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A deeper understanding of SOGIESC rights in the South African context: Does PEPUDA adequately protect the rights of transgender persons?

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Summary: *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) is a cornerstone of South Africa's anti-discrimination framework, aiming to uphold equality and prevent unfair treatment. However, its capacity to protect transgender individuals is hindered by several lacunae. This article critically examines whether PEPUDA adequately safeguards the rights of transgender persons, exploring the limitations of its current framework in addressing the lived realities and systemic challenges faced by this marginalised community. Drawing on principles of transformative constitutionalism, the article argues for a substantive interpretation of equality that goes beyond formal protections to dismantle entrenched structural inequities. It advocates for legislative reforms aligning PEPUDA with the Constitution's vision of substantive equality and international human rights standards. By proposing a nuanced legal and interpretive approach, the article seeks to bridge the gap between legislative intent and practical inclusivity, ensuring that transgender individuals can fully enjoy their rights and dignity in a democratic South Africa.*

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Key words: *PEPUDA; transformative constitutionalism; transgender rights; equality; SOGIESC; South Africa*

1 Introduction

1.1 Context

The enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) marked a new era towards the attainment of substantive equality in South Africa. As indicated in the long title of the Act, it gives effect to section 9 of the Constitution of the Republic of South Africa, 1996 (Constitution). This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who, among others, were deprived of their human dignity and continue to endure the consequences thereof. While the intended goals of PEPUDA seem noble, it is arguable that at times they are lofty and unattainable at best. As suggested by Kok:¹

The Act will likely not achieve its stated goals of establishing a more caring or more equal South African society. On the other hand, for those individual claimants so inclined, a potentially very powerful tool has been created to address insular, discrete instances of unfair discrimination.

There are two dichotomies raised by Kok's statement. On the one hand, one is to reconcile oneself with the possible reality that the Act remains mere words on paper, incapable of bringing about real change for every person relying on the Act. On the other hand, one has to find solace in the fact that change can be achieved by individual complaints under PEPUDA that might affect an entire group marginalised by the problem presented before the equity courts. The problem with the second part of that sentiment is that it fails to recognise that, at times, the victory of one is not a victory for an entire marginalised group.

This seems to be the case insofar as the issue of discrimination against people in the sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) community (otherwise commonly known as lesbian, gay, bisexual, transgender, queer, intersex and other gender and sexual minorities (LGBTQI+) is

¹ A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for legislative reform' (2008) 24 *South African Journal on Human Rights* 458.

concerned. For clarity, the term 'SOGIESC' gained prominence in human rights discourse in the mid to late-2010s.² The term became increasingly recognised in documents and reports from the United Nations (UN), particularly through the work of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, established by the Human Rights Council in 2016.³

My argument is that an individual claim should, for all intents and purposes, apply to the entire marginalised group instead of being viewed as an individual victory. However, the Act does not explicitly include 'gender identity' as a protected category. To date, there have been at least four notable decisions penned by the equality courts regarding SOGIESC issues. For purposes of this article, I limit my focus to three of the four decisions, namely, *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*;⁴ *September v Subramoney NO & Others (September)*;⁵ *Lallu v Van Staden (Lallu)*;⁶ and *Mphela v Manamela & Others (Mphela)*.⁷ The last two cases are specifically honed in as the focus of this article is on transgender persons only and not on all sexual and gender minorities. These cases explore the prevailing attitudes of South Africans towards the SOGIESC community, in particular, transgender persons, and the intolerance and discrimination that persist in South African society. Although South Africa's constitutional and legislative framework formally guarantees equality and protection from discrimination, transgender persons continue to encounter widespread social and structural

- 2 R Bagi 'A legal history of SOGIESC' in AR Ziegler, ML Fremuth & B Esperanza Hernández-Truyol (eds) *The Oxford handbook of LGBTI law* (2014), https://www.coe.int/en/web/sogi/home/-/asset_publisher/DBbuuXVUomKf/content/new-report-report-sheds-light-on-the-persistent-challenges-in-combating-sogiesc-based-hate-crime-in-europe (accessed 26 December 2024); CM/Rec (2010) 5 Recommendation of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies, <https://search.coe.int/cm?i=09000016805cf40a> (accessed 26 December 2024); United Nations Development Programme (UNDP) November 2022/PGA February 2022 'Advancing the human rights and inclusion of LGBTI people: A handbook for parliamentarians', https://www.undp.org/sites/g/files/zskgke326/files/2022-03/UNDP_LGBTI_Handbook_Part_I_EN_0.pdf (accessed 26 December 2024).
- 3 Created through Human Rights Council Resolution 32/2 in June 2016 for an initial period of three years, the mandate was renewed in June 2019 under Resolution 41/18 and in July 2022 under Resolution 50/10. The current mandate holder is Graeme Reid, <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity> (accessed 26 December 2024).
- 4 (2009) 30 ILJ 868 (EqC). This case will not be discussed as it relates to sexual orientation.
- 5 [2019] 4 All SA 927 (WCC).
- 6 Roodepoort Equality Court, Case 3 of 2011.
- 7 (2016) Case 1/2016 Seshego Magistrates Court (Equality Court).

exclusion.⁸ Persistent misconceptions about gender, sex and gender identity shape societal attitudes and influence the interpretation and application of equality laws. In this context, PEPUDA occupies a pivotal yet complex role. While it was enacted to advance substantive equality and counteract discrimination, its practical impact depends on how gender diversity is understood and accommodated within broader social and institutional contexts. This article, therefore, explores the intersection between societal attitudes and the legal framework governing equality, assessing whether PEPUDA operates as an effective instrument for the protection of transgender persons or whether its implementation reflects and reinforces prevailing biases in South African society.

1.1.1 Terminology

It is important to define certain terms to understand the content of this article. 'Gender identity' refers to a person's deeply felt, internal and individual experience of gender, which may or may not correspond to the person's physiology or designated sex at birth.⁹ The Yogyakarta Principles, a non-binding international human rights law instrument initially adopted in 2006 and updated in 2017 outlining a set of international principles relating to sexual orientation and gender identity, further explains that gender identity includes 'the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'.¹⁰ Furthermore, gender identity is not the same as sexual orientation. When one discusses gender identity, it usually is in the context of the individual being transgender. 'Transgender' is an umbrella term used to describe people whose sense of their gender is different to the sex that they were assigned at birth.¹¹ For the purposes of this article, I will refer to gender identity in the context of being transgender.

8 G van Heerden 'An in-depth look into the quality of life of LGBT South Africans', <https://irr.org.za/reports/occasional-reports/files/an-in-depth-look-into-the-quality-of-life-of-lgbt-south-africans.pdf> (accessed 13 October 2025).

9 World Health Organisation, https://www.who.int/health-topics/gender#tab=tab_1 (accessed 25 December 2024).

10 <https://yogyakartaprinciples.org/> (accessed 25 December 2024).

11 <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/transgender-people> (accessed 25 December 2024); JM White Hughto, SL Reisner & JE Pachankis 'Transgender stigma and health: A critical review of stigma determinants, mechanisms, and interventions' (2015) 147 *Social Science and Medicine* 222, 223; M Davidson 'Seeking refuge under the umbrella: Inclusion, exclusion, and organising within the category transgender' (2007) 4 *Sexuality Research and Social Policy* 60-80.

1.1.2 *Problem statement and objectives*

From an analysis of several provisions therein, PEPUDA points to an aim by the legislature to bring about changes in the 'hearts and minds' of South Africans.¹² According to the Preamble of the Act: 'This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.'

In attempting to achieve this goal, there is an obvious need for transformation to effect societal and legal change. The Act thus is primarily aimed at transforming South African society.¹³ Therefore, one can envisage the usage of the principles of transformative constitutionalism to underscore the importance of developing PEPUDA to fall in line with constitutional imperatives and not merely envisage the current legislative framework as being indicative of transformation having been achieved.

