

PROTECTING TRANSGENDER WOMEN WITHIN THE AFRICAN HUMAN RIGHTS SYSTEM THROUGH AN INCLUSIVE READING OF THE MAPUTO PROTOCOL AND THE PROPOSED SOUTHERN AFRICAN DEVELOPMENT COMMUNITY GENDER-BASED VIOLENCE MODEL LAW

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Abstract

Under Article 1 of the Maputo Protocol “women” are defined as “persons of the female gender”. Notwithstanding this definition, transgender women, persons whose gender is female but who were assigned male at birth, are yet to be recognised or protected under the Protocol. On the contrary, on the African continent, transgender women are some of the most vulnerable persons in society. Due to their frequent misidentification as homosexual men, and widespread criminalisation of homosexuality, these women are regularly discriminated against and victims of stigma and violence. Furthermore, because of the denial of their gender identities, these women are deprived of their legal recognition and subsequent protection of their human rights. This article considers discrimination against transgender women and contrasts it with the provisions of the Maputo Protocol. This article utilises the teleological approach to treaty interpretation, together with postmodern intersectional feminist legal theory and queer legal theory as well as fundamental principles of international human rights law such as dignity, equality and non-discrimination. Finally, the article considers the recognition and protection of transgender women in light of the proposed SADC GBV Model Law.

Keywords: *transgender women, Maputo Protocol, human rights, dignity, gender-based violence, SADC Model Law*

1 Introduction

In *Nathanson v Mteliso* (“*Nathanson*”),⁶⁹ handed down by Bere J in November 2019, the Bulawayo High Court awarded ground-breaking damages to a transgender woman – Ricky Nathanson – for unlawful arrest, unlawful detention and emotional distress.⁷⁰ In 2014, Ms Nathanson was arrested at the Palace Hotel in Bulawayo by six police officers in riot gear for using the female bathroom.⁷¹ She was later charged with criminal nuisance.⁷² During her three-day detainment, the police repeatedly mocked her and she was forced to undress to reveal her genitals.⁷³ She was also escorted on two different occasions to different hospitals to “verify” her gender.⁷⁴

The targeting and arresting of African transgender women for activities such as using the women’s restroom, dressing femininely or simply being seen in public is common and constant.⁷⁵ In cases such as this, the fact that the charges against Ms Nathanson were eventually dropped and that she could successfully access the judicial system to receive justice is a rare occurrence.⁷⁶ It must be emphasised that the harassment and vilification of transgender women, as illustrated in *Nathanson*, is a problem not only in Zimbabwe but in all African countries which criminalise homosexuality, “indecent” between males, and fail to legally recognise transgender women.⁷⁷

This article considers the conceptual conflation of “sex” and “gender” as well as the outcome of the misidentification of transgender women as homosexual men in domestic contexts where homosexuality and/or indecency between males is criminalised.⁷⁸

⁶⁹ [2019] ZWBHC 135.

⁷⁰ Para 132.

⁷¹ Para 9.

⁷² Para 17.

⁷³ Paras 11-12.

⁷⁴ Paras 13-15.

⁷⁵ For example, in 2018, two South African transgender women were forced to use the male bathroom at their college campus. They were thereafter harassed while attempting to use the bathroom, having to go so far as to endure being filmed and having male students reveal their genitals to them: C Collison “Trans toilet access still a struggle” (22-06-2018) *Mail & Guardian* <<https://mg.co.za/article/2018-06-22-00-trans-toilet-access-still-a-struggle>> (accessed 10-10-2021); in 2014 in Malawi, a transgender woman and her partner were arrested for trying to get married: M Gevisser *The Pink Line* (2020) 42-69; in Zambia in 2015 a transgender woman was arrested and convicted of sodomy and for having “deceived” a man to have sex with her: R Igual “Zambian hairdresser faces 15 years in jail for sodomy” (03-11-2015) *Mamba Online* <<https://www.mambaonline.com/2015/11/03/zambian-hairdresser-faces-15-years-jail-sodomy/>> (accessed 10-10-2021). In Namibia in 2020, a video of an assault of a transgender woman went viral with impunity for both the attackers and recorders: C Miyanicwe “Namibia: Assault on transgender woman condemned” (08-05-2020) *All Africa* <<https://allafrica.com/stories/202005080670.html>> (accessed 10-10-2021).

⁷⁶ Ms Nathanson was granted asylum and she now lives and works in the United States of America.

⁷⁷ Currently, 32 African countries still criminalise homosexuality, or more specifically, same-sex sexual acts between consenting adults. Furthermore, at the time of writing, consensual same-sex acts are punishable by death (as argued to be part of a strict interpretation of Sharia law) in Somalia, Mauritania, and certain states of Nigeria. See ILGA World: L Ramon Mendos, K Botha, RC Lelis, E López de la Peña, I Savelev & D Tan *State-Sponsored Homophobia 2020: Global Legislation Overview Update* 38 and 113.

⁷⁸ Transgender women are the singular focus of this article – rather than transgender men or non-binary persons – specifically due to the function of the Maputo Protocol (a women’s treaty) and the definition provided for ‘women’ based on gender rather than sex. It is noted that further research must be done on the experiences and protection of transgender men and non-binary persons in Africa but due to the limitations of this article, this is not a consideration here. This is not to overlook the fact that all persons who are seen to deviate from the gender binary or typical gender expectations and roles are

Within many African countries, the prevailing culture of religious and traditional conservatism poses a major threat to the human rights of any individual who does not conform to heteronormative gender and sexual identities.⁷⁹ Although discrimination based on sexual orientation *per se* is a pervasive and urgent threat to any individual's life and human rights, for the purposes of this article the focus is on discrimination that targets individuals based on their gender identities, particularly transgender women. The article illustrates that as long as sexuality and gender identity continue to be conflated, the violation of the fundamental human rights of African transgender women will continue alongside the inability (or unwillingness) of domestic justice systems to provide redress.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ("Maputo Protocol" or "Protocol") is the regional human rights treaty that codifies the human rights of African women to ensure that their rights are "promoted, realised and protected".⁸⁰ Of specific interest to the arguments put forward in this article, it is noteworthy that Article 1(k) of the Protocol defines women as persons of the female *gender* – not of the female *sex*.⁸¹ Utilising post-modern intersectional feminist legal theory and queer legal theory together with the teleological method of treaty interpretation, the objective of this article is to show that Article 1(k) includes African transgender women; and that read in conjunction with relevant rights in the Maputo Protocol, it can offer protection to African transgender women.

