] *Yogyakarta principles*, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country.”²²⁵

Following the NALSA judgment, the Transgender persons (Protection of Rights) Act, 2019 was enacted to address the social and cultural obstacles faced by transgender people in India. The legislation also follows through with the Court’s instruction to treat transgender persons as a third gender. Transgender persons are not a socially accepted group and do not experience equal treatment. They are often abandoned and have minimal means for survival or ways in which to maintain a livelihood. From a cultural perspective, identifying as transgender brings shame to the

²²³ *Pillay* (note 83 above) para 64. ‘A necessary element of freedom and of dignity of any individual is an “entitlement to respect for the unique set of ends that the individual pursues.” One of those ends is the voluntary religious and cultural practices in which we participate.’

²²⁴ *Pillay* (note 83 above) para 107.

²²⁵ *NALSA* (note 210 above) para 53.

family and affects one's marriage prospects. The Act therefore aims to address these issues²²⁶.

The Act establishes a National Council for Transgender Persons tasked with various responsibilities, all outlined in section 17 of the Act, including advising central government on the development of policies, programmes, legislation and projects related to transgender individuals; assessing the impact of initiatives aimed at achieving equality and full participation of transgender persons and; overseeing government department efforts as well as other organisations in addressing transgender issues and finally addressing grievances expressed by the transgender community.²²⁷ South Africa's own LGBTI National Task Team has a similar mandate, however their objective is more central to eliminating gaps within the criminal justice system and addressing human rights violations of the transgender community.²²⁸

In Canada, the issue of 'othering' was addressed, in which individualising the needs of transgender learners was feared to further exclude them. These two countries provide two potential options for inclusion in South African legislation, either explicitly protecting gender identity rather than leaving it to be inferred by the courts or providing explicit protection to a third gender that is recognised and affirmed in the legislation.

Jurisprudence and legislation addressing transgender students and the right to education

The case of *Jeeva M v State of Karnataka*,²²⁹ is relevant because it specifically addresses gender identity in the context of schools. The applicant petitioned various educational bodies including the Pre-University Education Department, Bangalore as well as the Karnataka Higher Education Examination Board to amend her name and gender marker on her Secondary School leaving Certificate.

²²⁶ 'Guide on the Rights of Transgender Persons in India' *Nyaaya*, available at <https://nyaaya.org/resource/guide-on-the-rights-of-transgender-persons-in-india/> accessed on 5 October 2023.

²²⁷ *Ibid.*

²²⁸ 'LGBTI National Task Team' 2018 available at <https://www.nationallgbtityaskteam.co.za/about-the-task-team/about-the-task-team-2> accessed on 30 September 2023.

²²⁹ *Jeeva M v State of Karnataka* 1211/2019 (EDN – RES).

The Karnataka High Court made reference to *NALSA v Union of India*²³⁰ and determined that the institutions concerned must act in accordance with the directions issued by the Supreme Court. The Court ordered the education department to have the applicant's documents amended by issuing a circular to relevant authorities, this type of amendment should not require transgender students to seek legal remedies for a name change.²³¹ The integration of a third gender into India's legislation eliminates margins for discrimination regarding which rights are applicable to whom.

India's National Education Policy of 2020 establishes a 'Gender- Inclusion fund' financed by the Government of India to adequately support the vision of equitable quality education for all girls and transgender students. The fund is intended to become available to States to finance resources and systems that will assist transgender children in gaining access to education. These resources are at the discretion of the Central government but include community-based interventions that address barriers to participation.²³²

The Samagra Shiksha Scheme boasts an alignment to and support of the goals of the Right of Children to Free and Compulsory Education Act, 2009 and the National Education Policy of 2020 as well as bridging social and gender gaps in school education.²³³ This will ensure that all children have access to education in classrooms that promote equality and inclusivity which will address diverse backgrounds, multilingual needs, varying academic strengths and encourage active participation²³⁴. An example of how the scheme intends to tackle the above variables is under NISHTHA (National Initiative for School Heads' and Teachers' Holistic Advancement). This is a nationwide program where teachers are trained to observe Gender Dimensions in the Teaching and Learning Process. This aids in the application of

²³⁰ *NALSA* (note 210 above).