For years, transgender persons have been existing on the fringes of society, being left to navigate an existence of stigma, discrimination and marginalisation. Gender diversity is often illegitimately repressed, under the umbrella of culture, religion and tradition.¹⁴

PEPUDA was designed as a cornerstone of South Africa's anti-discrimination framework, aiming to promote equality and prevent unfair discrimination. Its provisions cover both public and private spheres, addressing various grounds of discrimination, including gender and sex. As aforementioned, however, the Act does not explicitly include gender identity as a protected category. This gap leaves transgender persons vulnerable to discrimination that is not explicitly recognised or adequately addressed under the current legislative framework. One can counter this argument in the recognition that, to their credit, the drafters of PEPUDA ensured that it contains an open list of prohibited grounds instead of having to follow the 'pigeon-hole' approach whereby courts 'invent' or 'discover' new grounds deserving of protection, without having to await legislative endorsement of such grounds.¹⁵ Thus, one could argue that the protection afforded to those in terms of their gender

12 A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000: Court-driven or legislature-driven societal transformation?' (2008) 19 *Stellenbosch Law Review* 126.

13 Kok (n 1) 451.

14 https://www.ohchr.org/sites/default/files/GenderIdentityReport_SOGI.pdf (accessed 26 December 2024).

15 Kok (n 1) 448.

identity under the umbrella of 'any other ground' as per section 1 of the Act is the following:

'Prohibited grounds' are –

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) 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).

However, the stigma against transgender people often results in physical violence or bodily harm, sexual violence or assault, and verbal or emotional abuse.¹⁶ Despite the increased attention on gender identity over the past few years, it appears that transgender individuals require an additional focus to understand the personalised impact of their existence.¹⁷ Furthermore, while transgender persons may form part of the LGBTQI+ community, their inclusion in the community has been contentious, with transgender people possibly being treated as an out-group.¹⁸ While there have been no empirical studies to suggest this, it *seems* that issues of sexual orientation and the protection of women as a response to sexism (gender discrimination) often take up much of the bandwidth of protection from harassment and discrimination – this could of course, be an unsubstantiated claim based on the visibility, litigation and advocacy, in which there are overlaps and shifts in these groups. This is not to say that the aforementioned groups are not worthy of such protection; it is merely an observation that transgender issues are often left 'unseen'. Besides the cases listed above, there are no other reported cases regarding matters related to transgender persons. There is an argument to be made that 'gender identity' falls squarely on the ground where discrimination based on the fact that it indeed does (i) cause or perpetuate systemic disadvantage; and (ii) undermines human dignity as articulated in part in sub-section

16 C Weir & N Piquette 'Counselling transgender individuals: Issues and considerations' (2018) 59 *Canadian Psychology* 252-261; J Bradford and others 'Experiences of transgender-related discrimination and implications for health: Results from the Virginia Transgender Health Initiative Study' (2013) 103 *American Journal of Public Health* 1820-1829; TM Witten & AE Eyler 'Hate crimes and violence against the transgender' (1999) 11 *Peace Review* 461-468.

17 Weir & Piquette (n 16) 252.

18 Weir & Piquette (n 16) 256; EG Morrison 'Transgender as ingroup or outgroup? Lesbian, gay, and bisexual viewers respond to a transgender character in daytime television' (2010) 57 *Journal of Homosexuality* 650-665.

(b) of the definition above. Discrimination based on gender identity perpetuates systemic disadvantage and undermines the dignity of transgender persons. So, in the short term, equality courts should be able to recognise 'gender identity' as a further prohibited ground. In the medium term, Parliament should explicitly include 'gender identity' as a prohibited ground, as Parliament did in the Hate Crimes and Hate Speech Act 16 of 2023 (Hate Crimes and Hate Speech Act).¹⁹ Adding this definition of 'gender identity' explicitly in this manner in PEPUDA could perhaps curb the stigma that transgender persons endure (at least in the equality courts in the interim) by bringing transgender matters squarely into the mainstream. However, this does not mean that this will end stigma entirely. In this regard, Kok draws on the words of Dror in stating that '[l]aw seems to be the quickest and cheapest way in changing a society, and that is why governments too readily turn to the law when they wish to dispose of a social ill. In this belief, governments are probably usually mistaken.'²⁰

This article aims to critically examine the role of PEPUDA in advancing the protection of transgender persons within South Africa's equality framework. Specifically, it seeks to evaluate how a transformative interpretation of PEPUDA by the equality courts can be used to challenge entrenched binary conceptions of gender, reshape societal attitudes toward gender identity, and fulfil the Act's constitutional purpose of achieving substantive equality. The Act implicitly assumes that the equality courts will address at least a significant number of incidents of discrimination effectively.²¹ While it indeed is a useful tool in attempting to attain justice for those who can take their matters before the courts, it will likely not affect the change of the mindset of those on the ground if these are once-off matters heard in small courts for a marginalised group that has yet to make its presence known in the larger South African landscape. Coupled with this limitation is the underlying implication of an individual lawsuit that what is being complained about is somehow abnormal, while the 'truth' is that discrimination is the norm.²² Thus, I argue that in its current state, PEPUDA cannot effect social change where transgender persons are concerned, at least not on its own. There is a need for social change through the lens of a transformative

19 See the definition of the Hate Crimes and Hate Speech Act under prohibited grounds; (i) sexual orientation, gender identity or expression or sex characteristics are all mentioned as grounds therein.

20 Y Dror 'Law and social change' (1958) 33 *Tulane Law Review* 787-798; Kok (n 1) 458.

21 Kok (n 1) 455.

22 Kok (n 12) 447.

reading of the Act and the judgments before the equality courts to achieve transformation. Social change can be understood to be

- (a) an alteration in individual patterns of behaviour;
- (b) an alteration in group norms or relational patterns between individuals and groups and between groups;
- (c) an alteration in patterns of relationships between individuals or groups to the political, economic or social system; and
- (d) an alteration in a given society's 'basic values'.²³

Thus, this article aims to assess the tools which can be utilised to make PEPUDA more efficient in the lives of transgender persons and the push towards social change using the legal framework at large.

2 The 'toolbox' – Transformative constitutionalism

2.1 Introduction

Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law: 'reform', but something short of or different from 'revolution' in any traditional sense of the word.²⁴

Through the use of transformative constitutionalism, Klare thus postulates that the Constitution should go beyond merely enacting formal legal changes – it should also aim to address deep-seated injustices, such as inequality and oppression, and create a society founded on the ethos as it is reflected in section 1(a) of the Constitution.²⁵ The Constitution imposes positive or affirmative duties on the state to, among others, support individual self-realisation.²⁶ The Constitution thus is a tool that expresses a particular solicitude for and commitment to assist and protect especially vulnerable groups.²⁷ PEPUDA, by extension, should expand on the goals that the Constitution aims to achieve. PEPUDA's existence gives credence to Watson's observations that '[l]egislation is a better "instrument" than the judiciary in developing the law: When law develops from

23 JB Grossman & MH Grossman (eds) *Law and change in modern America* (1971) 4.

24 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150.

25 Sec 1(a) of the Constitution provides: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms.'

26 Klare (n 24) 154.

27 Klare (n 24) 155.

precedent, the law must always wait upon events, and, at that, on litigated events; it will always be retrospective.²⁸

If Watson's observations are to be taken as true, several proposals can be made to ensure that PEPUDA is not only seen to be protecting the rights of vulnerable groups such as transgender persons before litigation even takes place, but that its provisions are living and ever-changing to give effect to a transformative interpretation thereof. It must, therefore, be interpreted in a way that anticipates and protects lived realities before any 'problem cases' emerge. The question arises as to how this can be achieved. Should it be achieved by the equality courts in their interpretation of PEPUDA, Parliament in making amendments to PEPUDA, or both? The chapter in PEPUDA that deals with the promotion of equality is not yet in force; thus, all PEPUDA allows for currently is equality court-driven transformation.