Importantly this article focuses on defining State Party obligations towards African transgender women of value when evaluating domestic law. In this regard, a further objective of this article is to show how the protection generated through the Maputo Protocol should be utilised in the drafting of the Southern African Development Community ("SADC")⁸² Gender-Based Violence ("GBV") Model Law, currently being considered. The SADC GBV Model Law is an important step towards establishing domestic GBV laws that effectively protect *all* women against violence.

at risk to GBV. Due to the limited scope, this article only hoped to emphasise that transgender women by virtue of the definition for women set out in the Maputo Protocol must be recognised and protected from GBV. Transgender men, non-binary, and genderqueer persons all equally deserve recognition and protection under both international, regional, and domestic human rights law. Interpretation of the non-discrimination articles in both the African Charter as well as the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 provide a potential point of departure for such work.

⁷⁹ A very recent example can be found in Cameroon where earlier this year two individuals were arrested whilst out having dinner. They were convicted of attempted homosexuality, public indecency, and failure to carry identification. They were sentenced to five years in jail. Although they are currently out on bail pending the appeal of their sentence – the basis of their arrest and sentence was not any proven sexual activity but rather that in Cameroon, the two individuals are regarded legally and socially as men because their biological sex at birth was male, but they choose to present as feminine. Cameroon's Penal Code Section 347-I: "Whoever has sexual relations with a person of the same sex shall be punished with imprisonment for from 6 (six) months to 5 (five) years and a fine of from CFAF 20 000 (twenty thousand) to CFAF 200 000 (two hundred thousand)".

⁸⁰ Preamble of the Maputo Protocol.

⁸¹ Emphasis added.

⁸² SADC refers to the South African Development Community comprising of 16 member states: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe.

To achieve the objectives set out above, this article is divided into four parts. Part 2 sets out the theory and methodology used in this article to conceptualise a space for African transgender women within the Maputo Protocol. This part focuses particularly on the construction of “sex”, “gender” and “women” and the offerings of post-modern intersectional feminist and queer legal theories in establishing specific protection for African transgender women. Part 3 presents a teleological interpretation of the Maputo Protocol, highlighting the importance of human dignity, equality, and non-discrimination. This discussion further emphasises the under-utilised potential of the Maputo Protocol to recognise and protect African transgender women. Part 4 considers the anticipated SADC GBV Model Law, in light of the arguments presented under parts 2 and 3. Finally, part 5 sets out the main findings and addresses the key points that the drafters of the SADC Model Law should consider to ensure the protection of transgender women in the SADC region.

2 A theoretical framework to better understand the position of African transgender women

2 1 Introduction

Within the realm of a generally religious and often culturally conservative context, African transgender women are frequently deemed to be “un-African”.⁸³ Due to the prioritisation of masculinity within society, transgender women are seen as threats to “African values”.⁸⁴ Boswell describes the presence of this “deviant femininity” to be regarded as un-African because it challenges African hegemonic masculinity, patriarchy and heteronormativity which “prescribes, upholds and naturalises traditional, static gender roles”.⁸⁵ Accordingly, transgender women are a visible yet invisible minority and their misidentification as homosexual men jeopardises the recognition and protection of their fundamental human rights within a majority of African countries. Mukasa, commenting on the misplacement of homophobia towards transgender individuals, sets out how:

“Any person that expresses [themselves] as the opposite sex is a homosexual and so this exposes transgender people to all the mistreatment. All transgender people are seen as the obvious homosexuals. Therefore, on top of all the transphobia, there is homophobia, even if you are not gay”.⁸⁶

As emphasised in this article, terminology and meaning is everything in the strive to protect the rights of African transgender women. However, it is conceded that using the terminology “African transgender women” is in itself an attempt to categorise, and ultimately subject individuals to artificial

⁸³ AM Ibrahim “LGBT rights in Africa and the discursive role of international human rights law” (2015) 15 *AHRLJ* 266.

⁸⁴ S Olaoluwa “The human and the non-human: African sexuality debate and symbolisms of transgressions” in Z Matebeni, S Monro & V Reddy (eds) *Queer in Africa: LGBTQI Identities, Citizenship, and Activism* (2018) 21.

⁸⁵ B Boswell “On miniskirts and hegemonic masculinity: The ideology of deviant feminine sexuality in anti-homosexuality and decency laws” in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 52.

⁸⁶ Viktor Mukasa, as cited by G le Roux in “Proudly African and transgender” in E Ekine & H Abbas (eds) *Queer African Reader* (2013) 67.

categories and subjective judgements, far removed from the core argument as presented within post-modern and queer theories as further discussed under 2.2 and 2.3 below. Notwithstanding this fact, as the law is inherently constructed around categories, the legal argument, by necessity, requires some sort of classification. It is recognised and conceded that this is an inherent weakness of the law and that the categories of “African”, “transgender” and “women” can all be disputed contextually, based on experience, location, and status. The attempt to disrupt the ordinary meaning of “women” and “gender” to include transgender women, has the unwelcome effect of othering transgender women, forcing individuals into yet another category and making static what might be fluent.

2.2 Constructions of “sex”, “gender” and “women”

Considering the above and as a point of departure, “transgender” is an umbrella term used to describe a variety of gender identities and expressions. In general terms, transgender persons are individuals whose gender identity and biological sex diverge, whereas cisgender persons are individuals whose gender identity and biological sex correlate. Thus, considering the objective of this article, transgender women specifically are understood to be individuals who experience themselves as female but whose assigned sex at birth was male.⁸⁷

Gender is a “historically and culturally bound” social construction, which has often been dominated by Western conceptualisations.⁸⁸ Oyèrónke explains that conceptualising it as binarily opposed and as a hierarchal social category between “men” and “women” can be in and of itself a mistranslation; as in many African cultures and languages – such as Yoruba – it is not.⁸⁹ Notwithstanding, this acknowledgement arguably encourages – rather than discourages – a trans-inclusive legal reading as related to the purposes of this article. Moreover, it is relevant when considering how “gender” is conceptualised within the international legal community, and in turn, informs who is recognised and protected as a “woman”.

The term “sex” refers to the biological categorisation of an individual as male, female, or intersex.⁹⁰ It distinguishes individuals by accounting for the presence of chromosomes, sex hormones, internal reproductive structures,

⁸⁷ This is regardless of whether they have, are yet to have, or never plan to have, gender affirming surgery or hormone treatment.

⁸⁸ O Oyèrónke *The Invention of Women: Making an African Sense of Western Gender Discourses* (1997) 32.

⁸⁹ 32. This article, like many legal instruments, moreover falls into the trap of being limited by English. Many languages, historical and current, have different interaction with gendering their language and gender within their language. Moreover, much work has been done by African scholars and activists alike to highlight and debunk conceptualisations of gender – specific to their context and culture. See further: S Tamale (ed) *African Sexualities: A Reader* (2011); S Ekine & H Abbas (eds) *Queer African Reader* (2013).