²³¹ *Jeeva*(note 229 above), para 9.

²³² National Education Policy 2020 s 6(8).

²³³ 'Samagra Shiksha Scheme' 2018, available at https://samagra.education.gov.in/docs/samagra_shiksha.pdf accessed on 18 September 2023 at 2.

²³⁴ *Ibid* at 1.

learning devices that cultivate a more supportive and conscious classroom environment.²³⁵

India's approach to legislative consideration for transgender students is a well-rounded application of the States' guidelines outlined in the Yogyakarta Principles, the right to education in particular (principle 16).²³⁶ Firstly, principle 16 emphasises ensuring access to education that is inclusive and respectful of gender identity amongst other variables.²³⁷ The *Jeeva M* case provides an excellent example of the Court's efforts to ensure respect for gender identity by issuing a circular to relevant authorities. Secondly, ensuring access to opportunities including adults who have already suffered discrimination in the educational system by classifying transgender students as previously socio-economically disadvantaged and therefore attempting to bridge the gap.²³⁸ Additionally, ensuring that education methods serve to enhance understanding and respect for gender identity such as NISHTHA which is intended to train teachers to observe gender dimensions ensuring a more conscious learning environment.²³⁹

The significant strides taken in legal advancements for transgender learners, are exemplary. The key legal milestones taken by the courts in issuing a circular to the education department to amend the gender of Jeeva on her education certificates affirmed her right to education free from discrimination. The convergence of constitutional empowerment articles unpacked by the *NALSA* judgment and transgender-specific considerations in the National Education Policy as well as the educational scheme to ensure equal opportunity and fair treatment within the school system, marks a transformative shift towards legislative inclusivity in India.

General advancements in legal gender recognition and good practices from other jurisdictions

²³⁵ R Sabha 'Gender inclusive holistic education in NEP' *Press Information Bureau Government of India*, 3 August 2022, available at https://www.education.gov.in/sites/upload_files/mhrd/files/RU1937_sel.pdf accessed 30 September 2023.

²³⁶ "Everyone has the right to education, without discrimination on the basis of, and taking into account, their sexual orientation and gender identity."

²³⁷ International Commission of Jurists "The Yogyakarta Principles Plus 10" (note 38 above) principle 16(A).

²³⁸ *Ibid*, principle 16(H).

²³⁹ *Ibid*, principle 16(D).

Argentina passed the 'Gender Identity and Health Comprehensive Care for Transgender People Act.' This ensured gender recognition to transgender people without psychiatric, medical, or judicial intervention. The act also provisioned the right to access free, voluntary transitional healthcare. This is yet to occur in South Africa, as outlined in Chapter 2, the Alteration of Sex Description Act requires medical intervention.

Malta passed the 'Gender Identity, Gender Expression and Sex Characteristics Act', which has similar consideration for omission of peripheral intervention. This act acknowledges the capacity of minors' self-determination of gender reassignment whilst balancing parental participation and the best interests of the minor child. It also establishes a group working on transgender health to implement international best practices.²⁴⁰

Australia implemented an anti-violence project to provide education of gender identity and support to transgender people reporting incidences of violence and accessing legal assistance. Similar forms of education of the greater community and support of transgender persons have been reported in the Philippines, Ecuador and Zambia.²⁴¹

VI. Conclusion

The US provides a compelling perspective of how different areas of law can be extended and applied to the protection of the transgender community. Although much of this study has engaged with examples from disability law, it opens the possibility of engaging with various areas of law to address the discrimination and infringement of basic rights.

It has been demonstrated that Canada and India are examples of countries with progressive legislative frameworks that are both inclusive and empowering to the transgender community. Both jurisdictions have clear and intentional wording making

²⁴⁰ Divan (note 11 above).