With regard to transformative interpretation, to this effect, Langa J stated in relation to views of transformation that the 'traditional metaphor of the "bridge" is misleading as it seems to suggest that transformation is a temporary event, that at some point we will reach the other side of the bridge'.²⁹ Langa further states that change is constant and new ways must constantly be explored, created, accepted and rejected due to the unpredictability of change.³⁰

Therefore, one must not view PEPUDA through rose-tinted glasses and laud it for simply being in existence. This makes the words of Langa even more relevant: 'When we slip into a useless self-congratulatory complacency, a misplaced euphoria that where we are now is the only place to be.'³¹

2.2 The 'toolbox' at a glance

Klare's work on transformative constitutionalism reimagines the role of constitutional law as a vehicle for deep societal change. By challenging traditional legal formalism, Klare's vision advocates a progressive, justice-oriented approach to constitutional interpretation, emphasising the importance of addressing systemic inequalities and fostering a more egalitarian society.³²

28 A Watson 'Comparative law and legal change' (1978) 37 *Cambridge Law Journal* 323-324.

29 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351-360.

30 Langa (n 29) 354.

31 Langa (n 29) 360.

32 Klare (n 24) 151.

Without addressing systemic inequalities, the goals of transformation may remain aspirational – this is one of the challenges that plague transformative constitutionalism as a ‘vehicle for deep societal change’. Another challenge in utilising the toolbox to its full extent is that transformative constitutionalism requires balancing societal transformation with the need for legal certainty and stability. This tension can complicate judicial decision making. Furthermore, traditional legal cultures, especially those influenced by apartheid or colonial histories, may resist the radical changes demanded by transformative constitutionalism. Lawyers and judges may struggle to adopt a progressive interpretive approach. Klare identified the ‘disconnect’ between the Constitution’s transformative aspirations and the conservative character of South African legal culture.³³ So, how is one to overcome these challenges?

Klare argues for a shift from formal legalism, that is, adherence to rules and procedures, to substantive justice, where the focus is on the actual realisation of constitutional values, such as equality. This involves interpreting laws in a way that prioritises their social impact over rigid doctrinal consistency.³⁴ This, therefore, means that the legal framework must take a progressive and imaginative interpretive approach that aligns with constitutional values. I would, however, be remiss not to recognise the obscuring of lines between law and politics in using this toolbox. Transformative constitutionalism blurs the boundaries between law and politics.³⁵ Law is not a neutral arbiter, but a tool for political and social change. This calls for a contextual and value-laden interpretation of legal norms. To this end, legislation must be constitutionally imagined as a tool in the toolbox to further the aims of the end-user (that is, the party being unfairly discriminated against) of said tool. It must give credence to equality in living, social and economic circumstances and opportunities needed to experience human self-realisation.³⁶

Transgender persons are often viewed as ‘other’ – a deviation from the ‘norm’ and a threat to the binary construction of sex and gender. The term ‘othering’ describes the act of labelling and defining a person as a subaltern;³⁷ native, as someone who belongs to the socially subordinate category.³⁸ The process of ‘othering’ may find its

33 As above.

34 As above.

35 As above.

36 Klare (n 24) 154.

37 This is a post-colonial term that was brought to the fore by AF Gramsci, who was an Italian Marxist philosopher, journalist, linguist, writer and politician.

38 A Bullock, S Trombley & A Lawrie (eds) *The new Fontana dictionary of modern thought* (2000) 620.

application in systems of patriarchy and cisgenderedness. By othering transgender persons, society prevents them from experiencing human self-realisation. One could argue that (based on the paucity of jurisprudence on the matter) South Africa lacks comprehensive jurisprudence explicitly linking gender identity to human dignity. While PEPUDA prohibits discrimination based on gender and sex, the recognition of gender identity remains underdeveloped. How does one then go about using PEPUDA and the equality courts to develop this area of the law in a meaningful manner that gives effect not only to the equality of transgender persons but also gives effect to the restoration of the dignity of the transgender person affected by discrimination, stigma and marginalisation? The desired outcome is that the judgments of the courts bring about substantive change to a marginalised group to protect their right to equality and dignity as per the rights in the Bill of Rights; furthermore, to add to the jurisprudence in a manner that would include the protection of gender identity as an explicitly protected ground under PEPUDA.

The reason, therefore, is that the process of othering transgender persons has not only allowed human rights violations to be perpetrated against them but, in turn, it has robbed them of their dignity. Developing a person's individual worth also directs society to consider other fundamental rights. That is, dignity together with these rights creates an 'affirmative and mutually supportive' constitutional basis to pursue the development of an individual's worth further.³⁹ Dignity – while being a difficult concept to accurately define⁴⁰ – requires all to recognise and respect the worth of every individual, regardless of their standing in society.⁴¹ However, dignity must be viewed not only as refraining from inhumane, insulting or humiliating conduct in giving effect to the worth of individuals.⁴² Dignity also relates to the development of the worth of individuals.⁴³

39 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 113; *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs & Others; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35.

40 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) para 28.

41 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* 2020 (1) SA 1 (CC) para 45.

42 CJ Visser 'Revisiting the constitutionalisation of the common law of personality: Transformative constitutionalism and *Le Roux v Dey*' (2020) 36 *South African Journal on Human Rights* 248-249.

43 *Ferreira v Levin* 1996 (1) SA 984 (CC) para 49.

3 PEPUDA in action – Case law

3.1 Context

PEPUDA aims to facilitate the socio-economic transformation of South Africa and to create a human-centred South African society.⁴⁴ PEPUDA's objectives as well as its constitutional origin mean that the remedies that the Act seeks to provide through the establishment of equality courts must be accessible to all.⁴⁵ Equality courts only hear cases relating to unfair discrimination, harassment and hate speech based on several prohibited grounds as previously mentioned in paragraph 1(c) of this article. Upon a reading of the Act, however, it seems that there is a heavy emphasis on the protected grounds of race, gender and disability.⁴⁶ Section 4(2)(a) of the Act may provide a better understanding as to why these three prohibited grounds are given such key priority, as it acknowledges the history of colonialism, apartheid and the role of the patriarchy in South Africa.⁴⁷ While this context is important given the violence perpetuated and still present in post-democracy South Africa, there is a danger that, therefore, there is a hierarchy of oppression or at the very least a clear focus on what constitutes a 'serious' instance of discrimination and inequality.

The framing of this area of the law could benefit from clearer legislative and judicial developments regarding gender identity. To date, there have been only three matters brought to the attention of the equality courts regarding discrimination based on gender identity. Is this indicative of a society accepting of transgender persons? Or is this a false positive? Is it an invisibility cloak shielding past, present and future perpetrators of discrimination against transgender persons from facing consequences before the law in terms of PEPUDA? It is clear from the wording of the Act that one of the aims of the equality courts was to create an inexpensive, accessible, informal dispute resolution mechanism.⁴⁸ However, I am inclined to believe that the informality of the system in the equality courts may contribute to the blasé manner in which the courts are

44 L Botha & A Kok 'An empirical study of the early cases in the pilot equality courts established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2019) 19 *African Human Rights Law Journal* 319.