⁹⁰ “Intersex” refers to variances in sexual development, where bodies are not typically male nor typically female but have a combination of typically male or female chromosomes, hormones and sexual characteristics. Some feminist philosophers, such as Butler, argue that both categories of gender and sex, although not the same thing, are constructed. See further: J Butler *Bodies that Matter: On the Discursive Limits of ‘Sex’* (1993).

and external genitalia.⁹¹ Comparatively, “gender” refers to the cultural and social construction within which an individual comprehends their identity, usually accompanied by the experience of feeling male, female, or non-binary. As Ball argues:

“Identities are not predetermined categories that exist independently of the social forces that constitute them. Individuals do not “discover” their identities so much as adopt them as mechanisms and strategies for making sense of the social world around them”.⁹²

Stryker explains that after birth, an individual is assigned a sex and a corresponding gender. Whether or not they form an association with that gender is part of constructing their respective gender identity; described by Stryker as a “complex process of socialisation”.⁹³ Consequently, an individual’s gender is not determined by their biological sex, but rather it relates to their gender identity.⁹⁴ Gender identity, as defined in the Yogyakarta Principles⁹⁵ refers to:

“[A] 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 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”.⁹⁶

Accordingly, because sex and gender are not the same, their conflation impacts how societies commonly understand “gender”, gender expression as well as gender roles. As illustrated by the experiences of Ms Nathanson, as presented in the introduction, this often negatively affects the perception and treatment of transgender women.⁹⁷ Moreover, within some SADC countries, as is discussed in further detail in part 4 below, this continuous conflation is a key driving force for the violence, stigma and discrimination perpetuated against these women.

Although the term “transgender” is a recent descriptive concept; gender-diverse individuals have been present throughout history. Feinberg states that transgender as a category “only emerged in a collective, institutionalized way in the early 1990s”.⁹⁸ Stryker argues that although the 1990s saw the term enter widespread use, its history and development is intricate.⁹⁹ On the African continent, whether or not Western descriptive terms, such as “transgender” or even the LGBTIQ (lesbian, gay, bisexual, transgender,

⁹¹ K Govind “Basic Issues of Transgender” in C Subramanian & M Sugirtha (eds) *Transgender Wellbeing an Emerging Issue* (2015) 295.

⁹² CA Ball “A new stage for the LGBT movement protecting gender and sexual multiplicities” in CA Ball (ed) *After Marriage Equality The Future of LGBT Rights* (2016) 164.

⁹³ S Stryker *Transgender History The Roots of Today’s Revolution* 2 ed (2018) 14.

⁹⁴ Prager *Queer, There* 219, see also P Currah “The transgender rights imaginary” in M Fineman, J Jackson & A Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (2009) 255.

⁹⁵ The Yogyakarta Principles are non-binding but persuasive international guidelines for the implementation of human rights law with regard to LGBTIQ persons.

⁹⁶ The Yogyakarta Principles (2007) 1 <http://www.yogyakartaprinciples.org/principles_en.htm> (accessed 04-05-2021).

⁹⁷ M Chamallas *Introduction to Feminist Legal Theory* 3 ed (2013) 217.

⁹⁸ L Feinberg *Trans Liberation: Beyond Pink or Blue* (1998) 30.

⁹⁹ Stryker *Transgender History* 36.

intersex and queer) acronym are appropriate is highly contested.¹⁰⁰ Thus, it is important for queer (which is also a contested term) Africans, including African transgender women, to be able to create and use terms that describe and represent their lives and lived realities without having to subscribe to foreign cultural representations. As presented by Nyanzi:

“It is important to constantly interrogate, debunk, dismantle and queer the culturalist or reified traditional logic when it is appropriated to consolidate oppression, especially when embedding that oppression in legislative processes”.¹⁰¹

Expecting individuals to conform to a specific categorisation within the LGBTIQ acronym to be (legally) recognised, and, in turn, have their human rights protected is problematic as it stifles and restricts an individual’s self-development. It is also fundamentally contrary to the principle of universality as well as a violation of the *jus cogens* norms of equality, dignity, and non-discrimination.

Currently, out of the 42 state parties to the Maputo Protocol, transgender persons are only explicitly legally recognised and provided for in South Africa, through the Alteration of Sex Description and Sex Status Act 49 of 2003.¹⁰² Thus, the absence of regulatory and/or protective legislation for transgender persons in Africa is alarming and has a detrimental effect on the enjoyment of their human rights, as their marginalisation and stigmatisation is continuously overlooked.

The process of transitioning to reflect a person’s gender identity (with or without surgery or other medical treatments) often only occurs during adulthood. Especially in the case of transgender women, a late transition results in increased visibility as “non-normative” in their adult life because they go through puberty as biologically male. Being visible, transgender women are more likely to become targets of harassment, discrimination, and violence.¹⁰³ Oloka-Onyanga, writing on transgender women in Uganda and Kenya, elaborates that they are subjected to:

“[A]ll forms of harassment, including hate crimes, especially on account of the charge against transgender women that they are masquerading in order to dupe and extort money from the public, or the alternative claim that they are homosexual, confusing the issue of gender identity and sexual orientation. Others have faced lynch mobs and have been beaten, aside from being ostracized, barred from housing and suffering all manners of discrimination in their places of employment, as well as with immigration officers who accuse them of impersonation”.¹⁰⁴

¹⁰⁰ D Clarke “Twice removed: African invisibility in Western queer theory” in E Ekine & H Abbas (eds) *Queer African Reader* (2013) 182.

¹⁰¹ S Nyanzi “Afterword: Sexing the law and legislating gendered sexualities” in D Higginbotham & V=Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 75.

¹⁰² Although the Act is a step in the right direction, it is important to note that there has been significant criticism regarding its incorrect implementation as well as the fact that the Act requires applicants to undergo medical or surgical treatment before they may be successful in having their documents altered/gaining legal recognition (compared to potentially a self-declaratory model which is followed in other countries, such as Argentina and Malta). See further, B Deyi, S Kheswa & L Theron (obo Gender DynamiX) & M Mudarikwa, C May & M Rubin (obo the Legal Resources Centre) “Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003” (2019) *Transgendermap* <<https://www.transgendermap.com/wp-content/uploads/sites/7/2019/05/LRC-act49-2015-web.pdf>> (accessed 02-03-2022).

¹⁰³ Oloka-Onyanga (2015) *AHRLJ* 49.

¹⁰⁴ 50.

Moreover, the vulnerability of African transgender women is exacerbated when they are victims of harassment, violence, and rape, and are thereafter subject to repeat victimisation by state officials, such as police officers as exemplified by Ms Nathanson's case. Worldwide, police officers are often the key perpetrators of violence against transgender women.¹⁰⁵ This must be considered against the background that it is a police officer's duty, as an official of the state, to ensure the protection of human rights of all individuals, including the right to life, integrity and security of transgender women. As an example, because transgender women are frequently denied recognition of their gender identity when they are arrested and detained, they are kept in cells with men. This exacerbates their vulnerability and their exposure to general, as well as sexual, violence at the hands of other individuals in detention.¹⁰⁶ Furthermore, police officers are regularly accused of taking advantage of transgender women; forcing them to perform sexual acts, humiliating them or subjecting them to other forms of inhumane or degrading treatment as also observed in Ms Nathanson's case.