²⁴¹ Ibid.

specific reference to the empowerment of 'gender identity'. Canada's Human Rights Code has reasonable accommodation written into the equality clause that ensures equal opportunity to gender-diverse persons in all social aspects of their lives including education, this is a result of the ascension of Bill C-16. The example of Bill C-16 and the harmful narrative that followed about the transgender community was illustrative of the dire need for protective legislation. It was determined that reasonable accommodation within the school environment would lead to differential treatment of transgender students and instead, a policy that is targeted at non-discrimination and creating a safe environment for all students would be more well-received. In single-sex-schools, including the example of the UK, the scope for inclusion is far narrower considering this type of learning model. Schools are permitted to reject gender-diverse students without the practice being classified as discriminatory.

India has multiple affirming provisions in its Constitution which were interpreted by the Court in the *NALSA* judgment. The use of gender-neutral terms and the rights of dignity, equality and freedom of expression are all empowering to the right to express one's gender identity. Further, the Transgender Persons Act established through the *NALSA* judgment empowered a council to address the obstacles faced by transgender persons. India's progressive approach to addressing discrimination is exemplary and the considerations made in education redefines the extent of this. India's classification of the transgender community as previously 'socio-economically disadvantaged' ensures equal opportunities in education with fair treatment by teachers and school staff. The *Jeeva M* case set a precedent for educational bodies to amend gender and name changes ensuring that in future, students will not have to seek legal recourse.

Chapter 2 demonstrated that empowering gender identity fortifies all the rights that a transgender person is entitled to. However, the *Mphela* case demonstrated that South African legislation contains blanket terms that may be interpreted to protect gender identity if it is proven that one of the basic rights explicitly mentioned in the Constitution has been infringed. For example, it was inarguable that the right to dignity was violated. The Court in *Jeeva M* considered it inexcusable for a student to be forced to approach the courts to have government documents reflect their true identity. This was remedied for all future cases by issuing a circular and followed the precedent set by the courts, to affirm gender identity, in the *NALSA* judgment. This comparison best

contextualises the differences between South Africa's legislative framework and the jurisdictions discussed in this chapter. These jurisdictions have actively sought out mechanisms to incorporate explicit protections for gender identity, whether this is through application of principles from adjacent areas of law (protection under the ADA), instituting amendments to domestic legislation for explicit inclusion of gender identity (Canada's domestic legislation) or through landmark judgments (*NALSA*) that give rise to brand new legislation that can enact the extent of protection envisioned when the Court reviewed relevant law in the judgment (Transgender Persons Act).

Chapter 4

Concluding Remarks and Recommendations

I. Introduction

This study endeavoured to explore whether South African schools existing legislative and policy framework effectively safeguards transgender children against discrimination and infringements of their right to education. Furthermore, it sought to consider available protections in comparative jurisdictions as potential examples of legal developments that can extend to South Africa's legal framework. This study has revealed both the challenges and progress made in advocating for the rights and well-being of transgender children in the school environment, through the examination of the legal frameworks and social factors. Several key findings and insights emerged in the chapter breakdowns that follow.

II. Summary of Chapter findings

Chapter 1 Provided background and intention of the study as well as identified the limited literature addressing the lack of legal protection available to transgender children within the school environment.

Chapter 2 analysed the international frameworks as well as the domestic legislation and policies that could be applied in the context of the protection of the right to non-discrimination and basic education. The *Mphela* case was used as an example of the right to be protected from discrimination in the school environment and how the harassment she faced as a result of the infringement of her rights to equality, dignity, and psychological integrity ultimately led her to leave school therefore also infringing on the right to basic education. This demonstrated the lived reality of human rights infringements of transgender children and why this topic needed to be explored further. *September v Subramoney*, the Pillay case and the *Oortman* case were used to interpret the rights of equality, freedom of expression and the right to education and these cases were further used to demonstrate protections of equality, freedom of expression and basic education in the context of transgender children. The Western

Cape Educational Guidelines and SADTU's draft for Gender Policy were evaluated and criticised, although both documents are exemplary, they leave much to be desired.