45 Botha & Kok (n 44) 335.

46 Secs 2(c), 4(2)(a), 7, 8, 9 and sec 28 of PEPUDA, to name a few.

47 Sec 4(2)(a) of PEPUDA: 'The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy.'

48 A Kok 'A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' LLD thesis, University of Pretoria, 2008 9.

treated by society at large. In 2021, according to a research report of the National Research Fund (NRF) South African Research Chair in Equality, Law and Social Justice, School of Law, University of the Witwatersrand: 'Due to the deliberate informality and accessibility of the equality court, particularly at magistrate's court level, complainants and consequences of complaints vary, although the core content of complaints remains largely unvaried.'⁴⁹

In 2004 and 2025, respectively, only six matters had been handed down before the equality courts between January and August.⁵⁰ One must also keep in mind that these only reflect the number of decisions selected and provided by the courts. Furthermore, the Department of Justice and Constitutional Development (DoJ) also had seven equality engagements with the public during the 2023/2024 financial year.⁵¹ This represents a 17 per cent deviation from the planned target to the actual achievement for 2023/2024.⁵²

When PEPUDA was implemented, there were high expectations that it would be widely used.⁵³ In their first year of operation in 2003, the equality courts fell short of the DoJ's target of 1,5 million people accessing the courts. By the end of the 2003/2004 financial year, the DoJ had increased the number of equality courts at the magistrate's court level from 47 to 220 and had trained 800 magistrates. However, the number of complaints received totalled 75.⁵⁴ The courts are severely underutilised. There have been research projects undertaken to try and ascertain the effectiveness of the equality courts. However, no data exists on the prevalence of public knowledge of the equality court;⁵⁵ even in the big cities of Durban, Johannesburg and Pretoria, with very few matters being heard before the courts.⁵⁶ In the rural areas, the situation is more concerning. This could also be indicative of the level at which the information regarding the existence of the equality courts has been disseminated as a matter of importance by

49 'Emerging from the shadows? The equality courts in South Africa: A research report of the NRF South African Research Chair in Equality, Law and Social Justice, School of Law, University of the Witwatersrand, https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/sarchi-equality-chair/WITS%20-%20The%20Equality%20Courts%20in%20SA%20-%20Final_Interactive.pdf (accessed 12 October 2025).

50 <https://www.saflii.org/za/cases/ZAEQC/2025/> (accessed 12 October 2025).

51 The Department of Justice and Constitutional Development Annual Report 2023/2024, https://www.gov.za/sites/default/files/gcis_document/202410/dojcdannual-report-2023-24.pdf (accessed 12 October 2025).

52 Department of Justice and Constitutional Development (n 51) 87.

53 Research report (n 49) 7.

54 As above.

55 R Kruger 'Small steps to equal dignity: The work of the South African Equality Courts' (2011) 7 *Equal Rights Review* 27, 39.

56 Botha & Kok (n 44) 335.

the DoJ.⁵⁷ People, particularly in rural areas, may prefer turning to traditional courts rather than equality courts, as these institutions are more deeply rooted in their cultural and individual identities.⁵⁸ There generally is a high respect and influence that the traditional justice system has been accorded among residents of rural communities.⁵⁹ Furthermore, emphasis is placed on the preservation and promotion of African values of justice.⁶⁰ However, in context, there also is nuance that there may also be other reasons for the underutilisation of the equality courts, namely, frustration with access to the formal justice system (distance, delays, complexity, cost) and the perceived immediacy, familiarity and effectiveness of traditional forums.⁶¹

While there is nothing inherently wrong with utilising community and traditional structures, one must remember the context in which transgender persons exist. There is a persistent belief that the LGBTQI+ community is 'un-African'.⁶² Many in the LGBTQI+ community are ostracised, bullied, harassed, victims of violence and vulnerable. It may not always make for a safe environment in which to bring forward a dispute or even draw attention to their gender identity. To this end, I question the effectiveness of PEPUDA in this specific context. Surely, if one is afraid to utilise traditional means of redress against instances of discrimination based on their gender identity, it must be the duty of the state to ensure that the person has access to justice in the form of the equality courts. Perhaps this lack of access may serve as the missing link in the effectiveness of the equality courts in matters specifically about gender identity and of PEPUDA itself in its failure to explicitly make gender identity a protected ground applicable in terms of the Act. Furthermore, one can only see the lack of uptake in matters being brought forth to the court as a failure to harmonise the aims of the courts with the aspirations of the Act. Nevertheless, there are cases that have been brought before the equality courts, which have seen the protection of gender identity from unfair discrimination, harassment and hate speech.

57 Research report (n 49).

58 Botha & Kok (n 44) 328.

59 RN Ndlela, JM Green & PS Reddy 'Traditional leadership and governance in Africa' (2010) 40 *Africa Insight* 2-21.

60 As above.

61 N Ntlama & DD Ndimba 'The significance of South Africa's Traditional Courts Bill 1 to the challenge of promoting African traditional justice systems' (2009) 4 *International Journal of African Renaissance Studies* 45-63.

62 R Jaji 'Homosexuality: "Unafrianness" and Vulnerability' (2018) The Zambakari Advisory, https://papers.ssrn.com/sol3/Data_Integrity_Notice.cfm?abid=3148335 (accessed 12 October 2025) 1; BS Pincheon 'An ethnography of silences: Race, (homo)sexualities and a discourse of Africa' (2000) 43 *African Studies Review* 39-58.

3.2 *Lallu v Van Staden*

In 2011 the Equality Court in Roodepoort held that a neighbour's verbal abuse of a transgender woman amounted to harassment, hate speech and unfair discrimination. The harassment was so severe that the complainant was forced to relocate from her home. The complainant was subjected to verbal abuse, public humiliation and the creation of a hostile living environment in the complex where her neighbour was the respondent and perpetrator of this harassment.⁶³ This continued for a period of five years.⁶⁴ As a result of the ongoing harassment, the claimant suffered from psychological distress and patrimonial loss in the form of having to vacate her home to escape the ongoing harassment.⁶⁵ The Court found that the respondent's utterances amounted to hate speech, and the remedy afforded to the complainant came in the form of both general and special damages.

While the complainant received the compensation she sought, there are several glaring issues in this case that display a general ignorance around transgender persons and the flaws in the interpretation of PEPUDA in the judgment. It would be too easy, with the benefit of hindsight, to state that this judgment aged poorly. Unfortunately, it is a product of its time and displays a lack of understanding of gender, sex and gender identity. It is neither politically correct, nor does it, in its own words, display any attempt to understand the importance of its representative potential for the rights of transgender persons.

3.2.1 *Misgendering*

Throughout the judgment, Ms Lallu, despite identifying as a transgender woman (presumably using female or non-binary pronouns) is constantly referred to as 'he', 'him' or 'his'. Misgendering (using the wrong name, pronoun, or gendered language to refer to someone) is known to have negative impacts on the mental health and well-being of transgender individuals.⁶⁶ It is a form of invalidation and non-affirmation that can trigger dysphoria, rumination, anxiety, post-traumatic stress and body dissatisfaction.⁶⁷

⁶³ *Lallu* (n 6) para 7.

⁶⁴ As above.

⁶⁵ *Lallu* (n 6) para 9.

⁶⁶ K Jacobsen and others 'Misgendering and the health and wellbeing of nonbinary people in Canada' (2023) 25 *International Journal of Transgender Health* 816-830.

⁶⁷ Jacobsen and others (n 66) 817; SM Barr and others 'Posttraumatic stress in the trans community: The roles of anti-transgender bias, non-affirmation, and internalised transphobia' (2022) 9 *Psychology of Sexual Orientation and Gender Diversity* 410-421; KA McLemore 'Experiences with misgendering: Identity

3.2.2 *The conflation of gender identity and sexual orientation*

In paragraph 15 of the judgment, it states that Ms Lallu's 'sexual orientation is transsexual [*sic*]'.⁶⁸ According to the Yogyakarta Principles,⁶⁹ 'sexual orientation' is understood to refer to 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender'.⁷⁰ On the other hand, 'gender identity' is understood to refer to

each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.⁷¹

Thus, being transgender is not a sexual orientation. It is a gender identity. This judgment was delivered in 2011, quite some time since the term 'gender identity' entered the lexicon. Instead, it also leans into the trope that transgender persons' existence is that of their perceived sexual orientation and that they are simply limited to how they dress, that is, that of the 'opposite' gender and/or sex.⁷² The Yogyakarta Principles were established in 2006 and could thus have been utilised in the interpretation of the complainant's lived experience. Pre-dating the Yogyakarta Principles, by the 1980s, 'gender identity' was increasingly used in legal, psychological and activist circles, particularly in debates around transgender rights and health care.⁷³

misclassification of transgender spectrum individuals' (2015) 14 *Self and Identity* 51-74.