2 3 Post-modern intersectional feminist legal theory

As further argued in this article, the post-modern intersectional feminist legal theory allows for the deconstruction of the notion of "gender" and critically engages what encompasses the identity of "women". The application of this theory is especially useful when establishing whether transgender women can be understood to be subsumed under the term "women".

Feminism as a movement is grounded in the objective of establishing equality between men and women in all social, political, and economic spheres of life.¹⁰⁷ It aims to analyse the unequal distribution of power and privilege incurred by gender roles in society and through exposing it, provide a developmental directive towards increased equality. The integration of feminism within the legal framework is established in feminist legal theory, focusing on recognising the role of the law in governing women and the inherent manifestations of their implied inferiority to men. At its core, feminist legal theory recognises that an individual's gender influences how they are treated as a legal subject. Advocates of feminist legal theory emphasise that being a man, or a woman, has a significant impact on most people's lives.¹⁰⁸ Feminist legal theory is especially valuable in exposing gender biases in the law and establishing ways in which stereotypical legal predispositions can be challenged.¹⁰⁹

The role of feminism and feminist legal theory has been expanded by the general perspective of post-modernist thought, rejecting dominant narratives

¹⁰⁵ OHCHR *Born Free & Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2012) 67.

¹⁰⁶ 23.

¹⁰⁷ Chamallas *Introduction to Feminist Legal Theory* 1.

¹⁰⁸ 1.

¹⁰⁹ Romero "Methodological Descriptions" in *Feminist and Queer Legal Theory* 197.

and ideologies.¹¹⁰ Post-modernism, integrated with feminism and feminist legal theory, allows for the inclusion of an intersectional epistemology offering the potential to transcend the dominant understanding of who a woman is (white, straight, cisgender and middle class as reflected in first wave feminism), which encompasses her oppression, and how gender affects her lived experiences.¹¹¹ Post-modern feminist legal theory therefore effectively provides the tools to deconstruct the social identities and legal assumptions that affect the broader grouping of *all* women, irrespective of their race, class, sexual orientation and/or gender identity.

2.4 Queer legal theory

Whereas different feminist theories acknowledge and operate within gendered and sexual categories to overcome their confines, queer theory, as an epistemology, works to challenge the validity of such categories.¹¹² Queer theorists argue that the binary categories of gender and sexuality are neither natural nor predetermined, but instead social constructions which place limitations on an individual's identity and personal development.¹¹³ "Queer" is a descriptive term and through its rejection of dominant narratives and ideologies, it is inherently post-modern.¹¹⁴ Morland and Willox argue that "queerness calls at once for a celebration of a diversity of identities but also for a cultural diversity that surpasses the notion of identity".¹¹⁵ Through these fundamental notions, queer legal theory is useful in recognising the fluidity of identities and illustrates how transgender women can be included under the term "women".

Nonetheless, some queer theorists are suspicious of the role of the law and doubt its value to queer individuals as many experiences the law to "regulate, rather than liberate, them".¹¹⁶ Nonetheless, as argued in this article, queer legal theory can contribute to an inclusive application of the law which treats all individuals as equal legal subjects, irrespective of their gender identity. This in turn confirms the fundamental principles of international human rights protection, namely: dignity, equality and non-discrimination. Currah suggests that individuals should not be required to comply with heteronormative standards of gender expression to be regarded as protected legal subjects.¹¹⁷

Queer legal theory and its deconstruction of the gender binary can aid in dismantling the colonial heritage of heteronormative boundaries within African communities. In turn, this could arguably increase the general acceptance of African transgender women in Africa's many diverse societies and help augment their legal protection. Such a development, however,

¹¹⁰ F Valdes "Queering sexual orientation: A call for theory as praxis" in M Fineman, J Jackson & A Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (2009) 98.

¹¹¹ Chamallas *Introduction to Feminist Legal Theory* 7.

¹¹² Romero "Methodological descriptions" in *Feminist and Queer Legal Theory* 190.
¹¹³ 193.

¹¹⁴ SD Walters "From here to queer: Radical feminism, postmodernism, and the lesbian menace" in I Morland & A Willox (eds) *Queer Theory* (2005) 7.

¹¹⁵ I Morland & A Willox "Introduction" in I Morland & A Willox (eds) *Queer Theory* (2005) 3.

¹¹⁶ Chamallas *Introduction to Feminist Legal Theory* 225.

¹¹⁷ Currah "The transgender rights imaginary" in *Feminist and Queer Legal Theory* 255.

requires people to work autonomously rather than duplicate established forms of activism created in the Global North to affect change.¹¹⁸ As echoed by Nyanzi, queer legal theory is insightful in asking:

“What are the implications of legislating non-heteronormative gender identities and sexual practices in society? Apart from statutory laws, what alternative frameworks for managing the national standards of being appropriately gendered and sexualised citizens exist, if such standards should exist at all?”¹¹⁹

Higginbotham and Collis-Buthelezi argue that the vulnerable position of African transgender women is attributable to politically motivated stances; often with life-threatening implications.¹²⁰ This is taken as far as government officials using queer individuals as scapegoats, arguing that the “moral decay of society” is a result of them destroying African culture in an attempt to distract from incompetence and/or corruption within their own systems.¹²¹ Henceforth, it is crucial to destabilise the legal heteronormativity and hegemony to ensure the legal protection and safety of African transgender women. Applying queer legal theory in an African context has the potential to promote an empowered methodology in which queer individuals are treated equally. For African transgender women specifically, its application, as argued in this article, can help in the production and promotion of knowledge which encourages an understanding that they are both human and women. This, in turn, would warrant the legal protection of their fundamental human rights.

3 A teleological interpretation of the Maputo Protocol to protect African transgender women

3.1 The object and purpose of the Maputo Protocol

A teleological approach to treaty interpretation requires that the terms of a treaty be considered in light of its object and purpose. Thus, this approach does not only encourage that a treaty is interpreted through continuous reference to its object and purpose, but also that it is supplemented and appended through such reference.¹²² This article endorses a teleological approach to the interpretation of the Maputo Protocol to enable a consideration of the context within which it was conceived, the matrix of rights and fundamental principles included in the instrument as well as the lived realities of African transgender women.¹²³

International human rights protection is founded on the notion that all human rights are indivisible, interdependent, and interrelated.¹²⁴ The principles of

¹¹⁸ Banda *Women, Law and Human Rights* 44.

¹¹⁹ Nyanzi “Afterword” in *Contested Intimacies* 66.

¹²⁰ D Higginbotham & V Collis-Buthelezi “Introduction” in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) xvii.