Although not all scholars agree about the impact of the *September* case, it is a significant judgment for South Africa's jurisprudence. The Court incorporated discussion on the Yogyakarta principles and briefly made mention of International Rights for Prisoners. The court also referred to the *NALSA* judgment in which the Supreme Court of India included gender identity as part of the definition of dignity. The Court's analysis of relevant pieces of legislation from varying legal frameworks was far more methodical than the approach taken in the *Mphela* case and the Court's finding in favour of the applicant to express her gender identity affirmed her right to dignity, equality and freedom of expression.

In **chapter 3** the foreign law example of Canada was used. The parallels between the layout of the Human Rights Act was compared to South Africa's equality clause. The explicit integration of 'gender identity and expression' was explored as well as the criticism around affirming gender identity. In India, the National Education Policy 2020 emphasised efforts to bridge the gaps in education for previously socio-economically disadvantaged groups specifically women and transgender persons. There is also the implementation of the Transgender Persons Act which specifically addresses efforts to protect transgender rights. Further, there is the landmark judgment from *NALSA* and the Court's exemplary call to action of education departments in *Jeeva M.*

The US provided a compelling example of how the American Disabilities Act can extend legal protection to transgender people. It was determined that this is an appropriate application of law if disability is defined by society's limited perception of an individual rather than a bodily defect. It was observed that a Disability Act in South Africa could extend protection to transgender children in the school environment if disability is based on the definition mentioned above due to the potential scope for accommodations.

Canada, however, is a clear example of the dangers of individualisation and singling out a single group in order to uphold and protect their rights. It is therefore suggested that a policy is drafted for schools in which there are specific guidelines that create a safe, supportive and affirming learning environment for all students, and this

is likely to have more positive receptivity by the school community as a whole. Based on Martino et al's findings, individualisation is dependent on transgender students' voluntary declaration and self-visibility²⁴². An inclusive learning model should contain focused interventions and educational efforts concerning gender identity and diversity and therefore aim to be inclusive of everyone and not necessarily require reasonable accommodation for each potential group of marginalised students.

III. South African jurisprudence findings

A common thread in South African jurisprudence was reasonable accommodation, whether such accommodations pertained to disability (*Oortman*) or cultural accommodation as it was categorised in the *Pillay* case. The courts displayed a propensity towards inclusivity and implementing measures as far as possible to ensure that such accommodations pivoted towards the embodiment of fundamental rights to equality, dignity and freedoms of the Constitution. However, in the *Mphela* case the court appeared to distinguish and interpret these rights in a vacuum which meant that the interrelation between gender identity and the right to education was not considered at all. The *September* case, however, seemed to classify gender identity as an analogous ground by demonstrating the correlation between infringements to the rights of dignity, equality and gender identity. This leaves the potential for future legal proceedings to consider gender identity as a ground worthy of protection.

At this stage, however, South Africa's legislation lacks the explicit protection of gender identity in order to uphold and fulfil the right to education. Further proponents for legislative protection for the transgender community drawn from foreign jurisdictions have been discussed below.

IV. Recommendations

The question arises, what more does South Africa require legally to empower and protect transgender persons from an infringement of their education and related rights?

²⁴² Martino... et al (note 198 above) 761.

First, India established a Protection of Rights Act for Transgender persons that established a council to advise the government on policies and legislation to empower individuals. In South Africa legislation that serves a similar purpose could be established in which gender identity or a third gender as demonstrated in Canada, is emphasised as a protected ground from unfair discrimination. Further, such legislation could establish a more narrowed version of the LGBT Task Team, one specific to addressing the infringements of their rights as well as outsourcing research from organisations like Gender Dynamix to ensure that they are engaging with relevant stakeholders.

Second, the University of Pretoria named its Transformation Office and Centre for Sexuality, Aids and Gender as role players in their vision for transformation and inclusivity of gender diversity²⁴³. A proposed Act could also implement measures for government-funded role players to offer counselling and support, specifically tailored to address their needs.