68 There are debates regarding whether the word 'transsexual' is offensive, pathologised and outdated, thus the word 'transgender' or 'trans' is preferred by some. See in this regard C Moleiro & N Pinto 'Sexual orientation and gender identity: Review of concepts, controversies and their relation to psychopathology classification systems' (2015) 1511 *Frontiers in psychology*, <https://www.medicalnewstoday.com/articles/transgender-vs-transsexual#is-transsexual-offensive> (accessed 27 December 2024).

69 Yogyakarta Principles (n 10).

70 As above.

71 As above.

72 In para 16 of the judgment, the Court simply states that 'he (Lallu) feels more comfortable when dressed as a woman'. This, coupled with the incorrect assumption that being transgender is a sexual orientation, creates the stereotype that transgender persons are just people who like to 'cosplay' as the 'opposite' gender.

73 HM Levitt 'A psychosocial genealogy of LGBTQ+ gender: An empirically based theory of gender and gender identity cultures' (2019) 43 *Psychology of Women Quarterly* 275-297. More problematically, the term 'gender identity' became more prevalent in the DSM-III (1980) (ie, the Diagnostic and Statistical Manual of Mental Disorders) marking its formal introduction into medical and psychiatric contexts. This edition included 'gender identity disorder' (GID) as a diagnostic category, solidifying the term in clinical and medical discourse.

I, therefore, submit that the Court also had the opportunity, in this case, to lean on an interdisciplinary interpretation of gender identities and rely on the eminent international human rights instrument in this regard to strengthen the protection of transgender persons. This case, decided just over a decade ago, although flawed in many respects, is illustrative of the fact that the equality courts, when called upon to do so, have protected persons based on their gender identity. This ruling, therefore, can be construed as an early example of there being possible judicial protection for transgender persons. However, the lack of express statutory recognition creates uncertainty and risks inconsistent application. Amending PEPUDA to include gender identity would provide clear, consistent protection, strengthen the Act's transformative mandate, and align South Africa's equality law with international human rights standards.

3.3 *Mphela v Manamela & Others*

In 2016 the Court heard the matter of Nare Mphela who testified about their⁷⁴ school years and the hardships and challenges that led them to enrol for their grade 11 and subsequent grade 12 at the school. They did not finish matric because of these hardships. They testified that they identified themselves to be a girl from an early age and had lived in this manner in their family and immediate community. At the school, they dressed accordingly and used the girls' bathrooms.

They testified that they were the subject of verbal and physical abuse and humiliation at the hands and deeds of the first respondent in this matter (the principal of the school). This would include a beating with a stick, blocking of entry into the class and humiliation in the classroom. They sought help or interventions at various organisations, ranging from the school circuit office to community-based assistance offices, radio stations and, eventually, the Human Rights Commission. The matter was then brought before the equality court for the district of Seshego. Seshego is a township in the Polokwane local municipality of the Capricorn district municipality of the Limpopo province.

74 I will use the gender-neutral pronouns 'they', 'their', 'theirs' as the Court (in their own words) in this case deliberately chose to misgender the complainant. As per the judgment: 'The Court wants to stress the fact that the court is aware of the born sex of the complainant and also the complainant's sexual personal identity. The Court is cautious and sensitive to these facts. However, being a court that deals with facts, the Court will refer, where necessary, to the complainant in the male form.'

This case is fraught with insensitivity, ignorance and an incorrect interpretation of the aims of the Constitution and PEPUA. Despite the Court's assertions about 'sensitivity to in light of the facts of the matter', there virtually is no regard for the complainant's lived experience as a transgender woman. The 'sensitivity' exercised herein, from my perspective, appears to be a politically correct way to say, 'this is too controversial to deal with in-depth'. The Court does admonish the respondents for their inaction and not creating a safe environment for all learners and protecting their well-being to facilitate the learning process. However, this appears to be half-hearted and tacked on as a shift from the Court's responsibilities to the respondents' actions and failures.

In interpreting PEPUA, the Court found in favour of the complainant that the actions of the respondent amounted to hate speech as contemplated in section 10 of the Act. Section 10 provides:⁷⁵

- (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 a court may, per 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.

According to section 1 of the Act, harassment is defined as

unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to –

- (a) sex, gender or sexual orientation; or
- (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.

It is unclear from the reading of the judgment whether harassment was found on the grounds of sub-section (a) or (b) of this definition,

⁷⁵ At that time, this was the definition; this has since been changed by *Qwelane v South African Human Rights Commission & Another* 2021 (6) SA 579 (CC).

as the Court does not refer to the complainant's transgender identity as a gender identity, but rather as a 'sexual personal identity' and 'sexual dual identity'. It is unclear what the definition of these terms is, as they are not addressed by the Court. However, the insertion of the word 'sexual' would lend itself to an interpretation that the matter refers to sexual orientation and not necessarily gender identity. If it is indeed the former, then we note a conflation of sexual orientation and gender identity once again as discussed in the *Lallu* case above. Whereas a reading of gender identity in recognising the complainant as transgender would then presumably be covered under sub-section (b) as it is not an explicitly protected prohibited ground as contemplated by the Act.

The Court exercised its powers and functions in finding that the respondent infringed upon and violated the complainant's rights to dignity,⁷⁶ equality⁷⁷ and education⁷⁸ in the form of a declaratory order in terms of section 21(2)(b) of PEPUDA. It awarded the complainant remedies as contemplated in section 21 of PEPUDA, including, but limited to, an order that an unconditional apology be made⁷⁹ and that the principal attends a full-day presentation/programme drafted and presented by the Human Rights Commission on gender sensitivity.

3.4 *September case*

3.4.1 *Facts of the case*

In this case, a transgender woman incarcerated in a male prison for several crimes petitioned for the right to express her gender identity while still serving her sentence. This led to instances of harassment, misgendering, and the inability to express her gender identity through wearing her hair in feminine hairstyles, wearing make-up, and so forth.⁸⁰ Ms September therefore alleged that the respondents' treatment constituted unfair discrimination and harassment under PEPUDA. Ms September requested the Court to order just and equitable relief for the violation of her fundamental constitutional rights to equality and human dignity, including an order that the respondents permit her to express her gender identity.⁸¹

76 Sec 10 Constitution.

77 Sec 9 Constitution.

78 Sec 29 Constitution.

79 Sec 21(2)(j) PEPUDA.

80 *September* (n 5) paras 15-19.

81 *September* (n 5) para 20.

3.4.2 *Judgment*

The judgment is well written and incorporates international law in its interpretation of the Bill of Rights to also give effect to the approach to be followed in addressing this sensitive issue (that is, the use of General Comment 20 of the UN Committee on International Covenant on Economic, Social and Cultural Rights,⁸² and the Yogyakarta Principles).⁸³ Much credit can also be afforded to the Court for the sensitivity and dignity they afforded Ms September in respecting her gender identity, for example, through the use of the correct pronouns. There also is nuance in recognising the difference between sex and gender, and that neither sex nor gender is defined in the Act.⁸⁴ Ultimately, the Court found in favour of Ms September and that the actions of the respondents constituted unfair discrimination in terms of gender under section 8 of PEPUDA.

3.4.3 *Critique of the judgment*

I believe that the finding of unfair discrimination based on gender in terms of section 8 of the Act is erroneous. Gender and gender identity, as I have been at pains to explain, are not the same. I humbly submit that the Court should have found that the actions of the respondents constitute unfair discrimination based on an expansion of section 1(xxii)(a) of PEPUDA. Section 1(xxii)(b) currently reads:

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).

To do so would give effect to the nuanced differences between cisgender and transgender persons. There would therefore be a need to explicitly add 'gender identity' under the prohibited grounds listed in section 1(xxii)(a) of PEPUDA (that is, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth) as it currently would not be adequately protected under section 1(xxii)(b). As already discussed, while it may appear that adding new

82 E/C.12/GC/20 para 32, <https://www.refworld.org/legal/general/cescr/2009/en/68520> (accessed 31 December 2024).

83 *September* (n 5) paras 91-100.