¹²¹ CF Edozien *Lives of Great Men* (2018) 121.

¹²² GG Fitzmaurice “The law and procedure of the International Court of Justice: Treaty Interpretation and certain other treaty points” (1951) 28 *British Year Book of International Law* 2.

¹²³ A Amin *A Teleological Approach to the Interpretation of Socio-economic Rights in the African Charter on Human and People’s Rights* LLD dissertation, Stellenbosch University (2017) 31.

¹²⁴ R Wallace & O Martin-Ortega *International Law* 7 ed (2013) 244; Vienna Declaration and Programme of Action UN Doc A/CONF.157/23 para 5; Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

universality, equality and non-discrimination reaffirm this. The principle of universality specifically centres on the conception that there is an “essential and fundamental sameness of humankind”.¹²⁵ Accordingly, human rights are afforded to all individuals on the basis that they are human. Furthermore, the rights to equality and non-discrimination ensure that all human rights are afforded to all individuals regardless of their demographic and/or cultural background.¹²⁶ The principle of dignity, which is an inherent characteristic in all individuals, further affirms this understanding and substantiates the protection of their human rights.

In light of this approach endorsed, it is important to note that the object and purpose of the Maputo Protocol are to ensure that African women fully enjoy all of their human rights.¹²⁷ As explained by Muriithi:

“[The] lack of clarity of human rights vis-à-vis the preservation of traditions, coupled with mass violations against African women, led to the women’s movement demanding an African legal framework deriving from the African Charter that would spell out clearly the rights of women in Africa vis-à-vis culture and religion and once and for all end the debate on whether African women were entitled to the protections guaranteed within the African Charter and other human rights instruments that African countries had ratified.”¹²⁸

It is expressed in the preamble that the Maputo Protocol aims to promote the principle of gender equality as well as to eliminate all forms of discrimination and GBV against women. It is important to bear this in mind when considering the arguments presented below.

3.2 The inclusion of African transgender women under Article 1(k)

As noted in the introduction, Article 1(k) of the Maputo Protocol defines “women”, the legal subjects of the Protocol, as persons of the female gender. Furthermore, as has been noted, gender is distinct from sex, as it is a social notion through which one identifies themselves.¹²⁹ From this point of departure, a person’s gender identity is the terminology used to describe their gender. Thus, transgender women, because of their gender identities, are women based on their gender.

Accordingly, because the definition of women in Article 1(k) is established based on gender, transgender women can and should arguably be recognised and protected under the Maputo Protocol. As the Protocol is set on protecting women based on their gender, a trans-exclusionary reading negates its object and purpose, discriminating against transgender women based on a distinction between their gender identity and their sex at birth. Moreover, it contradicts the core principle of non-discrimination which is at the heart of the Protocol.

¹²⁵ A Fagan & H Fridlund “Relative universality, harmful cultural practices and the United Nations’ Human Rights Council” (2016) 34 *Nordic Journal of Human Rights* 22.

¹²⁶ BG Ramcharan *The Fundamentals of International Human Rights Treaty Law* (2011) 34, 69, 78.

¹²⁷ Equality Now *Journey to Equality: 10 Years of the Protocol on the Rights of Women in Africa* (2013) 19.

¹²⁸ 43.

¹²⁹ Sometimes this is aligned to biological birth sex and sometimes not.

3 3 The right to gender recognition as an aspect of the right to dignity

The notion of dignity is regarded to be a key principle of international human rights law.¹³⁰ Derived from the Latin term *dignitas* (which translates into “worthiness”), dignity refers to the recognition of the inherent worth and value of all human beings.¹³¹ The recognition of dignity, as an organising principle of international human rights law, confirms its existence as an inalienable and universal right bestowed to all persons. Within the Maputo Protocol, the right to dignity is set out in Article 3(1) as:

“Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.”

This article confirms two key principles. Firstly, the equality of the right to dignity, inferring that the intrinsic nature of “inherent dignity” is present in all women, by mere virtue of them being human. This confirms the universality of the right to dignity. Secondly, Article 3 provides for all rights of women to be recognised and protected as a *result* of their dignity. The reference to “recognition” is relevant to the argument that African transgender women are unable to enjoy their right to dignity (and correspondingly all of their other human rights) if their gender identities are not recognised. Furthermore, the failure to recognise these women because of their gender identity is discrimination in and of itself.

The realisation of the right to dignity complements the enjoyment of other fundamental human rights. Vollmer argues that violations of the right to dignity prevent the ability of individuals to live a dignified existence.¹³² Following this argument, protecting the right to dignity of African transgender women would arguably aid in protecting all their human rights. Moreover, the phrasing of Article 3(2) is also noteworthy as part of a teleological interpretation. It states that:

“Every woman shall have the right to respect as a person and to the free development of her personality”.

Because an individual’s personality is the combination of characteristics and qualities that form their distinctive character, and the personality and identity of individuals are inherently interrelated, it is put forward that the gender identity of an individual is a fundamental aspect of their respective personality. Thus, the protection offered in Article 3 of the Maputo Protocol creates an obligation for state parties to recognise and protect the dignity of African transgender women.

Articles 3(3) and 3(4) emphasise that state parties have a duty to prevent the exploitation and degradation of women as well as to ensure their protection

¹³⁰ T Lowenthal “The role of dignity in human rights theory: Constituent or teleological?” (2015) 18 *Trinity College Law Review* 56.

¹³¹ R Steinmann “The core meaning of human dignity” (2016) 19 *PELJ* 4.

¹³² DT Vollmer *Queer Families: An Analysis of Non-heteronormative Family Rights under the African Human Rights System* LLD dissertation, Stellenbosch University (2017) 244.

from sexual and verbal violence.¹³³ These obligations link dignity, not with an intangible, abstract concept, but rather a tangible and physical sense of being. It focuses on violations of women's bodies, emphasising their right to bodily integrity. The term "exploitation" refers to the treatment of an individual, where someone else benefits from their work and/or gains an unfair advantage from them. Often, exploitation is associated with economic gain through exploitative labour practices including slavery and human trafficking.¹³⁴ Other examples of exploitation are forced marriages as well as sexual exploitation. The core feature of exploitation is the coercive nature of the actions. The term "degradation" refers to instances where an individual is undermined or demeaned, making them feel as if they have little or no value. It is an umbrella term incorporating different forms of humiliation, as both degradation and humiliation undermine the self-worth, self-respect, and self-esteem of an individual.¹³⁵

Article 3(4) read alongside the definition of "violence against women" in Article 1(j) obligates state parties to unequivocally ensure the safety of African women. Although Article 3(4) emphasises the prevention of physical and sexual violence, Article 1(j) has a wider protective scope. It defines "violence against women" as:

"All acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war".