Third, India categorises transgender persons as previously socio-economically disadvantaged, in the same bracket as women, to ensure equal opportunity for education. Section 8 of PEPUDA prohibits discrimination on the grounds of gender which includes but is not limited to ensuring that women have equal access to employment opportunities, education health, and services. It is submitted that an amendment can be made to this provision to prohibit unfair discrimination based on gender and gender identity as envisioned by Albertyn et al in their submission for amendments to PEPUDA. This is consistent with the submission made by Sloth-Nielsen that gender identity is analogous ground.

Fourth, Although Indian jurisprudence argues that gender identity forms part of 'sex.' This is a difficult argument to maintain in the context of single-sex schools, since admittance of students is based solely on biological sex, without consideration for gender identity. It has also been established through the application of the single-sex school example in Canada that 'sex' and 'gender' are not the same and there is a danger in conflating gender identity with sex. It is therefore suggested that under the list of grounds against unfair discrimination in the South African Constitution under

²⁴³ University of Pretoria 'The Trans Protocol' 2021 at 14 accessed at https://www.up.ac.za/media/shared/1/ZP_Files/rt115_21-trans-protocol.zp202072.pdf accessed on 20 December 2023.

sections 9(3) and (4), that 'gender identity or expression' is also added as most of the legislation and policies discussed have a provision that refers to 'gender identity' as a specific factor requiring protection. This further substantiates the argument above that Section 8 of PEPUDA should include 'gender identity.'

Fifth, the Education Department could establish a national Anti-Discrimination Policy for schools with gender identity written in as one of the factors that must be protected, as well as teacher sensitivity training for diverse groups to encourage a more inclusive learning environment. This will be more widely received by parents because it is intended for the protection of the school community at large and will eliminate leeway for discriminatory practices in Codes of Conduct. Further investigation is required on a uniform and fair approach for single-sex public schools on how to accommodate transgender children, this will be fairly complex considering the current policies and legislation (The WCED guidelines and The National Education Policy Act) that leave the discretion of admittance of gender diverse students to the school governing bodies. An Anti-Discrimination Policy could establish clear guidelines on what constitutes discrimination when admitting learners to single-sex schools.

Sixth; In respect of the WCED guidelines, the LRC's submission that schools should establish a detailed protocol outlining appropriate procedures for handling disclosure about gender identity is supported. If appropriate, the principal can be consulted for guidance and support with the stipulation that no personal information is divulged, and a provision that gives the student the option to consent to sharing information with the principal as a preliminary step may also be considered. As part of this protocol the school may be obligated to compile a referral list of professionals who can assist the school and students with navigating the school's approach to student support.²⁴⁴ However, it is important to note that each student is different and this must be handled on a case-by-case basis because transgender students are required to be open about their identities in order for the school to engage with their needs.

²⁴⁴ Legal Resources Centre et al (note above) 16.

V. Conclusion

This study demonstrated that validating gender identity is an essential element of personhood (human development processes, education and health) without which the quality of an individual's life becomes extremely limited. Legal protection of gender identity is therefore in direct fulfilment of the right to education, equality, dignity and freedoms of the Constitution. South Africa's legislative framework at present, lacks explicit legal protection for gender identity and as a result, it cannot be stated that it is empowering to the protection of transgender children in schools. The developments in South African jurisprudence and draft policies are too recent to gauge any resultant improvements in the lives of transgender people. However, the current legislative framework, including jurisprudence, lays a solid foundation for the enactment of explicit protective legislation for the transgender community which read together with international legal principles will undoubtedly change the landscape and accessibility for legal protection of gender identity and therefore uphold the right to education.

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Miss Tremelle Govender (218004141)
School Of Law
Howard College

Dear Miss Tremelle Govender,

Original application number: 00019056

Project title: A critical analysis of the legislative and policy response to protect transgender children in South African schools, including single- sex schools.

Amended title: A critical analysis of the legislative and policy response to protect transgender children in South African schools.

Exemption from Ethics Review

In response to your **amendment** application received on 27 July 2023, your school has indicated that the amendment has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Matthew Blain Kimble
obo Academic Leader Research
School Of Law

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Website: <http://research.ukzn.ac.za/Research-Ethics/>