84 *September* (n 5) paras 105-109.

grounds under the prohibited grounds of the Act could potentially cause 'chaos' to a provision that is already open-ended, it could have a teaching effect as well because then lay people know that 'gender identity' is protected in PEPUDA.⁸⁵ Highlighting the difference between being cisgender and transgender would have had the effect of highlighting the unique circumstances of transgender persons. This would also be so if the Act had a definition for gender identity to strengthen the value of section 1(xxii)(a), as the courts would then (hopefully) be more educated on transgender issues when issuing their judgments.

This case is also somewhat a product of its unique facts. It looks at the rights of transgender inmates incarcerated in detention centres. It does not speak to the matters of general discrimination faced by all transgender persons. Therefore, it is individualistic rather than ground-breaking in a manner that brings about change as imagined in a transformative constitutionalism framework. This case did represent a huge step forward in recognising gender identity. It is not to say that the judgment has no value, as it is an example of how PEPUDA can be enforced and implemented to give effect to equality as imagined in the Constitution. However, there are still glaring gaps in knowledge and, as the court stated, '[t]his case is not about whether the binary model used in South Africa should be expanded to include a third gender, ie transgender. This binary model is therefore unchallenged and still in force.'

3.5 Key takeaways from the case law

While there have not been further cases addressing unfair discrimination, harassment and hate speech directed at transgender people, *September*, *Lallu* and *Mphela* (for all their flaws) still represent a step forward in protecting the rights of transgender persons even on a micro-scale. The cases tested the aims of PEPUDA and brought about the relief sought by the complainants. However, this is still individualised relief and does not constitute transformation in line with protecting the transgender community as a whole. Again, it is important to echo Watson's assertion that litigation on this scale will always be retrospective.⁸⁶ Kok contemplates that perhaps the most serious 'defect' is that it is very hard to conceive of effective litigation strategies to combat structural discrimination.⁸⁷ There is significant scope to employ a transformative approach in litigation before

85 Kok (n 1) 448.

86 Watson (n 28).

87 Kok (n 1) 447.

equality courts regarding protection against unfair discrimination on the basis of gender identity. Traditional litigation often emphasises individual redress, compensation or declaratory relief without addressing the structural and societal inequalities that underpin discrimination. A transformative approach, by contrast, situates claims within broader social, cultural and legal contexts, seeking not only to vindicate the rights of the complainant but also to challenge normative assumptions about gender and to promote systemic change. This approach could thereby extend the protective reach of PEPUA beyond the immediate case. By framing gender identity discrimination as a barrier to substantive equality rather than merely a personal grievance, litigants can leverage the equality courts' constitutional mandate to foster social transformation, aligning legal remedies with the progressive, emancipatory vision of section 9 of the Constitution.

Transformative constitutionalism can then aid in strengthening PEPUA's alignment with constitutional values and ensuring its implementation reflects transformative ideals. This can be achieved in several ways: reinterpreting discrimination protections, for example, by ensuring that the Act addresses systemic inequalities by embedding stronger protections for marginalised groups such as transgender persons, who were previously not considered or necessarily contemplated as requiring nuanced protection from discrimination, harassment and hate speech. One can then also integrate intersectionality explicitly to tackle overlapping forms of discrimination. The Constitution acknowledges the importance of cultural diversity and human dignity. Transformative constitutionalism would then require that Parliament or the equality courts, or both, need to interpret PEPUA in a manner that reflects these local realities and, therefore, tailor implementation frameworks to address disparities, especially in marginalised groups in society.

Furthermore, for transformative goals to be realised, public education must be a core focus. It is clear that, even from the judgments discussed here, that there is a severe lack of knowledge regarding transgender persons. It should therefore be an imperative goal that PEPUA, through its mechanisms, emphasise this imperative as soon as possible to strengthen anti-discrimination laws.

As it currently stands, I am not convinced that the equality courts provide a complete interpretation and execution of the aims of PEPUA. There is much room and need for improvement. However, that change must come from an amendment by Parliament of PEPUA regarding the definitions and the inclusion of the prohibited

ground of gender identity. That will strengthen the Act and not give rise to a direct reliance on the Constitution.⁸⁸

4 Fundamental problems with using transformative constitutionalism with the shortcomings of PEPUDA

4.1 Introduction

Using transformative constitutionalism to critique PEPUDA regarding discrimination based on transgender identities poses several challenges. These can be categorised into theoretical, legal and practical concerns. It could be theorised that transformative constitutionalism is a broad and idealistic concept that emphasises societal transformation and justice. Its abstract nature makes it difficult to apply concretely to a specific legislative critique. Critiquing PEPUDA through transformative constitutionalism may highlight tensions between liberal individualism and the broader, structural goals of societal transformation. Furthermore, while it may seek to address systemic inequality, transformative constitutionalism may not sufficiently account for the pragmatic limitations of law making and enforcement, potentially leading to critiques that are too idealistic or disconnected from legal realities. It can be stated that texts have gaps, conflict with other texts and are ambiguous.⁸⁹ However, is a broad and idealistic concept the answer to its improvement? Does critiquing this gap require a detailed doctrinal analysis rather than broad transformative ideals?

Transformative constitutionalism aims for deep societal change. Even if PEPUDA were amended to align more closely with transformative ideals, societal attitudes and enforcement mechanisms may lag. Furthermore, critiquing PEPUDA through transformative constitutionalism may highlight shortcomings in enforcement or judicial interpretation, but it does not directly address the operational challenges of ensuring gender identity protections in practice. PEPUDA's incremental approach to tackling discrimination may be more realistic in certain contexts.

88 *South African National Defence Union v Minister of Defence & Others* 2007 (5) SA 400 (CC) paras 51 & 52: '[W]here legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.'

89 Kok (n 12) 128.

Thus, one could argue that alternative frameworks or complementary approaches can provide valuable perspectives to address PEPUDA's shortcomings concerning discrimination based on gender identity. These approaches can supplement or refine the lens of transformative constitutionalism by emphasising different aspects of equality, justice and implementation. I will explore these alternatives briefly. A blended approach, using transformative constitutionalism alongside, among others, intersectionality, substantive equality and the human rights-based approach, could address PEPUDA's shortcomings more comprehensively.

4.2 Intersectionality

Intersectionality⁹⁰ It is a widely adopted theoretical orientation in the field of women and gender studies.⁹¹ Intersectionality argues that identities such as gender, race, sexuality and other markers of difference intersect and reflect large social structures of oppression and privilege, such as sexism, racism and heteronormativity.⁹² Intersectionality represents an implicit critique of exclusion and erasure of difference.⁹³ One of intersectionality's greatest strengths is its broad embrace of multiple intersecting identities and multiple interlocking privileges and oppressions.⁹⁴

When evaluating the *Mphela* case above, for example, it is clear that there are a number of intersections involved in Ms Mphela's lived experience. She is a black transgender child living in the township (without a matric) in a country that (despite its progressive Constitution) deems LGBTQI+ identities as 'un-African'.⁹⁵ Deyi perhaps best describes it by stating that 'South African law is predicated on a hierarchical and essentialist conception of gender and the concomitant result is the erasure of transgender persons and a denial of access to basic human rights'.⁹⁶ It is thus important

90 The feminist legal scholar Crenshaw coined the term 'intersectionality' to describe the exclusion of black women from white feminist discourse; K Crenshaw 'Mapping the margins: Intersectionality, identity politics, and violence against women of colour' (1991) 43 *Stanford Law Review* 1241-1299.

91 C Kelly and others "'Doing" or "using" intersectionality? Opportunities and challenges in incorporating intersectionality into knowledge translation theory and practice' (2021) 20 *International Journal for Equity in Health* 1-7.