A teleological interpretation of the Maputo Protocol where these articles are read together in light of the object and purpose illustrates that transgender women, when subjected to violence because of their gender identities, can seek redress under the Maputo Protocol. This is noteworthy considering the argument presented below under 4.2, as an indicator of what the SADC GBV Model Law could, and should aspire, to do. Accordingly, this argument together with Article 4(2)(c) challenges the heteronormative, cultural, and religious justifications for violence against African transgender women; in consideration of the fact that as human beings they have inherent dignity, and it is the mandate of the Maputo Protocol to recognise and protect them.¹³⁶ The African Commission in their General Comment No 2 set out that:

¹³³ "Article 3(3) States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women. Article 3(4) States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence."

¹³⁴ OHCHR *Integrating A Gender Perspective into Human Rights Investigations: Guidance and Practice* (2018) 47.

¹³⁵ Steinmann (2016) *PER/PELJ* 19.

¹³⁶ "Article 4(2)(c) State Parties shall take appropriate and effective measures to: identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence."

“The right to dignity enshrines the freedom to make personal decisions without interference from the State or non-State actors. The woman’s right to make personal decisions involves taking into account or not the beliefs, traditions, values and cultural or religious practices, and the right to question or ignore them”.¹³⁷

Vollmer interprets this statement in the context of queer rights and argues that it presents three key principles. First, because the enjoyment of the right to dignity obligates state parties not to interfere in the personal decisions of women, this includes that of gender identity expression. Second, that beliefs, traditions, values and/or cultural practices cannot be used as justification for the infringement of the right to dignity, as there are clear implications for violations to rights and the defences offered by states. Lastly, since gender identity is an integral part of an individual’s personality, Article 3 of the Maputo Protocol can advance the rights of women with non-normative sexual orientations or gender identities, and thus, transgender women.¹³⁸

3.4 A conceptual confusion

Article 1(f) of the Maputo Protocol sets out that “discrimination against women” includes:

“Any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life”.

Thus, while “gender” is the distinctive characteristic used to define a woman in Article 1(k), the basis on which discrimination is based in Article 1(f) is “sex”. Moreover, Article 2(2), which obliges states to eradicate harmful practices “based on the idea of the inferiority or superiority of either of the sexes”, again uses “sex” instead of “gender”.¹³⁹ So while gender is used to define women in the Protocol and is referenced four times otherwise,¹⁴⁰ sex is referenced twice. This illustrates that at the time of drafting, the terms were regarded as interchangeable, which, as was explained in part 2.2, they are not. The interchangeable (mis)use of the terms “gender” and “sex” within the Maputo Protocol is an example of a conflation of these terms which reveals the need for a post-modern and queer legal approach to regarding the Protocol, otherwise the application will remain (trans-)exclusive and discriminatory.

As discussed in part 2.2 above, “sex” and “gender” are fundamentally distinct concepts. However, their conflation within the Maputo Protocol is not an isolated instance, it is also reflective of a general practice in some of the member states. As an example, relevant to the discussion in this article,

¹³⁷ African Commission General Comment No 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2(a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa para 24.

¹³⁸ Vollmer *Queer Families* 244.

¹³⁹ “Article 2(2) States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”

¹⁴⁰ Articles 1(k), 2(1)(c), 8(d), 12(1)(e), 19(a).

De Vos criticised the then Ugandan Anti Homosexuality Act, 2014¹⁴¹ and explained how the Act defined:

“[A] ‘homosexual’... [as] a person who engages or attempts to engage in same gender sexual activity and ‘homosexuality’ as same gender or same-sex sexual acts (section 1). Given the obviously constructed nature of gender (as opposed to sex which is supposedly based on biological characteristics) it is unclear how a judge will be able to decide what the ‘gender’ of an accused person or their sexual partner is. The conceptual confusion – if one accepts that generally accepted categories of sex and gender are distinct ... suggest[s] an investment in the idea that sex and gender are both biologically determined and thus interchangeable”.¹⁴²

This example relates to the threat the conflation of these terms poses to transgender women specifically where homosexuality is still criminalised. As discussed in the introduction, homosexuality and/or indecency between males are criminalised in many state parties to the Maputo Protocol and African transgender women are often persecuted on this basis as they are misidentified as homosexual men. Because such laws use “sex” and “gender” interchangeably, as in the example related to above, the distinction between homosexual men and transgender women is often overlooked and the emphasis is placed on persecuting individuals who were born male and who do not comply with the heteronormative expectation of what a man is. This is representative of a harmful heteronormative culture present in a majority member states which operates as a justification for human rights violations of both homosexual men and transgender women.¹⁴³

The theoretical framework presented in part 2 above, is useful in illustrating how the use of the terms “gender” and “sex” affect the recognition of transgender women as “women” under the Maputo Protocol. The post-modern intersectional feminist legal theory reveals that there is no universal nor essential experience of being a woman and that the presence of other factors affect how women are treated in society and by the law. Moreover, queer legal theory illustrates that markers of identity are socially constructed and fluid.¹⁴⁴ It undermines the heteronormative and binary legal constraints expected of individuals to attain citizenship, recognition as legal subjects and the acknowledgement of their inherent dignity. If read teleologically, upholding the object and purpose of the Maputo Protocol, this would require the narrow reference to discrimination based on sex to extend to that of gender (including gender identity) discrimination.

¹⁴¹ On 20 December 2013, the Ugandan Constitutional Court found that there was no quorum in Parliament to enact the Anti-Homosexuality Act 2014 and as it was in contravention with Constitution of the Republic of Uganda 1995 and Rule 23 of the Parliamentary Rules of Procedure. Accordingly, it was made null and void on the technicalities; *Oloka-Onyango v Attorney-General* (2014) UGCC 14 20. In 2019 the Ugandan Sexual Offences Bill was presented before Parliament, which amongst other things criminalised same-sex consensual acts. On 3 May 2021, the Bill was rejected by President Museveni on the grounds that certain acts were already covered in the Ugandan Penal code.

¹⁴² P de Vos “The Limit(s) of the Law: Human rights and the emancipation of sexual minorities on the African continent” in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 8.

¹⁴³ Oloka-Onyango (2015) *AHJR* 50.

¹⁴⁴ Chamallas *Introduction to Feminist Legal Theory* 218.

3 5 The work of the African Commission supporting a trans-inclusive reading of the Maputo Protocol

The position of African transgender women in African society is precarious and sparsely documented.¹⁴⁵ However, concerning the (increasing) recognition of gender identity rights in the African human rights system, the work of the African Commission is significant.

As a point of departure, the African Commission, in 2014 at its 55th Ordinary Session in Luanda, Angola, concluded Resolution 275 entitled Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity (“Resolution 275”). This Resolution states that the African Commission is aware and alarmed at the fact that violence, discrimination, and harassment continue to be committed against individuals in many parts of Africa because of their actual or implied sexual orientation or gender identity.¹⁴⁶

Further, the Commission acknowledged that such violence includes “corrective” rape, assaults, torture, murder, arbitrary arrests, detention, executions, forced disappearances, extortion as well as blackmail. Even though it is not a binding instrument *per se*, Resolution 275 sets out the Commission’s interpretation of the legally binding instruments under its mandate, one of them being the Maputo Protocol. Resolution 275 is furthermore noteworthy as an explicit recognition of violations of queer rights within the African regional human rights system. It is useful in light of the preamble of the Maputo Protocol which states that any other related “Resolutions, Declarations, Recommendations, Decisions, Conventions ... aimed at eliminating all forms of discrimination and at promoting equality between women and men” must be considered. Accordingly, reading Resolution 275 together with the Maputo Protocol gives content and context to the rights and provides a basis for the condemnation of the violence committed against transgender women by private actors and state parties alike.

In 2018, the Centre for Human Rights published “Implementation Guidelines” for Resolution 275.¹⁴⁷ While praising the progress of the African Commission, the Centre noted that regardless of Resolution 275, queer Africans continue to be victims of violence and harassment.¹⁴⁸ Within the guidelines, the Centre argued that “the fight to curb violence against persons based on their real or imputed sexual orientation or gender identity

¹⁴⁵ GA Jobson, LB Theron, JK Kaggwa & HJ Kim “Transgender in Africa: Invisible, inaccessible, or ignored?” (2012) 9 *SAHARA-J: Journal of Social Aspects of HIV/AIDS* 161.

¹⁴⁶ Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, 55th Ordinary Session from 28 April to 12 May 2014.

¹⁴⁷ University of Pretoria, Centre for Human Rights & AMSHeR Resolution 275: What it means for State and Non-state actors in Africa (2018).

¹⁴⁸ S Khumalo “The Centre for Human Rights Launches Resolution 275 Guidelines at the 63rd Session of the African Commission on Human and Peoples’ Rights” (31-10-2018) *University of Pretoria News* <https://www.up.ac.za/en/faculty-of-law/news/post_2730847-the-centre-for-human-rights-launches-resolution-275-guidelines-at-the-63rd-session-of-the-african-commission-on-human-and-peoples-rights online publication> (accessed 05-10-2021).

is strengthened by two binding treaties that apply at the regional level”.¹⁴⁹ Referring to the African Charter on Human and People’s Rights (“African Charter”)¹⁵⁰ and the Maputo Protocol, they argued that the measures within both documents which grant the protection of “the rights to life, dignity and physical integrity”, as well as “the guarantee against cruel, degrading or inhuman treatment ... requires state parties to take specific measures to combat violence against women regardless of their ... gender identity”.¹⁵¹

Returning to the work of the Commission, in 2017 in a general comment regarding Article 5,¹⁵² the African Commission explicitly included “gender identity” as a protective ground for non-discrimination.¹⁵³ They continued to state that:

“Any person regardless of their gender may be a victim of sexual and gender-based violence. There is wide prevalence of sexual and gender-based violence perpetrated against women and girls. Acts of sexual violence against men and boys, persons with psychosocial disabilities, and lesbian, gay, bisexual, transgender and intersex persons are of equal concern, and must also be adequately and effectively addressed by State Parties.”¹⁵⁴

This inclusive approach to recognising the impact of GBV, the continued emphasis of gender (rather than sex) as well as the intentional mention of transgender persons as of “equal concern” is encouraging to consider in light of the object of, and arguments presented in, this article.

In 2018, the African Commission in a Guideline for the Implementation of Economic, Social and Cultural Rights again explicitly recognised transgender persons as part of the category of vulnerable and disadvantaged groups who “face significant impediments” to the enjoyment of their rights.¹⁵⁵ Later that same year, the Commission formed part of a joint dialogue with the Inter-American Commission on Human Rights and the Office of the United Nations High Commissioner for Human Rights (“OHCHR”) on “gender identity, sexual orientation and intersex related issues”. In their final report, they noted that such issues have “received limited attention within the African human rights system”.¹⁵⁶ The Commission further noted that in considering non-discrimination, there is to be “no limit” on the number of recognised grounds. This implies that even if gender identity is not an explicit ground, it is an implied one and that even though the African Charter does not explicitly list

¹⁴⁹ University of Pretoria, Centre for Human Rights & AMSHeR *Resolution 275: What it means for State and Non-state actors in Africa* (2018) 1.

¹⁵⁰ African Charter on Human and People’s Rights (adopted 27 June 1981, entered into force 21 October 1986).

¹⁵¹ University of Pretoria, Centre for Human Rights & AMSHeR *Resolution 275* 1.

¹⁵² The Right to Redress for Victims of Torture and Other Cruel, Inhuman and Degrading Punishment or Treatment.

¹⁵³ African Commission General Comment No. 4 on General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) para 20.

¹⁵⁴ Para 59; emphasis added.

¹⁵⁵ African Commission *Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples’ Rights* (2011) para 8.

¹⁵⁶ Inter-American Commission on Human Rights, African Commission on Human and People’s Rights and OHCHR *Joint thematic dialogue on sexual orientation, gender identity and intersex related issues* (2018) 28.

a group by its name, protection for them cannot be denied. The same line of argument applies to the Maputo Protocol.

In the joint dialogue, it is noticeable that the Commission, instead of conflating sex and gender reinforces that “sex” includes “sexual orientation” and “sexuality” and that therefore, “[b]y the same token, ‘gender’ should be interrelated to include ‘gender identity’”.¹⁵⁷ This, according to the Commission is “particularly important in respect of the [Maputo] Protocol, which defines “women” as “persons of female gender”.¹⁵⁸ Not only does this illustrate that there is growing recognition within the African human rights system to recognise and protect transgender persons, but it directly confirms the argument of this article that an inclusive, teleological, interpretation and application of the Maputo Protocol which includes transgender women is not only possible and necessary but legally sound.

4 The Draft SADC GBV Model Law

As the silent pandemic, GBV is “widespread” in the SADC region.¹⁵⁹ As discussed under 3 3, GBV is harmful or violent acts directed against persons as a result of their gender. This includes sexual, physical, mental and or economic harm, which is inflicted on them, either in public or in private.¹⁶⁰ As described by Iranti:

“Gender-based violence is the umbrella term that described violence that occurs as a result of the unequal power relationships and the normative role expectations with each gender in a specific society”.¹⁶¹

On the international level, the Convention on the Elimination of Discrimination against Women (“CEDAW”)¹⁶² and the work of the CEDAW Committee has defined and contextualised GBV. GBV has historically, and within this context, been approached with an emphasis on the impact of GBV on cisgender women. However, the recent creation of the position of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity by the UN Human Rights Council has broadened the extent of this understanding to include recognition of, amongst others, transgender persons as exceptionally vulnerable to GBV; arguably endorsing a post-modern intersectional feminist approach to GBV.¹⁶³

¹⁵⁷ 32.