92 Kelly and others (n 91) 1.

93 As above.

94 L Bowleg 'The problem with the phrase women and minorities: Intersectionality an important theoretical framework for public health' (2012) 102 *American Journal of Public Health* 1271.

95 SO Murray & W Roscoe (eds) *Boy-wives and female husbands: Studies in African homosexualities* (1998).

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

that the equality courts 'meet people where they are' in the sense that they should take these sensitivities into account when compiling their judgments to give effect to the spirit and purport of both the Constitution and PEPUDA. This could take place in several ways: by undoing stereotypes and stigma in how the judgments read; by changing the way in which transgender persons are referred to in judgments; by educating the broader audience of the judgments and acknowledging the current stereotyping in the judgments, and then 'educating' the audience on why these stereotypes are wrong.⁹⁷

4.3 Substantive equality

Albertyn argues that despite the broad reach of the Constitution, 'there remain clear legal and social boundaries that are both normative and doctrinal, that sustain conventionally gendered ideas of society'.⁹⁸ She further elaborates:⁹⁹

As a result, equality jurisprudence has broadened the net of 'inclusion' but has not necessarily dislodged the underlying social framework. For the equality jurisprudence to be truly 'transformative', rather than merely 'inclusionary', the legal application of substantive equality needs to be more conceptually consistent. This requires it to be embedded in a broader transformative jurisprudence that is better able to understand systemic inequalities (social context) and overcome legal formalism, especially the chilling effect of traditional legal concepts and doctrines on transformative outcomes.

In this interpretation by Albertyn, this thus shifts the focus to achieving actual equality in outcomes, rather than mere formal equality (that is, treating everyone the same). Transgender persons are a vulnerable and marginalised group. There is no actual equality achieved without understanding and catering for their specific needs to realise and tangibly embrace that equality. Substantive equality would call for proactive measures to address systemic barriers that perpetuate discrimination against gender-diverse individuals. This could involve creating specific protections, affirmative measures or targeted public education campaigns. The challenges herein, however, lie in the need for detailed policy design and robust enforcement mechanisms, which can be resource-intensive.

97 The Constitutional Court has taken cognisance and endorsed the principles of intersectionality. *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC) para 76; *Qwelane v South African Human Rights Commission & Another* 2021 (6) SA 579 (CC) paras 59 & 60.

98 C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 254.

99 As above.

Drawing on Goldschmidt's notion of transformative equality, the inclusion of a definition of 'gender identity' in PEPUDA would constitute more than a semantic reform.¹⁰⁰ It would represent a structural recalibration of South Africa's equality jurisprudence. Goldschmidt argues that transformative equality requires legal systems to move beyond merely redressing instances of discrimination towards actively restructuring the social and institutional frameworks that sustain inequality.¹⁰¹ In the South African context, the current absence of an explicit definition of gender identity in PEPUDA fosters interpretive inconsistency and renders transgender persons vulnerable to the persistence of formalist reasoning in the equality courts. By codifying 'gender identity' as a protected ground, PEPUDA could operationalise its transformative purpose, ensuring that judicial and administrative bodies approach discrimination through a lens attuned to systemic subordination rather than individual harm. Such an amendment would guide courts towards proactive, context-sensitive remedies mandating public education, institutional reform and compliance mechanisms that reflect the lived realities of gender-diverse persons. In Goldschmidt's terms, this would transform equality law from a reactive framework into a dynamic instrument of social reconstruction, embedding gender diversity within the very architecture of substantive equality and aligning PEPUDA's implementation with its constitutional promise of transformation.¹⁰²

4.4 Summary

Much is reliant on the manner in which judicial officers interpret context in making their judgments. This has led to certain cases where a contextual analysis has been ignored, partially applied or applied in an abstract or socially conservative manner.¹⁰³ To this end, Albertyn argues as follows:¹⁰⁴ 'One of the most important indicators of a transformative approach is the extent to which equality judgments contribute to the dismantling of systemic inequalities and the establishment of new norms and conditions.'

Thus, one can, in this reading, view the *Lallu* and *Mphela* cases as not achieving the goal of establishing new norms and conditions in the sense that they have neither tangibly contributed to the de-

100 JE Goldschmidt 'New perspectives on equality: Towards transformative justice through the disability convention?' (2017) 35 *Nordic Journal of Human Rights* 1-14.

101 Goldschmidt (n 100) 5.

102 Goldschmidt (n 100) 11-13.

103 Albertyn (n 98) 274.

104 Albertyn (98) 257.

stigmatisation of transgender persons, nor have they broken the chains of understanding the unique circumstances of transgender persons. If anything, I would postulate that the judgments themselves reinforce stereotypes regarding transgender persons and contribute to secondary trauma by their blatant disregard for the pronouns of the complainants and conflating their gender identity with sexual orientation. These cases did not go far enough in attempting to dismantle incidents of transphobia and made little or no attempt to bring about social change through their interpretation of the provisions of PEPUDA.

As our courts still struggle with legal formalism and the social consequences of a more radical approach, our equality jurisprudence remains contradictory and limited.¹⁰⁵

One may critique the above by stating that it is not a task suited for only the judiciary, but rather that both Parliament and the courts have the responsibility to combat these issues.¹⁰⁶

5 Legislative reform

Some authors argue that the attempt to equalise the social position of vulnerable and marginalised groups and the restructuring of the overall benefits in a given society is a political task best left to Parliament since courts are ill-equipped and ill-trained in respect of such a task.¹⁰⁷ There is an argument to be made that Parliament enjoys more 'legitimacy' than the courts and that Parliament should therefore be the main force driving transformation. In this regard, two forms of transformation are at play here: (a) 'hearts and minds' transformation; and (b) socio-economic 'equalisation'. Courts do not compile budgets, so socio-economic equalisation is usually done by Parliament.

However, this seems too simplistic and an erroneously postulated assumption to make. The quote below does not speak to the legitimacy of Parliament versus courts. Van der Walt states that many judges are conservative and tend to reinforce the *status quo*. Van Der Walt speaks to this point:¹⁰⁸

¹⁰⁵ Albertyn (n 98) 276.

¹⁰⁶ *S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 para 30.

¹⁰⁷ W Freedman 'Understanding the right to equality' (1998) 115 *South African Law Journal* 243-251.

¹⁰⁸ J van der Walt 'Progressive indirect horizontal application of the Bill of Rights: Towards a cooperative relation between common-law and constitutional jurisprudence' (2001) 17 *South African Journal on Human Rights* 341-361.

I believe a significant part of the failure of the judicial development of the law to address the ills of modern society can be traced to conservative political attitudes bent on the preservation of an existing status quo and vested interests. Such political attitudes are bound to turn open-ended legal principles such as reasonableness, good faith and the *boni mores* of society into rule-like maxims that entrench rather than challenge existing power relations.

Therefore, should PEPUDA be revised in this regard?

5.1 Definitions in PEPUDA

The definitions in the Act are vague and inconsistent. As it currently stands, the definitions of 'sex' and 'gender' are inaccurate.¹⁰⁹ Provision should be made for definitions for 'gender identity', 'intersex' and 'sexual orientation' to establish clarity and prevent the conflation of the concepts, as is the case when one assesses the judgments in *Lalla* and *Mphela*. The clarity will also afford the presiding officer the tools needed to properly interpret the provisions of the Act. Furthermore, it is keeping in the spirit of dignity and equality to establish and recognise the changing discourse regarding the SOGIESC community, not only from a national standpoint but also under the international law human rights framework. The growing field of SOGIESC issues has presented an opportunity to further recognise and identify marginalised groups who were previously not categorised efficiently and correctly.

5.5.1 Definition of 'sex'

According to the current reading of section 1 of PEPUDA, sex is defined as 'sex includes intersex'. This definition was inserted by section 16(b) of the Judicial Matters Amendment Act 22 of 2005 (Judicial Matters Amendment Act). With respect, this is not a definition. It neither explains to readers nor provides them with an understanding of what 'sex' is. While it can be commended for the ability to be interpreted broadly to encompass the experiences of individuals beyond binary categorisations of male or female through the inclusion of intersex, it still does not define the concept at all. One would have to read legislation such as the Alteration of Sex Description and Sex Status Act 49 of 2003 (Alteration Act) and the

¹⁰⁹ Sex and gender are related yet distinct concepts. The terms are often confused or used interchangeably. A Fausto-Sterling (ed) *Sex/gender: Biology in a social world* (2012) 142; JS Hyde and others 'The future of sex and gender in psychology: Five challenges to the gender binary' (2019) 74 *The American Psychologist* 171-193.

Judicial Matters Amendment Act to ascertain a definition for intersex. In terms of section 1 of the Alteration Act, 'intersex', 'with reference to a person, means a person whose congenital sex differentiation is atypical, to whatever degree'. The definition is the same in the Judicial Matters Amendment Act.

This definition presents several problems. First, it does not consider the medico-legal and international human rights law shift to depathologise intersex bodies. There are several variations of intersex characteristics and, thus, intersex persons are not a monolith. Second, these characteristics are biologically occurring and, thus, calling them 'atypical' suggests that the binary notion of sex is the 'norm' while intersex persons are 'othered'. Given PEPUDA's purpose, 'sex' should be defined in a way that upholds human dignity and equality. This means recognising the diversity of human experiences. Thus, my suggested definition would be the following:¹¹⁰

'Sex' refers to the physical, biological, and physiological attributes of an individual, including male, female, intersex, or variations thereof, and encompasses the social and legal recognition of these attributes, as well as the experiences and identities associated with them.

This definition would therefore recognise the biological and social dimensions of sex.

5.5.2 Definition of 'gender'

PEPUDA prohibits unfair discrimination on various grounds, including 'gender'. The Act itself does not provide an exhaustive definition of gender. From a social sciences perspective, gender is a social construct reflecting societal roles and expectations tied to masculinity and femininity.¹¹¹ The view that humans comprise only two types of beings, that is, women and men, is a framework that is sometimes referred to as the 'gender binary'.¹¹² It is on this basis that the focus of gender discrimination has primarily always been premised on the

110 <https://www.who.int/news-room/questions-and-answers/item/gender-and-health> (accessed 30 December 2024); <https://www.edi.nih.gov/our-communities/sexual-and-gender-minority/resources/lgbtiq-terminology> (accessed 30 December 2024); DE Sandberg & M Gardner 'Differences/disorders of sex development: Medical conditions at the intersection of sex and gender' (2022) 18 *Annual Review of Clinical Psychology* 201-321; IA Hughes and others 'Consensus statement on management of intersex disorders' (2006) 91 *Archives of Disease in Childhood* 554-563, <https://interactadvocates.org/faq/#definition> (accessed 30 December 2024).

111 G Gilleri (ed) *Sex, gender, and international human rights law: Contesting binaries* (2024); MR Kaufman, EL Eschliman & T Sanchez Karver 'Differentiating sex and gender in health research to achieve gender equity' (2023) 101 *Bulletin of the World Health Organization* 666-671.

112 Hyde and others (n 109).

unfair treatment of women in society as being inferior to men. The remedy to this has traditionally been to enact legislation and policies to level the playing field through the demolition of patriarchal barriers, which have seen women being the victims of social and systemic oppression. An example of this can be seen from an international human rights law perspective. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹¹³ recognises that the 'extensive discrimination against women continues to exist' and emphasises that such discrimination 'violates the principles of equality of rights and respect for human dignity'.¹¹⁴

I would therefore argue that the absence of an exhaustive definition of gender is predicated on a false notion that the protection of gender in question applies to all genders as a continuum. Rather, the reading of gender in my interpretation is that the protection of gender in terms of PEPUDA is the protection from unfair discrimination, harassment and hate speech against women specifically.¹¹⁵

While there is absolutely nothing inherently wrong with this interpretation, as women are a vulnerable group that must be protected, an assumption is created that the protections in PEPUDA geared towards the protection of gender as a prohibited ground extend to those with a different gender identity. In other words, it creates the illusion that transgender persons are also covered by this construction of gender within the Act. This simply is not the case. I thus propose that the definition of gender also be clarified in PEPUDA. A proposed definition could read as follows: 'Gender' refers to the socially constructed roles, behaviours, identities and attributes that a society considers appropriate for individuals based on their perceived or actual sex.

5.5.3 *Definition of 'gender identity'*

Gender identity should be understood in a way that upholds human dignity, autonomy and equality. Drawing from international instruments such as the Yogyakarta Principles, gender identity could be defined as 'a person's deeply felt internal and individual

113 Entry into force: 3 September 1981, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> (accessed 30 December 2024).

114 As above. Art 2(b) of CEDAW: 'States are to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.'

115 Although rare, there may also be instances where there is unfair discrimination regarding assumptions against men. *President of the Republic of South Africa & Another v Hugo* 1997 (6) BCLR 708.

experience of gender, which may or may not correspond with the sex assigned at birth, including the person's sense of their body and other expressions of gender'.

This definition is sufficiently wide to encompass transgender persons regardless of social or medical transitioning. PEPUDA aims to address systemic inequality. Therefore, the definition should be inclusive of all identities beyond the binary framework of male and female, recognising that gender identity exists on a spectrum.

6 Conclusion

PEPUDA represents a cornerstone of South Africa's legal framework aimed at fostering an inclusive society free from discrimination. However, the Act's potential to protect transgender individuals is constrained by definitional ambiguities and a lack of substantive focus on the realities of gender diversity. In the context of South Africa's transformational constitutional mandate, there is an urgent need for legislative and interpretative reforms to fully actualise the rights of transgender persons and ensure substantive equality. This can be achieved by adding definitions to PEPUDA explaining different SOGIESC issues, such as, for example, properly defining 'gender identity'.

At its core, the Constitution of South Africa envisions a society that transcends mere formal equality, aspiring instead toward substantive equality that acknowledges and addresses the lived experiences of marginalised communities. Transgender individuals face unique and compounded forms of discrimination that cannot be fully addressed under PEPUDA's current definitional framework. Reforming PEPUDA in the manner proposed in this article would align the Act with constitutional imperatives and international human rights norms. These amendments would ensure clarity and robust legal protections, eliminating interpretative gaps that allow for systemic prejudice to persist.

Moreover, the interpretative approach to PEPUDA must be informed by the principles of transformative constitutionalism, a theory that demands proactive measures to dismantle entrenched inequalities and foster dignity, autonomy and inclusivity. A transformative reading of PEPUDA requires the judiciary and law makers to recognise the intersectionality of oppression faced by transgender individuals, acknowledging that discrimination on the grounds of gender identity is inextricably linked to broader patterns of

marginalisation, including socio-economic exclusion, violence and stigma.

Substantive equality for transgender persons under PEPUDA necessitates more than legal reform; it requires active engagement with societal norms and the dismantling of cultural biases. Courts must interpret the Act in ways that emphasise the material conditions and social barriers that transgender persons face, ensuring that legal remedies address not just the symptoms of discrimination but its structural underpinnings. Such an approach would place PEPUDA in alignment with international best practices.

Finally, the protection of transgender rights under PEPUDA offers an opportunity to demonstrate South Africa's commitment to its constitutional vision of equality and dignity for all. Reforming the definitions in the Act to explicitly recognise the nuances of gender identity, sexual orientation, gender and sex, coupled with a transformative constitutionalist approach to its interpretation, would ensure that the legal framework is both inclusive and reflective of the lived realities of transgender persons. Such changes are essential not only for addressing immediate injustices, but also for building a society where diversity is celebrated and equality is a tangible reality for all. These reforms are not merely legislative necessities – they are moral imperatives that will shape the evolution of South Africa's democracy in its quest for true inclusivity.