¹⁵⁸ 32.

¹⁵⁹ See Southern African Development Community “Gender based violence” (undated) *SADC* <<https://www.sadc.int/issues/gender/gender-based-violence/>> (accessed 05-10-2021).

¹⁶⁰ UNHCR “Gender-based violence” (undated) *UNHCR* <<https://www.unhcr.org/gender-based-violence.html>> (accessed 05-10-2021).

¹⁶¹ Iranti & Arcus Foundation “Data Collection and Reporting on Violence Perpetrated Against LGBTIQI Persons in Botswana, Kenya, Malawi, South Africa and Uganda” (2019) *Arcus Foundation* 9 <<https://www.arcusfoundation.org/wp-content/uploads/2020/04/Iranti-Violence-Against-LGBTQI-Persons-in-Botswana-Kenya-Malawi-South-Africa-Uganda.pdf>> (accessed 05-10-2021).

¹⁶² (adopted 18 December 1976, entered into force 3 September 1981) 1249 UNTS 13.

¹⁶³ HRC “Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity” 38th Session (18 June-6 July 2018).

As noted by the OHCHR:

“[T]ransphobic violence has been reported in all regions of the world [and] ranges from aggressive, sustained psychological bullying to physical assault, torture, kidnapping and targeted killings. Sexual violence has also been widely reported, including so-called “corrective” or “punitive” rape”.¹⁶⁴

In general terms, international or regional model laws stipulate best norms and practices which are contained in international instruments, such as the CEDAW and Maputo Protocol. Thus, they aim to act as catalysts for the domestication of such treaties as they contain comparable norms that can be enacted into domestic legislation. The Draft SADC GBV Model Law, as mentioned in the introduction, is currently undergoing several consultative processes. It contains best practices relating to the prevention of GBV across all SADC member states. The main objective of the SADC GBV Model Law is:

“[T]o serve as a guidance, a yardstick, and as an advocacy tool for legislators and other key stakeholders in the region and provide best practice language which can be easily adopted/adapted by member states. The GBV model legislation will assist member states - in particular policy makers and legislative drafters - to address all the relevant areas in need of legislative reform without interfering with the authority of national legislatures”.¹⁶⁵

The SADC GBV Model Law is closely related to the SADC Protocol on Gender and Development which was revised in 2016 to emphasise the urgent need to address all forms of GBV within the member states as well as the Maputo Protocol. The Draft SADC GBV Model Law defines gender-based violence to include economic and psychological violence as well as stalking and harassment. Clearly modelled on the Maputo Protocol, the SADC GBV Model Law therefore has the potential of influencing GBV legislation across all SADC member states by providing a single piece of legislation, squarely based on pre-existing state obligations, which can be readily domesticated.

Of the 16 SADC member states, which are all bound by the SADC Protocol, all have ratified the CEDAW and only Botswana is yet to ratify the Maputo Protocol. GBV is only explicitly mentioned in the Maputo Protocol once in the preamble. However, “violence against women” is acknowledged several times within the Protocol and as noted under 3.3, is defined in Article 1(j). Applying the teleological method of treaty interpretation and thus the inclusive reading as advocated for within this article confirms that when focusing on how to eradicate GBV, violence against women as noted in the Protocol includes GBV against transgender women.

The SADC Gender Protocol urges member states to enact and enforce legislation that prohibits all forms of GBV. This directly relates to the

¹⁶⁴ OHCHR *Free & equal United Nations for LGBT Equality Fact Sheet: Homophobic and transphobic violence* (2017) 1.

¹⁶⁵ UNFPA “Consultancy Southern African Development Community (SADC) Gender-Based Violence Model Law Drafting” (undated) UNFPA <<https://www.unfpa.org/jobs/consultancy-southern-african-development-community-sadc-gender-based-violence-model-law>> (accessed 05-10-2021). Although this draft law will only be applicable to the 16 countries – it is contended that there will be incentive to further such standards within the entire region.

realisation of the obligations set out in Articles 3(4), 4(2) and 5(d) of the Maputo Protocol. The Draft SADC Model Law is thus important as it has the potential to strengthen the mandate of human rights protection based on gender (identity) within the SADC region.

5 Conclusion

Within the SADC region, like the rest of the continent, queer individuals continue to face significant threats to their human rights, including their right to dignity, life, safety, and security. For transgender women, the risk of being attacked or murdered is particularly high due to the misogynistic response to the “deviant femininity” these women are often seen to encompass. In this regard, the unlawful arrest and detention of Ms Nathanson was noted in the introduction. Moreover, throughout this article, violations of transgender women’s human rights based on the conflation of sexual orientation and gender identity (viewed as gay men and criminalised as homosexual or as engaging in indecent behaviour) and the unacceptance of their gender identities (viewed as non-conforming to normative gender stereotypes) were highlighted.

The research presented in this article illustrated that if sexuality and gender identity continue to be conflated, and homosexuality or indecent behaviour between males remains criminalised the violation of the fundamental human rights of African transgender women will continue alongside the inability (or unwillingness) of domestic justice systems to provide redress. In this regard, the article offered a post-modern intersectional feminist and queer legal reading together with a teleological interpretation of the Maputo Protocol which showed that Article 1(k) can be read to include African transgender women. Article 1(k), read in conjunction with relevant rights in the Maputo Protocol, can offer fundamental protection to African transgender women. Except for Botswana, all SADC countries, including Zimbabwe, have ratified the Maputo Protocol. Therefore, defining State Party obligations towards African transgender women can be of much value when evaluating domestic law especially when it comes to challenging the criminal codes that criminalise homosexuality or indecent behaviour between males and advocating for the legal recognition of transgender identities.

The need for specific laws confronting violence that is based on gender is evident in the Draft SADC Model Law. A further objective of this article was to show how the protection generated through the Maputo Protocol should be utilised in the drafting of the SADC GBV Model Law to provide transgender women equal protection to cisgender women under this model law. In this regard, it is key for the SADC GBV Model Law to include a comprehensive definition of “gender”, including reference to the importance of gender identity to fulfil the obligation in the Maputo Protocol to which 15 out of the 16 SADC member states are bound. The Model Law should also provide definitions of “sex”, “sexual orientation” and “women” in line with the arguments set out in part 2 above, to create an understanding that if women are considered “women” based on their gender (identities) – as is the case under the Maputo Protocol - then transgender women should be included as a specific group

requiring protection from GBV. The endorsement of the African Commission of such an inclusion further stresses the need for the SADC Model Law to do the same. If gender identity is once again overtly overlooked as a cause for GBV the SADC GBV Model Law will not honour the core aspect of the Maputo Protocol: that all women have a right to live in dignity free of violence.